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LICENSING UPDATE

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CHAPTER 13 ANTITRUST AND INTELLECTUAL PROPERTY LICENSING

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§13.01 INTRODUCTION

The antitrust and intellectual property ("IP") laws share the goal of promoting competition by encouraging innovation and investment in creative content and brand identity. Intellectual property rights ("IPRs") encourage investment by creating enforceable rights to exclude others from free-riding on the IP owner's investment, encouraging firms to win in the marketplace by creating better products, services, and technologies. The antitrust laws promote dynamic competition by ensuring that incumbents do not block the path to market for disruptive new technologies and business models.

This chapter provides an overview of the U.S. antitrust laws and how those laws apply to the acquisition or exercise of intellectual property rights ("IPRs"), including through IPR licensing. While this chapter focuses primarily on U.S. law, both antitrust and intellectual property law vary internationally. Since the vast majority of jurisdictions have antitrust enforcement regimes in place, it is critical that companies involved in global licensing programs or other activities involving the acquisition or assertion of IPRs take the broader international antitrust and IP legal landscape into account.

§13.02 ANTITRUST LAW IN THE UNITED STATES

U.S. antitrust law is defined by federal and state statutes, as interpreted by the courts. The core federal statutes are the Sherman Act,[1] passed by Congress in 1890, and the Federal Trade Commission[2] and Clayton Acts,[3] both passed in 1914. The United States Department of Justice ("DOJ") and the Federal Trade Commission ("FTC" or "Commission") (together the "agencies") share enforcement of most areas of

[1] 15 U.S.C. §§1-8.
[2] 15 U.S.C. §§41-58.
[3] 15 U.S.C. §§12-27.

federal antitrust law but with some differences in the scope of their authority. The FTC has sole authority to enforce Section 5 of FTC Act, which prohibits (1) unfair methods of competition and (2) unfair or deceptive acts or practices. The FTC almost always pursues claims for anticompetitive conduct as unfair methods of competition and reserves charges of unfair or deceptive acts or practices for consumer protection violations. Though the FTC's authority to challenge unfair methods of competition goes beyond conduct prohibited by the Sherman and Clayton Acts, in practice the FTC brings most unfair methods of competition cases under the same standards that courts apply to Sherman Act claims. The most prominent exception is the invitation to collude offense, which falls outside the scope of the Sherman Act (if the invitation is not accepted, there is no agreement). The FTC challenges invitations to collude as so-called "standalone" violations of Section 5.[4] The DOJ has sole authority to pursue criminal violations of the antitrust laws. Most states have their own state antitrust and unfair competition statutes. State law follows federal law to some extent, though as discussed below, may differ from federal law in meaningful ways that vary state to state. State attorneys general and private parties can also typically file suit to enforce both federal and state antitrust law.

[A] Sherman Act Section 1: Agreements That Unreasonably Restrain Trade

The key substantive provisions of the Sherman Act are Sections 1 and 2. Section 1 prohibits agreements that unreasonably restrain trade. An agreement can be any "meeting of the minds" between separate entities. An agreement can be express or in the form of a tacit unwritten understanding.[5] Most agreements are evaluated under the "rule of reason" standard. The rule of reason is a fact-based test that requires a plaintiff to prove that an agreement has harmed competition. To prove that an agreement has harmed competition, courts typically apply a three-step burden shifting framework. The plaintiff has the initial burden to show that the agreement imposed a meaningful restriction on competition in a relevant market. Agreements among parties that do not possess some degree of market power are unlikely to generate competitive harm, so market power plays an important role in step one of the test, either directly or indirectly. If the plaintiff shows competitive harm, the defendant must show a procompetitive rationale for the agreement. If the defendant succeeds, the burden shifts back to the plaintiff to show that the same benefits could reasonably be achieved in a less restrictive manner.[6]

Where courts have determined that a particular type of agreement is unlikely to ever generate procompetitive benefits, that agreement is subject to the per se rather than rule of reason standard.[7] If an agreement is per se unlawful, competitive harm is presumed and irrebuttable. Even parties that do not possess market power can violate Section 1 under the per se standard.[8] Agreements in the per se category are primarily limited to agreements among competitors to fix prices, allocate territories, or engage in bid rigging. The DOJ has the discretion to prosecute these kinds of "hard core" violations criminally.[9]

In some limited circumstances, courts may apply an intermediate standard known as the "quick look"

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[4]Complaint at 8, *In the Matter of U-Haul Int'l*, FTC Dkt. No. C-4294 (July 14, 2010), available at https://www.ftc.gov/sites/default/files/documents/cases/2010/07/100720uhaulcmpt.pdf; *see also* Fed. Trade Comm'n, *Statement of Enforcement Principles Regarding "Unfair Methods of Competition" under Section 5 of the FTC Act.* (Aug. 13, 2015), *available at* https://www.ftc.gov/system/files/documents/public_statements/735201/150813section5enforcement.pdf.

[5]Copperweld Corp. v. Independence Tube Corp., 467 U.S. 752, 767–68 (1984).

[6]Ohio v. American Express, 138 S. Ct. 2274, 2289 (2018).

[7]Leegin Creative Leather Prods. v. PSKS, Inc., 551 U.S. 877, 886 (2007).

[8]Nat'l Collegiate Athletic Ass'n v. Bd. of Regents, 468 U.S. 85, 110 (1984).

[9]U.S. Dep't of Justice, *Criminal Enforcement*, *available at* https://www.justice.gov/atr/criminal-enforcement.

or "presumptively unlawful" test.[10] Courts will apply the quick look test where an agreement falls outside the narrow set of well-recognized per se violations, but nevertheless appears to lack any procompetitive value. Under a quick look standard, courts treat the agreement as presumptively unlawful, but will allow the defendant to rebut that presumption by showing that the agreement has procompetitive benefits.[11] For example, in FTC v. Indiana Federation of Dentists, the Supreme Court used the quick look test to analyze whether an agreement between a group of dentists to refuse to submit dental x-rays was anticompetitive.[12] While the Court did not condemn the agreement as per se unlawful, it did not require the FTC to engage in the kind of elaborate market analysis ordinarily required under the rule of reason.[13]

[B] Sherman Act Section 2: Monopolization

Section 2 of the Sherman Act covers unilateral conduct to unlawfully acquire or maintain monopoly power.[14] A firm has an economic monopoly if it is the sole supplier of a product, service, or technology for which there are no close substitutes (for at least some group of customers).[15] However, defining monopoly power under the antitrust laws is a more nuanced factual question. A dominant firm that faces some rivals may possess monopoly power under Section 2 if it faces few meaningful market constraints on its decisions, at least in the reasonably short term. The Supreme Court has defined monopoly power as "the power to control price or exclude competition." Because a firm with monopoly power is less constrained by the market, its business decisions can generate antitrust risks that less powerful firms do not face. Thus firms with monopoly power need to carefully analyze even ordinary business strategies, such as exclusive distribution arrangements or customer loyalty programs, to assess antitrust risk.

