



***IP Meets Antitrust Around the Globe:
Policy Developments in the Legal Treatment of SEPs and FRAND***

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October 7, 2020

INTELLECTUAL PROPERTY AND ANTITRUST LAW

- INNOVATION AND THE ECONOMY
- TIME OF CHANGE FOR INNOVATION POLICY
- FRIENDS OR FOES?
- SETTING THE STAGE: IP LICENSING AND ANTITRUST
- FTC AND DOJ INITIATIVES
- RECENT BLOCKBUSTER CASES

Innovation and the Economy

U.S. Department of Commerce's Intellectual Property of the U.S. Economy: 2016 Update.



$\frac{3}{4}$ of U.S.
growth since
mid-1940s

45 million
U.S. jobs

> \$6 trillion
to U.S. GDP

> 38.2% of
U.S. GDP

Time of Change for Innovation Policy



Setting the Stage

FRAND arises in the context of standard setting as SDOs commonly adopt patent policies to promote access after a standard is adopted

Many SDO policies ask members to indicate whether they will agree to provide access to essential patents on F/RAND terms

Where members agree to SDO policies, these assurances create contractual commitments between the patent owner and the SDO

Implementers then typically have enforceable rights as third-party beneficiaries

Divergent schools of thought on whether an SEP holder's breach of a F/RAND commitment ("hold-up") or an implementer's breach ("hold out") is or is not an antitrust concern

Until recently, Antitrust law has been viewed as one way to enforce F/RAND requirements in the U.S.



Patentee (patent owner) is required to license the patented technology on FRAND terms

Setting the Stage (cont.)

The U.S. Antitrust Agencies have long acknowledged that package (or “blanket”) licensing can but does not always raise antitrust concerns

Efficiencies from aggregating licenses to IPRs into packages:

- Reducing transaction costs associated with negotiating

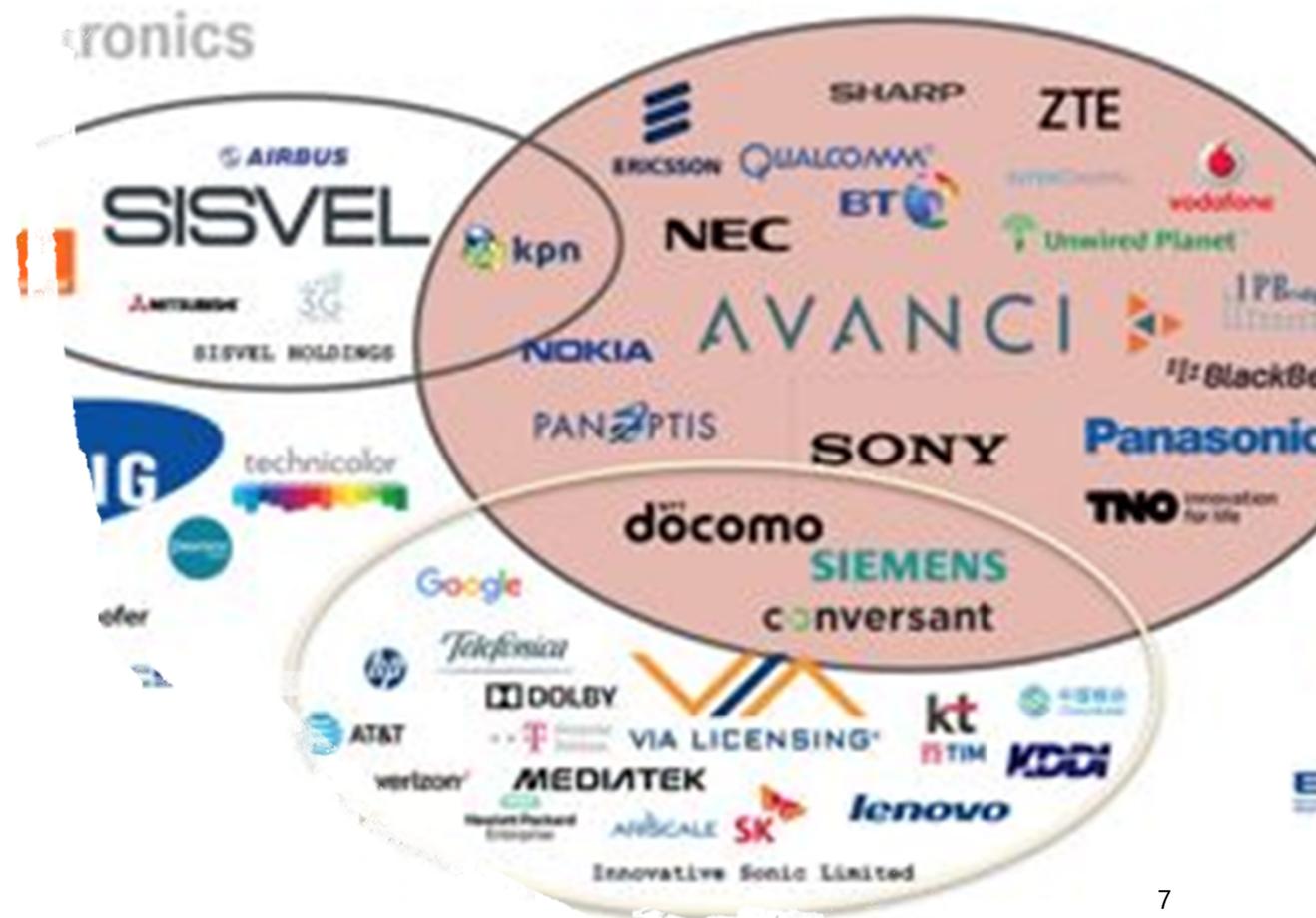
- Promoting patent peace by indemnifying licensees and lowering monitoring costs for licensors.

