Antitrust, Vol. 35, No. 2, Spring 2021.

Rationalizing U.S. Standardization Policy: A Proposal for Institutional Reform

BY JORGE L. CONTRERAS

TECHNICAL INTEROPERABILITY standards like Wi-Fi, 3G/4G/5G, HTTP, and Bluetooth are integral components of the global technology infrastructure that play key roles in international trade, competition, and commerce. Given their significance, standards have been at the heart of an increasing number of domestic and international disputes, including patent litigation, national export and import bans, and allegations of trade secret theft, industrial espionage, and national security threats.

Yet, in the United States, national policy regarding standardization, and especially patents covering standardized products (standards-essential patents, or SEPs) is in a state of disarray. No single U.S. federal agency has authority over national policy toward standardization, nor does a coherent national standardization policy exist. Rather, policies are created ad hoc by a range of authorities, often in response to industry lobbying and in areas outside the agencies' core competencies. The result has been a piecemeal array of conflicting and flip-flopping policies that confound private industry, harm consumers, and diminish the role of the United States as a model for the rest of the world. Rationalizing and centralizing this patchwork of policy authority would significantly improve consistency, predictability, and stability in this area of national importance.

Who Creates U.S. Standards Policy?

Today, there is a surfeit of entities independently engaged in the development of U.S. policy for standards. Here are ten of the most notable.

1. *Federal Trade Commission*. In its role investigating and prosecuting "unfair methods of competition" over the past three decades, the FTC has brought numerous enforcement actions against alleged antitrust abuses (or violations of antitrust law) in the area of standardization.[1] The FTC also produces industry studies and policy statements that address issues at the intersections of standardization, intellectual property, and antitrust law.[2]
2. *Department of Justice Antitrust Division*. As the other U.S. agency charged with enforcing the antitrust laws, the principal outlets for DOJ policymaking in the area of standardization have been business review letters (BRLs) requested by private parties[3] and policy statements, often issued in conjunction with other agencies.[4] While DOJ officials have occasionally advanced policy initiatives through public speeches,[5] during the Trump administration, the DOJ markedly increased its policy advocacy regarding standardization through a spate of speeches[6] and interventions in third-party litigation.[7]
3. *National Institute of Standards and Technology (NIST)*. Housed within the Department of Commerce, NIST is charged by statute "to coordinate the use by Federal agencies of private sector standards."[8] In addition, NIST promulgates standards in areas such as measurement, cybersecurity, and electrical power, but it had not addressed matters of commercial standardization policy or intellectual property until its recent participation in a joint policy statement with the DOJ and Patent and Trademark Office,[9] discussed below.
4. *Patent and Trademark Office (PTO)*. Another entity within the Department of Commerce, the PTO is largely concerned with the examination, issuance, and maintenance of patents and trademarks. Yet beginning in 2013, the PTO has more actively engaged in policy discussions over standards-related patent litigation.[10]
5. *American National Standards Institute (ANSI)*. ANSI is a private trade association that accredits U.S. standards developers and represents the United States in some international standardization bodies.[11] ANSI often acts as a spokesperson for U.S. standardization policy,[12] though several significant U.S.-based standards development organizaitons (SDOs) are not ANSI members, and ANSI's rules lack the force of law.
6. *Federal Courts*. There has been significant patent, antitrust, and contractual litigation over standards during the past several decades, and several U.S. federal district and appellate courts have issued influential opinions

Jorge Contreras is Presidential Scholar and Professor of Law, University of Utah S.J. Quinney College of Law.

in the area. At the appellate level, the U.S. Courts of Appeal for the D.C. Circuit, Federal Circuit, and Ninth Circuit have emerged as the leading venues for decisions in this area, although their opinions are often not entirely consistent. The U.S. Supreme Court has not heard a significant standards-related case since a pair of landmark antitrust decisions in the 1980s.[13]

7. *International Trade Commission (ITC)*. The ITC is, among other things, an adjudicatory body that protects U.S. markets from counterfeit imports. Beginning in 2012, the ITC began to play a prominent role in international patent disputes over standardized products, and today numerous standards-related patent disputes are heard by the ITC.[14]
8. *Office of the U.S. Trade Representative (USTR).* The USTR, a cabinet-level office, is responsible for developing and coordinating U.S. policy on international trade and investment. The USTR made a significant contribution to standardization policy in 2013 when it disapproved (i.e., vetoed) an ITC exclusion order that would have prevented the importation of Apple products with standardized features into the United States.[15]
9. *Office of Management and Budget (OMB)*. The White House OMB coordinates the activities of federal agencies, and since 1980 it has issued rules regarding the use and promulgation of technical standards by such agencies, notably in its Circular A-119.[16]
10. *Office of the Federal Register (OFR)*. The OFR, an office within the National Archives and Records Administration (NARA), promulgates rules regarding the incorporation of privately developed standards into federal regulation[17]—rules that have become the focus of recent litigation over the copyrightability of standards documents.[18]

Conflicts and Reversals in Standards Policy

The development of policy by the multiple entities described above has resulted in numerous conflicts and policy reversals—a trend that reached fever pitch during the Trump administration.[19] A few examples will illustrate this trend.