To prove a claim for monopolization under Section 2, a plaintiff is required to show that (1) the defendant possesses monopoly power in a relevant market, and (2) either acquired or maintained that power through "exclusionary conduct."[16] Section 2 also prohibits attempts to monopolize, which requires (1) exclusionary conduct, (2) a specific intent to harm competition, and (3) a reasonable probability of success.[17] Conduct is exclusionary if it restricts competition from rivals and is not justified by legitimate procompetitive benefits or efficiencies.[18] Courts will evaluate whether conduct is exclusionary under Section 2 using a burden shifting framework that is similar to the framework courts apply under the rule of

[10]The Federal Trade Commission sometimes refers to the abbreviated rule of reason standard as the "inherently suspect" standard.

[11]Nat'l Collegiate Athletic Ass'n, 468 U.S. at 100–09.

[12]FTC v. Indiana Fed'n of Dentists, 476 U.S. 447, 460–61 (1986).

[13]*Id.* at 460–61.

[14]Section 2 also outlaws conspiracies to monopolize. Copperweld Corp. v. Independence Tube Corp., 467 U.S. 752, 767 n.13 (1984). The elements of a conspiracy to monopolize claim are: (1) proof of a combination or conspiracy; (2) an overt act in support of the conspiracy; (3) an effect on a substantial amount of interstate commerce; and (4) a specific intent to monopolize. Multistate Legal Studies v. Harcourt Brace Jovanovich Legal & Prof'l Publ'n, 63 F.3d 1540, 1556 (10th Cir. 1995).

[15]Economic theory defines a monopolist as the sole supplier of a product or service for which there are no close substitutes. Dennis W. Carlton & Jeffrey M. Perloff, Modern Industrial Organization at 112 (4th Ed. 2015). However, a firm may have monopoly power under the antitrust law even if it faces some rivals. The Supreme Court has defined monopoly power under Section 2 as "the power to control prices or exclude competition." United States v. Grinnell, 384 U.S. 563, 566 (1966).

[16]Verizon Commc'ns v. Trinko, 540 U.S. 398, 407 (2004).

[17]Spectrum Sports v. McQuillan, 506 U.S. 447, 456 (1993).

[18]The Supreme Court has defined exclusion as "the willful acquisition or maintenance of [monopoly power] as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident." *Grinnell*, 384 U.S. at 566.

reason.[19] The mere possession of monopoly power does not violate the antitrust laws. Firms with lawfully acquired monopoly power are free to exercise that power, including through charging monopoly prices, without running afoul of U.S. antitrust law.[20]

[C] Clayton Act Section 7: Mergers

Mergers are typically analyzed under the Clayton Act.[21] Section 7 of the Clayton Act prohibits mergers where "the effect of such acquisition may be substantially to lessen competition, or tend to create a monopoly."[22] The Clayton Act is forward looking. It allows the government and private parties to block mergers that "may" substantially lessen competition. In 1976, Congress passed the Hart-Scott-Rodino ("HSR") Act, which amended the Clayton Act to require that parties to a merger that exceeds certain size threshold notify the DOJ and FTC and allow a waiting period to expire before closing the transaction.[23]

[D] State Antitrust Laws

Almost all states have their own antitrust laws.[24] Many state antitrust statutes specifically require that courts apply the law in harmony with federal antitrust law.[25] But there can be some key differences. For example, though resale price maintenance agreements are evaluated under the rule of reason under federal law, such agreements remain per se unlawful under some state laws, including California.[26] Additionally, under federal law, only customers that purchase directly from a company that has violated the antitrust laws have standing to sue for damages. Some states have passed laws that allow indirect purchases to bring claims under state law.[27]

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[19]To establish that conduct is exclusionary, a plaintiff must first show that it had an anticompetitive effect. The burden then shifts to the defendant to show that that conduct had a legitimate procompetitive justification. If the defendant meets that burden, a plaintiff is required to show that the anticompetitive harm outweighs the benefit. United States v. Microsoft, 253 F.3d 34, 58–59 (2001).

[20]*Verizon Commc'ns Inc.*, 540 U.S. at 407. European Union and several other international jurisdictions may allow claims for "exploitative abuse" or excessive pricing. *See* Sean-Paul Brankin, Salomé Cisnal de Ugarte, and Lisa Kimmel, *Int'l Developments, Huawei: Injunctions and Standard Essential Patents,* 30 Antitrust ABA 80, 82 (2015), *available at* https://www.crowell.com/files/Huawei-Injunctions-Standard-Essential-Patents-Is-Exclusion-a-Foregone-Conclusion.pdf. Though such claims are rare and disfavored as inconsistent with promoting dynamic competition, they remain legitimate claims.

[21]Mergers can also be challenged under the Sections 1 and 2 of the Sherman and Section 5 of the FTC Acts.

[22]The Clayton Act also restricts interlocking directorates and certain tying contracts that are likely to harm competition. *See* Bankamerica Corp. v. United States, 462 U.S. 122, 127 (1983); Ill. Tool Works Inc. v. Indep. Ink, Inc., 547 U.S. 28, 33–34 (2006).

[23]Pharm. Research & Mfrs. of Am. v. FTC, 790 F.3d 198, 199 (D.C. Cir. 2015).

[24]*See, e.g.*, 6 Del. C. §2103; Fla. Stat. §542.15; 740 Ill. Comp. Stat. §10/2.

[25]McGarry & McGarry, LLC v. Bankr. Mgmt. Sols., 937 F.3d 1056, 1062 (7th Cir. 2019).

[26]*Leegin*, 551 U.S. at 881 (holding that resale price maintenance agreements should be evaluated under the rule of reason); UFCW & Employers Benefit Trust v. Sutter Health, Case No. CGC-14-538451, 2019 Cal. Super. LEXIS 342, at *11–12 (Cal. Super. Ct. Mar. 14, 2019) (finding resale price maintenance agreements are per se unlawful under the California Cartwright Act).

[27]Knevelbaard Dairies v. Kraft Foods, Inc., 232 F.3d 979, 991 (9th Cir. 2000).