Antitrust concerns raised by aggregation of this nature:

- This may be a form of tying arrangement.

The antitrust treatment of package licenses depends largely on whether the arrangement involves tying-like coercion. The question becomes whether the licensee is forced to accept the package of aggregated rights as a condition for receiving one or more rights.

LTE Pools & Patent Holders in the Internet of Things



FTC and DOJ Initiatives

1970s list of “Nine No-Nos” – by 1981 recognized as “contain[ing] more error than accuracy” when viewed through the lens of “rational economic policy.”

2016 FTC PAE Report

Portfolio PAEs: 9% of licenses = 80% of revenue

Litigation PAEs: 91% of licenses = 20% of revenue (avg. < \$300,000)

2017 FTC and DOJ Joint Update of the Antitrust Guidelines for the Licensing of Intellectual Property

Continue to protect strong IP rights in the United States

Affirm that IP laws grant “enforceable rights,” which have social value

No liability for unilateral refusal to deal



FTC and DOJ Initiatives

December 2018 DOJ withdrawal from 2013 “Policy Statement on Remedies for Standard-Essential Patents Subject to Voluntary F/RAND Commitments”

December 2019 Updated “Policy Statement on Remedies for Standards-Essential Patents Subject to Voluntary F/RAND Commitments” (DOJ, USPTO, and NIST)

A previous statement on the matter issued in 2013 had been misinterpreted to suggest that different legal rules should be applied to SEPs than are applied to other patents, limiting the remedies available when SEPs are infringed. Today’s joint statement seeks to ensure that U.S. patent law is appropriately calibrated to incentivize and protect, and not hamper, the growth of standards-based technology. Moreover, the statement sets a positive example for other jurisdictions that have sought to diminish the value of SEPs.



FTC and DOJ Initiatives (cont.)

DOJ's New Madison Approach

- 1) Patent hold-up is not an antitrust problem
- 2) SSOs should better protect against hold-out to ensure maximum incentives to innovate
- 3) Patent holder injunction rights should be protected, not persecuted
- 4) A unilateral and unconditional refusal to license a valid patent should be *per se* legal

FTC agrees with some of New Madison Approach

Breach of FRAND alone is not an antitrust problem

Both hold-out and hold-up can raise serious concerns



FTC and DOJ Initiatives (cont.)

FTC Hearings on Competition and Consumer Protection in the 21st Century: #4 Patents, Intellectual Property, and Innovation

IPRs provide an incentive to innovate (if protections are pegged correctly)

Recent IP law developments have impacted innovation

Supreme Court decisions in *Mayo* and *Alice*

Injunction hurdle post *eBay*

High invalidity rate following 2011 America Invents Act's creation of PTAB

General trend of lower patent damages awards



DOJ Advocacy in Federal Courts

Government Amicus Efforts Show Antitrust Policy Via Advocacy

Statements of Interest

Federal Trade Commission v. Qualcomm Inc. (N.D. Ca., 9th Cir.)

U-Blox AG v. Interdigital, Inc. (S.D. Ca.)

Continental Automotive Systems, Inc. v. Avanci, LLC, et al. (N.D. Tex.)

Intel Corporation and Apple Inc., v. Fortress Investment Group LLC, et al. (N.D. Ca.)

NSS Labs Inc., v. CrowdStrike, Inc. et al. (N.D. Ca.)

Lenovo (United States) Inc. and Motorola Mobility LLC v. Interdigital Technology Corporation, et al. (D. Del.)

Joint Amicus Brief with USPTO

Case No. 19-40566, Consolidated with: 19-40643

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

HTC CORPORATION; HTC AMERICA, INCORPORATED,

Plaintiffs-Appellants,

v.