ITC Exclusion Orders Against Standardized Products. Conflict among U.S. agencies over standards policy began in 2012, when the ITC considered requests for exclusion orders against standardized products that allegedly infringed U.S. patents.[20] The first such actions were instigated by Motorola Mobility (the holder of patents covering the H.264 video encoding standard and the 802.11 Wi-Fi standard), which sought exclusion orders against both Apple and Microsoft products implementing those standards. The FTC submitted a Third Party Statement of Interest to the ITC with respect to both cases, arguing that the "issuance of an exclusion . . . order in matters involving RAND-encumbered SEPs . . . has the potential to cause substantial harm to U.S. competition, consumers and innovation."[21] Then, in January 2013, the DOJ and PTO issued a joint policy statement addressing the same question and coming to much the same conclusion as the FTC.[22]

Nevertheless, in June 2013, the ITC issued an exclusion order against Apple smartphones and tablets that allegedly infringed Samsung patents covering wireless telecommunications standards.[23] In response, the USTR, acting on behalf of the Obama administration, disapproved (thereby reversing) the ITC's exclusion order against Apple. The USTR reasoned that the ITC had not acted on the basis of a sufficient factual record regarding, inter alia, "information on the standards-essential nature of the patent at issue . . . and the presence or absence of patent hold-up or reverse hold-up."[24] The USTR's disapproval of the exclusion order against Apple took many by surprise. In subsequent cases, the ITC has more carefully considered factors relating to SEPs when conducting its public interest analysis.[25]

Yet in 2019, the DOJ and PTO reversed their earlier position, which had urged restraint in the issuance of ITC exclusion orders. They took the unusual step of withdrawing their 2013 Policy Statement and replacing it with a new policy statement that was joined, for the first time, by NIST.[26] The agencies attributed this action to "additional experience with disputes concerning standards-essential patents" over the intervening years, as well as concerns that the 2013 Policy Statement was being "misinterpreted."[27] But many viewed the move simply as the latest in a series of steps initiated by the DOJ Antitrust Division to strengthen the rights of SEP holders to the detriment of manufacturers of standardized products.[28]

The IEEE Business Review Letter. In 2015, the IEEE Standards Association (the SDO responsible for computer networking standards, including the popular 802.11 Wi-Fi standard) amended its intellectual property rights (IPR) policy. Among other things, the amended policy clarified the basis for the "reasonable and nondiscriminatory" (RAND) royalties that IEEE members were permitted to charge for the use of their SEPs and limited the ability of SEP holders to seek injunctive relief against "willing" potential licensees. This policy amendment was vehemently opposed by significant SEP holders at IEEE. Nevertheless, after reviewing the policy, the DOJ issued a positive BRL that concluded that the policy "has the potential to benefit competition and consumers by facilitating licensing negotiations, mitigating hold up and royalty stacking, and promoting competition among technologies for inclusion in standards."[29] The DOJ concluded that it had "no present intention to take antitrust enforcement action against" the IEEE.[30]

However, in 2017, soon after he assumed leadership of the Antitrust Division, Assistant Attorney General Makan Delrahim began to question the continuing vitality of the IEEE BRL.[31] Prominent SEP holders like U.S.-based Qualcomm, which had originally opposed IEEE's 2015 amendments, urged the DOJ to revisit the 2015 BRL.[32] Other large SEP holders, most of them based in Europe, joined the criticism of the IEEE policy and the DOJ's 2015 BRL.[33] One

commentator, who later became Qualcomm's Director of Antitrust Policy and Litigation, expressly urged "the DOJ's new leadership to announce its intention to investigate the process concerns with the amendments to the IEEE's IPR Policy. . . . [and] renounce . . . sections of the prior administration's IEEE BRL . . . "[34]

The DOJ obliged, and in 2020 it took the unprecedented step of issuing a new letter to "supplement, update, and append" its 2015 BRL.[35] The 2020 update made a number of sweeping statements about ways in which U.S. law had changed since 2015, including the stunning (and incorrect) assertion that there is a "consensus view in the United States that seeking an injunction is an 'exclusive right' conferred by the U.S. Constitution."[36] The update letter suggests that the original process by which the 2015 IEEE amendments were adopted might have been biased against SEP holders and, thus, anticompetitive. It concludes by encouraging IEEE "to consider whether changes are needed to promote full participation, competition, and innovation in IEEE's standard setting activities."[37] In other words, in sharp contrast to its own 2015 BRL, the DOJ suggests that IEEE would be well advised to consider revoking the 2015 amendments to its IPR policy and substituting something more favorable to SEP holders.