§13.03 OVERVIEW OF THE INTERSECTION OF ANTITRUST AND IP

The same antitrust laws and analytic framework that apply to tangible property apply to the acquisition and assertion of IPRs, including through IP licensing. The Sherman and FTC Acts apply to agreements and unilateral conduct involving IPRs. Mergers involving the transfer of IPRs may also be analyzed under the Clayton Act and may be subject to reporting requirements under the HSR Act if the value of the transaction triggers the statutory thresholds and no exemptions apply.[28]

In 2007, the DOJ and FTC issued a joint report on antitrust and IPRs that provides an overview of federal agency enforcement policy. The 2007 report describes how the federal agencies will apply the antitrust laws to the most common areas of conduct, including the decision of IP owners to retain exclusive use of their IP, patent pooling arrangements, and tying or bundling IP rights.[29] In 2017, the DOJ and FTC provided updated antitrust guidelines focusing more narrowly on IP licensing.[30] Together with federal and relevant state case law, these guidance materials (which are also drawn from applicable federal law) provide a roadmap to the application of antitrust law to conduct involving IPRs in the United States.

For purposes of antitrust analysis, patents can be viewed as an input into downstream product or service markets. Conduct involving patents can impact competition in the upstream input market, known as a technology market, or the downstream product market.[31] A technology market consists of IPRs and close market substitutes.[32] While IP confers a bundle of rights that may include the right to exclude, patents do not necessarily confer a monopoly under the antitrust laws. As with other forms of property, whether IPRs confer market power will depend on whether there are commercially viable substitutes for the underlying patents or other IP.[33] Because the transaction costs of enforcing IP rights may be higher than the costs of excluding others from using tangible property, even when there are no close substitutes, the potential for the exercise of market power in IPRs may be more muted than for tangible property. The agencies have also stated that they will sometimes evaluate the impact of conduct involving IPRs on a "research and development" market, defined as "the assets comprising research and development related to the identification of a commercializable product."[34] In practice, antitrust claims based on harm to an R&D

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[28] 15 U.S.C. §18a; 16 C.F.R. 801–03.

[29] U.S. Dep't of Justice and Fed. Trade Comm'n, *Antitrust Enforcement and Intellectual Property Rights: Promoting Innovation and Competition* (Apr. 2007) (hereinafter "2007 IP Report"), *available at* https://www.justice.gov/atr/antitrust-enforcement-and-intellectual-property-rights-promoting-innovation-and-competition.

[30] U.S. Dep't of Justice and Fed. Trade Comm'n, *Antitrust Guidelines for the Licensing of Intellectual Property* (Jan. 12, 2017) (hereinafter "Licensing Guidelines"), *available at* https://www.justice.gov/atr/IPguidelines/download.

[31] Licensing Guidelines at 8–12.

[32] *Id.* at 9.

[33] *Ill. Tool Works*, 547 U.S. at 45–46 ("Congress, the antitrust enforcement agencies, and most economists have all reached the conclusion that a patent does not necessarily confer market power upon the patentee. Today, we reach the same conclusion, and therefore hold that, in all cases involving a tying arrangement, the plaintiff must prove that the defendant has market power in the tying product."). While some courts evaluating patent claims may sometimes still mistakenly state in dicta that patents confer an economic monopoly, both the antitrust enforcement agencies continue to emphasize that is not the case. *See* Brief for the United States of America and Federal Trade Commission as Amici Curiae in Support of Neither Party (corrected), *Invention Investment Fund II v. Capital One Fin. Corp.*, No. 8:14-cv-111, at *5 (Fed. Cir. May 11, 2018) (ECF No. 41), *available at* https://www.justice.gov/atr/case-document/file/1063226/download.

[34] Licensing Guidelines at 11.

market have not gained traction with the enforcement agencies except in merger cases involving a pharmaceutical pipeline product.[35]

[A] IP Enforcement

Enforcement of a patent obtained by fraud on the Patent and Trademark Office ("PTO") can form the basis of a monopolization claim if the other elements of an offense are established, including competitive harm.[36] The plaintiff must show that the patent owner knew that its patent was procured by fraud at the time it asserted its rights. At the pleading stage, the fraud must be alleged with particularity under the Federal Rules of Civil Procedure.[37] However, absent fraud in the procurement of a patent, the assertion of IPRs is protected under the *Noerr-Pennington* doctrine and cannot give rise to antitrust liability unless the assertion is both objectively and subjectively baseless.[38] Conduct that is incidental to filing a lawsuit, such as sending infringement notices, is also immune from antitrust liability unless it passes the same two-part "sham litigation" test.[39] A lesser standard of proof may apply where the litigant pursues a pattern of filing baseless lawsuits without consideration of the merits of the underlying claim.[40]

The owners of standard-essential patents ("SEPs") subject to a contractual assurance to license on reasonable and nondiscriminatory terms, or fair, reasonable, and nondiscriminatory ("F/RAND") terms are also immune from antitrust liability under U.S. law for asserting a legitimate claim or asking a court for relief from infringement, including injunctive relief.[41] However, *Noerr* immunity is a creature of the U.S. Constitution and SEP-owners do not necessarily enjoy these protections from antitrust scrutiny internationally. For example, under European law, the owner of a F/RAND-assured SEP may seek an injunction without running afoul of the antitrust laws if it has notified the alleged infringer of its unlawful

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[35]Licensing Guidelines at 11, n. 40. These cases may be more easily understood as claims concerning potential competition in a pharmaceutical product market.

[36]Walker Process Equip. v. Food Machinery & Chem., 382 U.S. 172 (1965).

[37]MedImmune v. Genentech, 427 F.3d 958, 967 (Fed. Cir. 2005).

[38]Prof'l Real Estate Investors v. Columbia Pictures Indus., 508 U.S. 49 (1993) ("*PRE*"). The Court in *PRE* recognized the tension between *Noerr* immunity for the assertion of legitimate IP rights and its decision in *Walker Process*, which permits an antitrust cause of action for assertion of patent rights obtained through fraud on the PTO, even if the ensuing claim is not objectively baseless. *Id.* at 62 n.6 ("We need not decide here whether, and to what extent *Noerr* permits the imposition of antitrust liability for a litigant's fraud or other misrepresentation."). Consequently, both *Walker Process* claims and *Noerr* immunity remain part of antitrust jurisprudence today.

[39]*See, e.g.*, Globetrotter Software v. Elan, 362 F.3d 1367, 1376 (Fed. Cir. 2004).

[40]USS-POSCO Indus. v. Contra Costa Cty., 31 F.3d 800, 811 (9th Cir. 1994) (citing Cal. Motor Transp. Co. v. Trucking Unlimited, 404 U.S. 508 (1972)).