TELEFONAKTIEBOLAGET LM ERICSSON; ERICSSON, INCORPORATED,

Defendants-Appellees.

On Appeal from the United States District Court
for the Eastern District of Texas

BRIEF FOR THE UNITED STATES OF AMERICA
AS AMICUS CURIAE IN SUPPORT OF NEITHER PARTY

DOJ Business Review Letters



FOR IMMEDIATE RELEASE

Tuesday, July 28, 2020

Justice Department Issues Business Review Letter To Avanci For Proposed Licensing Platform To Advance 5G Technology For Interconnected Automobiles

The Department of Justice's Antitrust Division announced today that it has completed its review of Avanci's new Platform for licensing "Fifth Generation" (5G) telecommunications technology in the automotive industry. As part of its review, the Division interviewed a broad range of stakeholders, including automakers, automotive suppliers, potential licensors, and others, and considered letters issued to other patent pools in similar emergent technologies. The Department has concluded that, on balance, and based on the representations in Avanci's letter request, Avanci's proposed 5G Platform is unlikely to harm competition.



FOR IMMEDIATE RELEASE

Thursday, September 10, 2020

Justice Department Updates 2015 Business Review Letter To The Institute Of Electrical And Electronics Engineers

The Justice Department today issued a supplement to its Feb. 2, 2015 Business Review Letter from the Antitrust Division to the Institute of Electrical and Electronics Engineers, Incorporated (IEEE) ("the 2015 Letter"). The 2015 Letter analyzed proposed revisions to the IEEE's Patent Policy of that same year pursuant to the department's Business Review Procedure, 28 C.F.R. § 50.6. The Antitrust Division took this step to address concerns raised publicly by industry, lawmakers, and former department and other federal government officials that the 2015 letter has been misinterpreted, and cited frequently and incorrectly, as an endorsement of the IEEE's Patent Policy. Additionally, aspects of the 2015 letter had become outdated based on recent jurisprudential and policy developments.

Recent Blockbuster Cases – *FTC v. Qualcomm*

FTC Charges Qualcomm With Monopolizing Key Semiconductor Device Used in Cell Phones

January 17, 2017

Company's sales and licensing practices hamper Qualcomm's competitors and threaten innovation in mobile communications, according to FTC

The Commission vote to file the complaint was 2-1. [Commissioner Maureen K. Ohlhausen dissented and issued a statement.](#)

B Barron's

Qualcomm Antitrust Case Shows Justice Department and FTC Are Split

- Regulatory overreach
- Potential for overly broad remedy which could lead to reduced competition and innovation

8,469 views | Jun 10, 2019, 06:11am EDT

No License, No Chips? No Dice: Dissecting Judge Koh's Opinion in FTC v. Qualcomm

FTC v. Qualcomm (cont.) – On Appeal

3 Fed. Departments Back Qualcomm Against FTC At 9th Circ.

Flurry of amicus briefs

Judge Michel called the decision “deeply troubling” and “an unheralded use of antitrust law.”

Judge Rader et al. criticized the ruling as “a giant step backward to the old days of sweeping prohibitions against a single firm’s patent licensing practices.”

Ninth Circuit Stays Judge Koh’s Injunction in the FTC v. DOJ Competition Brawl (FTC v. Qualcomm)

By [David Long](#) on August 23, 2019

Characterized Judge Koh’s decision as either “a trailblazing application of the antitrust laws, or . . . an improper excursion beyond the outer limits” of antitrust law.

High Tech Investors Alliance amicus [brief](#)
Fair Standards Alliance amicus [brief](#)
MediaTek amicus [brief](#)
Timothy J. Muris Amicus [brief](#)
Continental Automotive Systems amicus [brief](#)
Assoc of Global Automakers amicus [brief](#)
Intel Amicus [brief](#)
R Street Inst. Amicus [brief](#)
ACT The App Association amicus [brief](#)
Law and Economics scholars amicus [brief](#)
Computer and Communications Industry Assoc amicus [brief](#)
Open Markets Institute amicus [brief](#)
Professor Jorge L Contreras amicus [brief](#)
International Center for Law & Economics Amicus [Brief](#)
Nokia Technologies amicus [brief](#)
Alliance of US Startups and Inventors for Jobs amicus [brief](#)
InterDigital, Inc. amicus [brief](#)
Paul R. Michel amicus [brief](#)
United States amicus [brief](#)
Antitrust and Patent Law Professors amicus [brief](#)
Dolby Laboratories, Inc., amicus [brief](#)
Cause of Action Institute Amicus [Brief](#)
MediaTek Inc. [Amicus Brief](#)
ACT [Amicus Brief](#)
Ericsson, Inc. Amicus [Brief](#)
United States' [Statement of Interest](#)
Honorable Paul R. Michel [Amicus Brief](#)

What's the Problem?