[41]*See* Apple Inc. v. Motorola Mobility Inc., 886 F. Supp. 2d 1061, 1066, 1079 (W.D. Wis. 2012) ("[E]nforcement of. . . patents is privileged conduct protected by the First Amendment."). The court "conclude[d] that . . . the *Noerr–Pennington* doctrine provides [the Defendant] immunity from [Plaintiff's] antitrust and unfair competition claims. . . to the extent that those claims are premised on a theory of antitrust or unfair competition." *Id.* at 1066; *see also* TCL Communications Tech. Holdings, Ltd. v. Telefonaktienbolaget LM Ericsson, No. SACV 14-0341, 2016 U.S. Dist. LEXIS 140566 (2016 WL 7049263), at *6-7 (C.D. Cal. Aug. 9, 2016) (finding the Plaintiff lacks standing to allege its "incurred significant expense defending against actions by [the Defendant] seeking injunctions or exclusion orders" is a violation of California's Unfair Competition Law, because of the *Noerr-Pennington Doctrine* which "provides absolute immunity for statutory liability for conduct when petitioning the government for redress.") (quoting Sosa v. DIRECTV, Inc., 437 F.3d 923, 929 (9th Cir. 2006)).

use and the infringer fails to signal that it is willing to conclude a license on F/RAND terms.[42] Further, where the alleged infringer has expressed that it is willing to conclude a F/RAND license, the SEP owner may nevertheless pursue an injunction if the alleged infringer later fails to respond to a written offer in good faith.[43] However, it may be an abuse of dominance under Article 102 of the Treaty on the Functioning of the European Union ("TFEU") for the owner of a F/RAND-assured SEP to pursue injunctive relief where the alleged infringer acts in good faith to negotiate a license after receiving an offer.[44]

The doctrine of patent misuse can provide a defense to an infringement claim where the patent owner tries to expand the scope of its statutory patent grant. Conduct that supports a patent misuse defense may not necessarily sustain an affirmative antitrust claim, even though the doctrine of patent misuse draws on antitrust principles. In most cases patent misuse can succeed only where the conduct harms competition under a rule of reason type of analysis. The patent act itself bars claims for misuse based on tying unless the patent owner has market power in the tying product or patented technology.[45] However, charging royalties beyond the term of a patent remains per se unlawful patent misuse without any showing of anticompetitive harm.[46]

[B] Reverse Payment Patent Settlements

Patent infringement settlements in the pharmaceutical sector that include a reverse payment from the owner of a patent on a branded drug to an alleged generic infringer have been scrutinized by the FTC and widely litigated by private plaintiffs. The Drug Price Competition and Patent Term Restoration Act, referred to as the Hatch-Waxman Act, creates an abbreviated approval process for generic drugs and a mechanism to resolve patent disputes.[47] A generic applicant that seeks to enter a market for a patent-protected drug can file a statement claiming that either its product does not infringe the incumbent's patents or that the patents are invalid. That statement, known as a "paragraph IV certification," is treated as an act of infringement that allows the branded manufacturer to file suit against the generic for infringement. If the generic filer is successful, it enjoys a 180-day exclusivity period during which no other generic can enter the market. Following a paragraph IV certification, the patent owner and the potential generic entrant will sometimes reach a settlement where the patent owner drops its infringement claim *and* pays the alleged infringer to settle (the reverse payment). In return the generic entrant agrees to delay entry past the date it likely could have entered had it prevailed, though often before expiration of the potentially blocking patent.

In Federal Trade Commission v. Actavis, Inc., the Supreme Court held that even in cases where the underlying infringement claim was not a sham, reverse payment settlements are subject to antitrust scrutiny under the rule of reason standard.[48] The Court explained that an "unexplained large reverse payment itself would normally suggest that the patentee has serious doubts about the patent's survival," suggesting the objective of the settlement is to preserve and share monopoly profits by avoiding price competition.[49] However, the Court refused to find that reverse payment settlements are presumptively unlawful, which would effectively shift the burden to the settling parties to prove that the agreement was procompetitive. The Court held that the anticompetitive effects of a settlement depend on a variety of factors, including the size of the payment relative to likely litigation costs, whether the payment provided compensation for other

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[42]Case C-170/13, *Huawei Technologies Co. Ltd v ZTE Corp., ZTE Deutschland GmbYH*, Judgment of the Court, July 16, 2015).

[43]*Id.*

[44]*Id.*

[45]35 U.S.C. §271(d).

[46]Kimble v. Marvel Ent., 135 S. Ct. 2401 (2015).

[47]21 U.S.C. §335.

[48]133 S. Ct. 2223 (2013).

[49]*Id.* at 2236.

services, and that a plaintiff "must prove its case as in other rule-of-reason cases."[50]

Since *Actavis*, most district courts have concluded that a non-cash transfer of value from the branded pharmaceutical to the potential generic entrant in the form of a side-business arrangement can constitute a reverse payment. Two appellate courts have agreed, finding that a patent owner's agreement to refrain from introducing an authorized generic version of its branded product, which would compete with the first generic filer during its statutory 180-day exclusivity period, can constitute a non-cash reverse payment and support an antitrust claim.[51]

[C] Mergers Involving IPRs

Acquisitions involving IP rights are evaluated under the same standards and principles that apply to other acquisitions. Some transfers of IP rights that fall short of outright sale may be reportable to the U.S. agencies under the HSR Act. Based on informal guidance from the FTC Premerger Notification Office ("PNO"), exclusive patent or trademark licenses may need to be reported under the HSR Act. When determining whether a license is exclusive, PNO has applied the "make, use, and sell" approach, which treats licenses as exclusive where the licensee is granted the exclusive right to develop, manufacture, and sell the product without restriction. Licenses with only partial exclusivity, for example, in a specific geography, are still treated as exclusive for purposes of determining reportability. Non-exclusive licenses generally do not need to be reported except for exclusive pharmaceutical patent licenses that transfer all "commercially significant rights," even where the licensor retains manufacturing rights.[52]

Mere acquisition of IP rights without more does not violate the antitrust laws.[53] The agencies may challenge the transaction if a merger involving IP would be likely to harm competition. When evaluating competitive effects, the agencies may consider whether the combination of substitute patents is likely to enhance market power in one or more technology markets. Since IPRs can be an input into a downstream product market, the agencies may also consider whether the transfer of rights may lessen competition by foreclosing entry or raising a rival's costs in a downstream product market.

From 2011 to 2012, the DOJ investigated a series of mergers involving the acquisition of large patent portfolios that included F/RAND-assured SEPs or patents subject to open-source commitments.[54] The DOJ expressed concerns that these large portfolio transactions would allow the acquirers, firms that also

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[50] *Id.* at 2237.

[51] King Drug Co. v. Smithkline Beecham Corp., 791 F.3d 388, 404 (3d Cir. 2015); Rochester Drug Co-Operative, Inc. v. Warner Chilcott Co. (In re Loestrin 24 Fe Antitrust Litig.) Leave *In re*, 814 F.3d 538, 552 (1st Cir. 2016).

[52] 78 Fed. Reg. 68,705, 68,706-07 (Nov. 15, 2013).

[53] United States v. United Shoe Mach. Corp., 110 F. Supp. 295 (D. Mass. 1953), *aff'd*, 347 U.S. 521 (1954).

[54] U.S. Dep't of Justice, *CPTN Holdings LLC and Novell Change Deal in Order to Address Department of Justice Open Source Concerns* (Apr. 20, 2011), *available at* https://www.justice.gov/opa/pr/cptn-holdings-llc-and-novell-inc-change-deal-order-address-department-justices-open-source; U.S. Dep't of Justice, *Statement of the Dep't of Justice Antitrust Division on its Decision to Close the Investigations of Google Inc.'s Acquisition of Motorola Mobility Holdings, Inc., and the Acquisition of Certain Patents by Apple Inc., Microsoft Corp., and Research in Motion of Nortel Network Patents and the Acquisition by Apple, Inc. of Certain Novell, Inc. Patents* (Feb. 13, 2012), available at https://www.justice.gov/opa/pr/statement-department-justice-s-antitrust-division-its-decision-close-its-investigations. Federal courts have raised similar concerns where sellers acquire rights necessary to participate in downstream product market, finding Sherman Act violations where a single firm acquired all key patents in an effort to block downstream market entry. United States v. Singer Mfg. Co., 374 U.S. 174 (1963).

competed in downstream product markets, to alter the terms of prior licensing agreements in ways that would exclude their product market rivals. The DOJ ultimately closed its investigation into all three transactions in large part because the parties made public commitments regarding future access to the patents, including promises to license on F/RAND terms.

The agencies may also seek remedies involving the assignment of IP rights to address likely anticompetitive effects of broader transactions. In 2013, the FTC approved Honeywell's acquisition of Intermec on the condition that Honeywell license key patents to a third-party. Honeywell and Intermec were two of only three 2D scan engine makers in the U.S. The FTC alleged that the transaction would be anticompetitive primarily because IP held by the merging parties would create a barrier to new entry. To restore competition, Honeywell agreed to license its U.S. patents to a foreign competitor, eliminating the key entry barrier that would have otherwise restricted competition in the U.S. market after the acquisition.[55]

§13.04 ANTITRUST AND IP LICENSING

On January 12, 2017, the DOJ and FTC issued updated guidelines on the licensing of intellectual property ("Guidelines"). The Guidelines cover most common practices associated with licensing such as field-of-use restrictions, exclusivity provisions, grantbacks, and cross-licenses. The Guidelines also cover closely related issues such as patent pools and bundled or package licensing arrangements. Although the Guidelines expressly cover enforcement policy regarding licensing rights covered by patent, copyright, and trade secrets, the agencies state that the same principles are relevant to the brand protection issues associated with trademark rights.[56]

The Guidelines start from the premise that IP licensing allows firms to combine complementary assets of production and is generally procompetitive. Recognizing the strong procompetitive benefits associated with licensing, the agencies evaluate most licensing arrangements under the rule of reason. Since firms are not required to share or create competition for their own IP, the starting point under the rule of reason is to ask whether the restriction "harms competition among entities that would have been actual or potential competitors…in the absence of a license." [57] In addition, since there is no antitrust duty to license IP, there is no duty to license on particular terms or to charge nondiscriminatory rates. The Robinson-Patman Act, a federal antitrust law which under certain circumstances restricts price discrimination in the sale of commodities, does not apply to IP licenses because IP is not a commodity. In limited cases, a restriction in a licensing agreement between actual or potential competitors may be per se unlawful. Examples of restrictions that may be per se unlawful include those that limit price competition or allocate territories among firms that would have been horizontal competitors absent the license. Resale price maintenance agreements in licenses are evaluated under the rule of reason.[58]

U.S. courts and agencies recognize that patent pooling arrangements can generate substantial efficiencies. In some sectors, a large number of firms may own the patent rights necessary to commercialize a product. Combining rights across firms into a single license can reduce transaction costs and increase

[55]Fed. Trade Comm'n, *FTC Approves Final Order Settling Charges That Honeywell's Acquisition of Intermec Was* Anticompetitive (Nov. 27, 2013), *available at* https://www.ftc.gov/news-events/press-releases/2013/11/ftc-approves-final-order-settling-charges-honeywells-acquisition.

[56]Licensing Guidelines at 1, n.1.

[57]Licensing Guidelines at 6.

[58]In 1926, the Supreme Court held that resale price maintenance agreements in patent licenses are evaluated under the rule of reason and do not typically harm competition. United States v. General Elec., 272 U.S. 476, 490 (1926) (recognizing the right of intellectual property owners to forbid sales by a licensee includes the power to restrict the prices at which the licensee may sell the licensed material). Eighty years later, the Supreme Court held that the rule of reason applies generally to resale price maintenance agreements involving any form of property. *Leegin*, 551 U.S. at 881.

monetization for smaller patent holders that may lack the resources to pursue unlicensed use of their technology. Patent pools can nevertheless raise antitrust concerns. The formation of a pool is far more likely to raise competitive concerns if the pool combines substitute patents covering non-infringing alternative technologies. In 1998, the FTC settled allegations that Summit and VISX had violated the antitrust laws by pooling substitute patents covering the manufacture and use of photorefractive keratectomy lasers, equipment used for vision correction surgery.[59] According to the FTC, the pool eliminated competition that otherwise would have existing between Summit and VISX for both licensing their patents and for fees charged to doctors leasing the equipment.[60]

Pools that combine complementary patents that are likely to be essential to practice an industry standard can create substantial integrative efficiencies and are likely to be procompetitive. Parties can reduce antitrust risks associated with forming a pool by employing an independent expert to confirm that patents submitted to the pool are likely to be essential to a standard and thus complementary. However, restrictions in pooling arrangements that limit the ability of pool members to license outside the pool or require members to offer grantbacks to pool members that extend beyond the scope of the pool technologies may raise competitive concerns. While patent pools do not need to be open to all, consistent with general joint venture principles, excluding rivals from a pool can raise antitrust concerns if firms excluded from the participating in the pool cannot compete effectively in downstream markets. As with restrictions in IP licenses more generally, restrictions in pooling arrangements or pool licenses are more likely to create antitrust risk if the parties to the arrangement collectively possess market power.