U.S. Influence on Other Jurisdictions Globally

FTC v. Qualcomm district court decision applies broad duty to deal

This is in tension with the long-standing rule that businesses have no general obligation to assist competitors

The Sherman Act does not impose a duty to deal with or continue dealing with rivals except in the rarest circumstances because "once you start, the Sherman Act may be read as an antiodivorce statute."
- Philip Areeda, *Essential Facilities: An Epithet in Need of Limiting Principles*, 58 Antitrust 7 L.J. 841, 850 (1990)

China suggested a wide application of compulsory licensing as an antitrust remedy

In Europe, the essential facilities doctrine already forms part of the EU competition framework in both theory and practice



FTC v. Qualcomm (cont.) – Ninth Circuit Decision

 The National Law Review

9th Circuit Invalidates FTC Antitrust Win in Qualcomm Case

Ninth Circuit Reverses FTC Win in *FTC v. Qualcomm*, Finding No Antitrust Violations from Qualcomm's Licensing of its Standard-Essential Patents ... held that the FTC failed to satisfy its initial burden under the rule of reason
1 month ago



 Forbes

Qualcomm Found Guilty Of Aggressively Innovating By Ninth Circuit Court Of Appeals

The Ninth Circuit Court of Appeals was crystal clear on its ruling: ...



 Lexology

No License, No Chips, No Problem: Ninth Circuit Vacates Injunction in *FTC v. Qualcomm*

Last week, the Ninth Circuit issued its long-awaited decision in *FTC v. Qualcomm* and vacated the district court's injunction
1 month ago

While “[a]nticompetitive behavior is illegal under federal antitrust law[,]” “[h]ypercompetitive behavior is not.”

FTC Requests Rehearing En Banc of Qualcomm Appeals Panel Decision

Recent Blockbuster Cases – *Continental v. Avanci*

THURSDAY, DECEMBER 12, 2019

Avanci, Nokia win transfer of Continental's FRAND/antitrust case from San Jose to Dallas

The Avanci patent pool firm and its co-defendants--most notably, Nokia--never wanted Judge Lucy H. Koh of the United States District Court for the Northern District of California, famous for (among other high-profile cases) *FTC v. Qualcomm*, to adjudicate Continental Automotive Systems' FRAND/antitrust complaint.

US DOJ Moves to Insert Itself in Automotive Antitrust Lawsuit

“[A]lleged breaches of . . . ‘FRAND’ commitments . . . , including claims of purported “deception” regarding FRAND rates, do not articulate cognizable [Section 2] antitrust claims”

Qualcomm-Nokia Group Wins Dismissal of Lawsuit by Auto Supplier

By [Susan Decker](#)

September 12, 2020, 1:15 PM EDT

- ▶ Continental said Avanci patent demands violate antitrust law
- ▶ Ruling is based in part on Qualcomm’s win over the FTC

“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 . . .”

“It is not anticompetitive for an SEP holder to violate its FRAND obligations.”

BIOGRAPHY

Maureen Ohlhausen

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EDUCATION/HONORS

- J.D., George Mason University School of Law, 1991
Research Assistant to Professor William Kovacic
American Jurisprudence Award for Excellence in Business Associations *with distinction*
- B.A., English, University of Virginia, 1984
National Merit Scholar
Echols Scholar
with distinction
- FTC Robert Pitofsky Lifetime Achievement Award

Maureen joins the firm after leading the Federal Trade Commission as Acting Chairman and Commissioner. She directed all aspects of the FTC's antitrust work, including merger review and conduct enforcement, and steered all FTC consumer protection enforcement, with a particular emphasis on privacy and technology issues. A thought leader, Maureen has published dozens of articles on antitrust, privacy, IP, regulation, FTC litigation, telecommunications, and international law issues in prestigious publications and has testified over a dozen times before the U.S. Congress. Maureen has relationships with officials in the U.S. and abroad, with a particular emphasis on Europe and China, and has led the U.S. delegation at international antitrust and data privacy meetings on many occasions. She has received numerous awards, including the FTC's Robert Pitofsky Lifetime Achievement Award.

Prior to her role as Commissioner, Maureen led the FTC's Internet Access Task Force, which produced an influential report analyzing competition and consumer protection legal issues in the areas of broadband and Internet.

In private practice, she headed the FTC practice group at a leading telecommunications firm, representing and counseling telecommunications and technology clients on antitrust compliance, privacy, and consumer protection matters before the FTC and the FCC. She also clerked at the U.S. Court of Appeals for the D.C. Circuit.

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