The Guidelines' antitrust principles apply equally to SEPs subject to a F/RAND assurance. Disputes regarding F/RAND terms are evaluated under principles of contract law and do not raise antitrust issues unless the patent owner engages in exclusionary conduct under Section 2 of the Sherman Act. In Rambus Inc. v. Federal Trade Commission, the D.C. Circuit overruled an FTC decision finding that Rambus had violated Section 2 by deceptively failing to disclose patents that read on a developing standard.[61] According to the FTC, but for that deception, the standard development organization would have either selected a different technology or would have required Rambus to commit to license its SEPs on reasonable and nondiscriminatory terms. However, since the FTC did not prove that one or the other outcome was more likely, the court reversed the FTC decision, finding that merely evading a contractual commitment could not form the basis for an antitrust claim and the FTC had failed to prove anticompetitive exclusion.[62]

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[59]Fed. Trade Comm'n, *Summit and VISX Settle FTC Charges of Violating the Antitrust Laws* (Aug. 21, 1998), *available at* https://www.ftc.gov/news-events/press-releases/1998/08/summit-and-visx-settle-ftc-charges-violating-antitrust-laws.

[60]*Id*. The DOJ has issued several Business Review letters that also provide guidance on the antitrust analysis of patent pools. U.S. Dep't Justice, *Letter from Joel I. Klein, Assistant Attorney Gen., U.S. Dep't of Justice, to Gerard R. Beeney* (June 26, 1997), *available at* https://www.justice.gov/archive/atr/public/busreview/215742.htm; U.S. Dep't Justice, *Letter from Joel I. Klein, Assistant Attorney Gen., U.S. Dep't of Justice, to Gerard R. Beeney* (Dec. 16, 1998), *available at* https://www.justice.gov/archive/atr/public/busreview/2121.htm; U.S. Dep't Justice, *Letter from Joel I. Klein, Assistant Attorney Gen., U.S. Dep't of Justice, to Carey R. Ramos* (June 10, 1999), *available at* https://www.justice.gov/archive/atr/public/busreview/2485.htm; U.S. Dep't Justice, *Letter from Charles A. James, Assistant Attorney Gen., U.S. Dep't of Justice, to Ky P. Ewing* (Nov. 12, 2002), *available at* https://www.justice.gov/archive/atr/public/busreview/200455.htm. For an overview of these matters, *see* 2007 IP Report at 64–80.

[61]522 F.3d 456 (D.C. Cir. 2008).

[62]*Id.* at 466–67; *see also* Integraph Corp. v. Intel Corp., 195 F.3d 1346, 1351 (Fed. Cir. 1999) (finding that Intel's refusal to continue to license its former customer Integraph did not change "this 'garden variety patent dispute'" into an antitrust offense).

§13.05 RECENT HIGHLIGHTS AND MATTERS TO WATCH IN 2020

Over the past few years the FTC has brought several matters that seek to refine the legal standards at the intersection of antitrust and IP law. Three cases are currently pending on appeal in separate circuits, with decisions on each likely in 2020. At the same time, the DOJ has been actively using its policy and advocacy tools to reshape the dialogue around many of these same issues by intervening and filing amicus briefs in courts across the country. These important developments and issues to watch in 2020 are described below.

FTC v. Qualcomm has the potential to either clarify or reshape the legal standards that define the antitrust duty to share IP with competitors. In January 2017, the FTC filed an antitrust complaint against Qualcomm alleging that the company had unlawfully monopolized two markets for modem chips by (1) requiring modem chip customers to license its patents separately before it would sell them chips (what the FTC called the "no license – no chips" policy), (2) declining to license its SEPs to competing modem chip suppliers, and (3) utilizing *de facto* exclusive dealing arrangements with Apple. The case was tried in the Northern District of California. The court issued a decision on May 21, 2019 finding for the FTC on each of its three main theories of harm.[63] The court issued a broad injunction that could require substantial changes to Qualcomm's business model, including blocking Qualcomm from conditioning the supply of modem chips on a customer's patent-license status, and requiring the company to make exhaustive licenses available to modem chip suppliers on F/RAND terms.

Qualcomm appealed to the Ninth Circuit, which granted Qualcomm's motion to stay key aspects of the order pending appeal.[64] The court spoke only briefly on the merits, stating that it would leave to another day whether "the district court's order and injunction represent a trailblazing application of the antitrust laws, or instead an improper excursion beyond the outer limits of the Sherman Act."[65] The high-profile appeal attracted broad participation from amici, on both the motion to stay the injunction and the merits, including a brief from the DOJ with support from the Departments of Defense and Energy supporting a stay, and a subsequent DOJ merits brief supporting Qualcomm.[66]

Impax Laboratories *v. FTC* is likely to add to the appellate court guidance on reverse payment settlements. On January 13, 2017 the FTC filed a complaint against Impax Laboratories, alleging that Impax had executed an unlawful reverse payment settlement agreement with Endo Pharmaceuticals, Inc., the company that produced Opana ER, the branded version of the drug oxymorphone ER.[67] According to the FTC, the parties agreed that Impax would drop its challenge to Endo's patents and delay entry of generic oxymorphone ER. In exchange, Endo agreed to refrain from offering an authorized generic version of

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[63]FTC v. Qualcomm Inc., Case No. 17-CV-00220-LHK, 2019 U.S. Dist. LEXIS 86219 (2019 WL 2206013), at *82–85, *211–12, *261–62 (N.D. Cal. May 21, 2019).

[64]Order re Mot. to Stay, FTC v. Qualcomm Inc., No. 19-16122 (9th Cir. Aug. 23, 2019) (ECF No. 74).

[65]*Id.* at *6.

[66]United States' Statement of Interest Concerning Qualcomm's Mot. for Partial Stay of Injunction Pending Appeal, FTC v. Qualcomm Inc., No. 19-16122 (9th Cir. July 16, 2019) (ECF No. 25); Brief of the United States of America as Amicus Curiae in Support of Appellant and Vacatur, FTC v. Qualcomm, Inc., No. 19-16122 (9th Cir. Aug. 30, 2019) (ECF No. 86).

[67]Complaint at 2, *In the Matter of Impax Labs., Inc.*, FTC Dkt. No. 9373 (Jan. 19, 2017), *available at* https://www.ftc.gov/system/files/documents/cases/docket_no_9373_impax_part_3_administrative_complaint_redacted_public_version_1-23-17.pdf. Endo settled with the FTC early in the litigation. Fed. Trade Comm'n, *Endo Pharmaceuticals Inc. Agrees to Abandon Anticompetitive Pay-for-Delay Agreements to Settle FTC Charges* (Jan. 23, 2017).

oxymorphone ER during Impax's six-month generic exclusivity period (known as the "No AG agreement"). The parties also agreed that Endo would make a cash payment to Impax if it reduced the value of the No AG promise by transitioning patients to a new branded formulation. The settlement agreement also included a $10-40 million independent development and co-promotion agreement related to a different drug.

The case was tried before the FTC's Administrative Law Judge ("ALJ"), who found against FTC complaint counsel. The ALJ concluded that the settlement had procompetitive benefits, which included an independent development and co-promotion agreement for a separate drug.[68] In a unanimous decision on April 3, 2019, the Commission reversed.[69] The Commission held that the ALJ erred by including the development and co-promotion agreement in its analysis because those terms did not provide a justification for the reverse payment itself.[70]

Impax has appealed to the Fifth Circuit, arguing that in weighing the competitive costs and benefits of a reverse payment settlement, all procompetitive benefits stemming from that agreement should be counted, not just those that directly justify the reverse payment and entry delay.[71] The FTC filed its opposition brief on December 10, 2019, arguing that only benefits tied to the reverse payment and entry delay should be cognizable.[72]

1-800 CONTACTS v. FTC is likely to clarify the antitrust standards that apply to more ordinary IP infringement settlements that do not involve a reverse payment. In August 2016 the FTC filed an administrative complaint against 1-800 CONTACTS. The company had asserted trademark infringement claims against several online sellers for bidding on the 1-800 CONTACTS brand name in a keyword search auction to trigger their own search advertising. The parties settled those claims using standard non-use agreements. While the FTC did not challenge the legitimacy of the underlying infringement claims, it claimed that the settlement agreements nevertheless created an unreasonable restraint on competition under either a presumptively unlawful (quick look) or full rule of reason standard.[73]

The case was tried before the FTC's ALJ, who held in favor of FTC complaint counsel in October 2017.[74] The ALJ found that FTC complaint counsel had shown that the agreements harmed competition under a full rule of reason standard by merely showing that the agreements restricted advertising.[75] The ALJ declined to rule on complaint counsel's theory that the agreements were also presumptively unlawful.[76] 1-800 CONTACTS appealed to the full Commission. On November 14, 2018 the Commission upheld the ALJ decision by a vote of three to one, with one commissioner issuing a vigorous dissent, and one declining

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[68]Initial Decision by Chief Admin. Law Judge D. Michael Chappell at 157-58, *In the Matter of Impax Laboratories, Inc.*, FTC Dkt. No. 9373 (May 18, 2018), *available at* https://www.ftc.gov/system/files/documents/cases/d09373initialdecisionpublic.pdf.

[69]Op. of the Comm'n at 42, *In the Matter of Impax Labs, Inc.*, FTC Dkt. No. 9373 (Fed. Trade Comm'n Apr. 3, 2019), *available at* https://www.ftc.gov/system/files/documents/cases/d09373_impax_laboratories_opinion_of_the_commission_-_public_redacted_version_redacted_0.pdf.

[70] *See id.* at 31–32. According to the FTC, only facts that provide a direct justification for the reverse payment should be considered in the rule of reason analysis.

[71]Brief for Pet'r at 2–3, Impax Labs., Inc. v. FTC, Case No. 19-60394 (5th Cir. Oct. 3, 2019).

[72]Brief of Resp't at 20–21, Impax Labs., Inc. v. FTC, Case No. 19-60394 (5th Cir. Dec. 10, 2019).

[73]Complaint at 1, 4, *In the Matter of 1-800 Contacts, Inc.*, FTC Dkt. No. 9372 (Aug. 8, 2016), *available at* https://www.ftc.gov/system/files/documents/cases/160808_1800contactspt3cmpt.pdf

[74]Initial Decision of Chief Admin. Law Judge D. Michael Chappell at 201, *In the Matter of 1-800 Contacts, Inc.*, FTC Dkt. No. 9372 (Oct. 27, 2017), *available at* https://www.ftc.gov/system/files/documents/cases/docket_9372_1-800_contacts_inc._initial_decision_final_redacted_public_version.pdf.

[75]*Id.* at 138, 152.

[76]*Id.* at 138.

to participate.[77] Though the majority affirmed the ALJ, it departed from the ALJ's analysis by deciding that the agreements were presumptively unlawful, a standard that the Supreme Court rejected for even reverse payment patent settlements in *Actavis*.[78] 1-800 CONTACTS has appealed to the Second Circuit, challenging, among other things, the Commission's decision to avoid a full analysis of competitive effects by both invoking the presumptively unlawful standard and, concluding, in the alternative, that a restriction on advertising that is the result of a bona fide assertion of trademark rights is sufficient to establish competitive harm.[79] Briefing is complete and oral argument is expected in March 2020.

The Antitrust Division and the New Madison Approach. Since taking over as Assistant Attorney General for Antitrust, Makan Delrahim has been actively using the DOJ's policy and advocacy tools to press for greater attention to long-run incentives to innovate in matters at the intersection of antitrust and IP law, focusing often on issues associated with SEPs subject to a voluntary F/RAND assurance.[80] In a series of speeches, Delrahim has objected to a narrow focus in recent years on the conduct of SEP owners and the risk that firms that have made F/RAND assurances will breach those commitments and demand royalty terms that exceed reasonable levels, often called "patent hold-up." Delrahim has expressed concern that this narrow focus has led antitrust enforcers to misuse antitrust law to police private contractual arrangements, and to ignore the greater risk that firms implementing standardized technologies will collude in ways that shift the bargaining leverage in licensing negotiations towards licensees (sometimes called "reverse hold-up"). Early in his tenure, Delrahim advised SDOs and their members to exercise caution in discussing or imposing licensing policies that disadvantage either licensors or licensees, and to ensure that standards are developed through transparent procedures with due process for all relevant stakeholders.[81] He

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[77] FTC, *FTC Commissioners Find That 1-800 Contacts Unlawfully Harmed Competition in Online Search Advertising Auctions* (Nov. 14, 2018), *available at* https://www.ftc.gov/news-events/press-releases/2018/11/ftc-commissioners-find-1-800-contacts-unlawfully-harmed.

[78] Op. of the Comm'n at 22, *In the Matter of 1-800 Contacts, Inc.*, FTC Dkt. No. 9372 (Nov. 7, 2018), *available at* https://www.ftc.gov/system/files/documents/cases/docket_no_9372_opinion_of_the_commission_redacted_public_version.pdf; *but see* Dissenting Statement of Comm'r Noah Joshua Phillips at 21, *In the Matter of 1-800 Contacts, Inc.*, FTC Dkt. No. 9372 (Nov. 14, 2018), *available at* https://www.ftc.gov/system/files/documents/public_statements/1421309/docket_no_9372_dissenting_statement_of_commissioner_phillips_redacted_public_version.pdf ("Treating the Trademark Settlements as 'inherently suspect' yields an unclear rule that, regardless of interpretation, will, I fear, create uncertainty, dilute trademark rights, and dampen inter-brand competition.").

[79] Final Form Brief for Pet'r at 39, 50, 1-800 Contacts v. FTC, Case 18-3848 (2d Cir. Oct. 11, 2019).

[80] "Antitrust, Standard Development, and Essential Patent Licensing: The Antitrust Division Returns to Sound Enforcement Principles," Crowell & Moring Client Alert (Nov. 22, 2017), *available at* https://www.crowell.com/NewsEvents/AlertsNewsletters/all/Antitrust-Standard-Development-and-Essential-Patent-Licensing-The-Antitrust-Division-Returns-to-Sound-Enforcement-Principles.

[81] *See e.g.* Makan Delrahim, Assistant Att'y Gen. for Antitrust, *The New Madison Approach to Antitrust and Intellectual Property Law,* Remarks as Prepared for Delivery University of Pennsylvania Law School at 4-5 (March 16, 2018), *available at* https://www.justice.gov/opa/speech/file/1044316/download ("There has been a shift in recent years toward what I would call a "retro-Jefferson" view of patents as conferring too much power that ought to be curbed, either through reinterpreting antitrust law or establishing patent policies of standard setting organization ("SSO") that favor implementers who practice on a patent when they build new technologies. Many advocates of reducing the power of intellectual property rights cite the so-called "hold-up" problem in the context of SSOs. As many of you know, I believe these concerns are largely misplaced. Instead, I favor what I call the "New Madison" approach to the application of antitrust law to intellectual property rights."); Makan Delrahim, Assistant Att'y Gen for Antitrust, *Take It to the Limit: Respecting Innovation Incentives in the Application of Antitrust Law*, Remarks as Prepared for Delivery at

has called this approach the "New Madison" approach.

Delrahim has actively advocated for what he calls "New Madison approach" by filing statements and amicus briefs in relevant federal court antitrust matters, including the FTC's case against Qualcomm described above.[82] The Department of Justice and United States Patent and Trademark Office ("PTO") also submitted a joint amicus brief in HTC v. Ericsson to provide the court with innovation policy guidance relevant to the court's analysis of a jury instruction in a F/RAND determination matter.[83]

DOJ has also partnered with other executive branch agencies on key competition policy initiatives relating to IPRs. On December 19, 2019, DOJ, PTO, and the National Institute of Standards and Technology (NIST) issued an interagency policy statement on remedies for SEPs subject to a voluntary F/RAND commitment.[84] The policy statement represents the views of U.S. executive branch agencies and is intended to provide guidance to courts and administrative agencies charged with adjudicating infringement claims, as well as jurisdictions internationally, on the important role that a strong system of patent remedies plays in promoting competition, innovation, and the standards-development ecosystem more broadly. The statement emphasizes that remedies for infringement of SEPs subject to a voluntary F/RAND assurance are not subject to a separate set of rules; all remedies, including injunctive relief and exclusion orders, are available in appropriate circumstances.[85] It replaces the now-withdrawn 2013 joint DOJ/PTO policy

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USC Gould School of Law (Nov. 10, 2017) at 13, available at https://www.justice.gov/opa/speech/file/1010746/download ("enforcers should carefully examine and recognize the risk that SSO participants might engage in a form of buyer's carte, what economists call a monopsony effect.").

[82]Statement of Interest of the United States, Lenovo (United States) Inc. et al. v. IPCOM GMBH, Case No. 5:19-cv-01389 at 7 (N.D. Cal., Oct. 25, 2019), available at https://www.justice.gov/atr/case-document/file/1213856/download (merely seeking injunctive relief does not raise an antitrust issue); Notice of Intent to File Statement of Interest of the United States, U-Blox v. InterDigital, Case No. 3:19-cv-0001-CAB (S.D. Cal. Jan. 11, 2019) at 2 ("The Antitrust Division…intends to file a Statement of Interest of the United States in this case to explain its views that [plaintiff's claim for alleged breach of F/RAND] does not properly sound in antitrust law and that injunctive relief granted on that basis would risk distorting licensing negotiations for standard essential patents.").

[83]Brief for the United States of America as Amicus Curiae in Support of Neither Party, HTC Corporation v. Telefonaktiebolaget LM Ericsson, Case No. 19-40566 at 1-2 (5th Cir. Oct. 30, 2019), *available at* https://www.justice.gov/atr/case-document/file/1214541/download ("Incorrect interpretations of patent laws and related doctrines as they are applied to SEPs may result in SEP holders receiving lower revenue streams for their inventions or implementers paying too much for the use of a patented technology, either of which has the potential to diminish innovation and competition.").

[84]United States Pat. and Trademark Off., United States Dep't of Justice, Nat'l Inst. of Standards and Tech., *Policy Statement on Remedies for Standards-Essential Patents Subject to Voluntary F/RAND Commitments* (Dec. 19, 2019), *available at* https://www.justice.gov/atr/page/file/1228016/download; Dep't of Justice, *United States Patent and Trademark Office, and National Institute of Standards and Technology Announce Joint Policy Statement on Remedies for Standard-Essential Patents* (Dec. 19, 2019), *available at* https://www.justice.gov/opa/pr/department-justice-united-states-patent-and-trademark-office-and-national-institute-standards "); U.S. Pat. and Trademark Off., *U.S. Patent and Trademark Office releases policy statement on standards-essential patents subject to voluntary F/RAND commitments: Extensive Discussions Yield Balanced Policy* (Dec. 19, 2019), *available at* https://www.uspto.gov/about-us/news-updates/us-patent-and-trademark-office-releases-policy-statement-standards-essential.

[85]United States Pat. and Trademark Off., United States Dep't of Justice, Nat'l Inst. of Standards and Tech., *Policy Statement on Remedies for Standards-Essential Patents Subject to Voluntary F/RAND Commitments* (Dec. 19, 2019), *available at* https://www.justice.gov/atr/page/file/1228016/download ("All

statement with the goal of correcting any misimpression that the prior statement may have generated.[86] DOJ is likely to continue its New Madison policy agenda through both interagency activity and perhaps its own enforcement matters in 2020.

§13.06 CONCLUSION

Litigation and policy activity at the intersection of antitrust and IP law is likely to remain active in 2020. Companies that own or use IPRs should stay alert to these developments and seek guidance from experienced counsel to stay informed and incorporate key developments into their business and legal strategies.

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remedies available under national law, including injunctive relief and adequate damages, should be available for infringement of standard-essential patents subject to a F/RAND commitment.").

[86] United States Pat. and Trademark Off. and United States Dep't of Justice, *Policy Statement on Remedies for Standards-Essential Patents Subject to Voluntary F/RAND Commitments* (Jan. 8, 2013), *available at* https://www.justice.gov/atr/page/file/1118381/download (withdrawn and archived).