The DOJ's reversal has upended reliance on the BRL by standards organizations in the United States and elsewhere, and it has given the impression, around the world, that U.S. policy in this area rests on shaky ground.[38]

***Interventions in* FTC v. Qualcomm.** In 2017, the FTC brought an action against Qualcomm, Inc., for alleged violations of the Sherman Act in connection with the licensing of SEPs for wireless telecommunications standards. In yet another unprecedented move, the DOJ intervened in the suit not once, but twice, to oppose the FTC and support Qualcomm.[39] In its Statement of Interest at the Ninth Circuit, the DOJ included separate supporting declarations from the Department of Defense (DOD) and the Department of Energy (DOE).[40]

During the Trump administration, the FTC and DOJ clashed on numerous other issues of antitrust enforcement and policy, revealing a deep and public rift in the two agencies' philosophical approaches to patents, standards, and antitrust law.[41]

Ultra Vires Advocacy

The three examples above illustrate numerous interagency conflicts and destabilizing policy reversals in relation to standardization policy. Without more, these developments alone would be of significant concern. But even more troubling is the fact that, in many cases, the subject matter of these agency actions lies outside of the agencies' primary missions and statutory competency. In taking such policy positions the agencies are, in fact, acting in a manner that is *ultra vires*, outside the scope of their legal power and authority.[42]

This pattern of *ultra vires* advocacy in standard setting predates the Trump administration. It began with a set of FTC, DOJ, and PTO policy statements submitted to the ITC in 2012–2013. The FTC and DOJ are the U.S. antitrust enforcement agencies.[43] Yet these agencies somehow saw fit to advise the ITC on the propriety of injunctive relief as a remedy for patent infringement—a matter not grounded in antitrust law.[44] Likewise, until then the PTO had not ventured into the policy debates surrounding standardization or patent litigation remedies. Nevertheless, it joined the DOJ in issuing the 2013 Policy Statement addressing remedies under Section 337 of the Tariff Act of 1930, well beyond its usual purview.

In November 2017, AAG Delrahim publicly rebuked Judge Richard Posner and the Federal Circuit for their respective decisions in *Apple v. Motorola*,[45] a case involving the availability of injunctive relief for SEP holders in federal court.[46] What is most remarkable about AAG Delrahim's criticism is not that he disagreed with the courts' decisions, but that the case did not concern antitrust law. He was disagreeing with an application of the Supreme Court's equitable test for injunctive relief under *eBay v. MercExchange*[47]—a matter of patent remedies. As such, the issue was outside the authority and competence of the DOJ Antitrust Division.[48]

And while many of the Antitrust Division's interventions in private litigation arguably addressed issues of antitrust law, the Division was rebuked in 2019 by the Chairman of the Subcommittee on Antitrust, Commercial, and Administrative Law of the House Committee on the Judiciary, who questioned the Division's allocation of substantial resources to intervening in private litigation absent the request of any court and in the FTC's case against Qualcomm, apparently without following accepted inter-agency clearance practices.[49]

But perhaps the Trump DOJ's most puzzling and extreme exercise of non-antitrust advocacy in the area of standardization arose at the Ninth Circuit in *FTC v. Qualcomm*. There, the Antitrust Division ventured far afield from antitrust law, making arguments, supported by the DOD and DOE, that entering an injunction against Qualcomm for anticompetitive conduct would adversely affect national security and encourage cyber-espionage.[50]

Agency Capture

It is well known that political appointees to federal agencies tend to favor the parties and causes they supported prior to their appointments, and that they will often continue to represent those parties and causes in the private sector after the term of their government service.[51] Criticism of the FTC and DOJ Antitrust Division in this regard began before the Trump administration.

Former ITC Commissioner F. Scott Kieff and economist Anne Layne Farrar have studied the susceptibility of the DOJ Antitrust Division and the FTC to political and commercial pressures, using the term "government holdup" to

describe the well-known phenomenon of regulatory capture by private interests.[52] Economist J. Gregory Sidak has also criticized the political capture of the DOJ Antitrust Division, observing that "[t]he electoral cycle drives the political process that installs the Division's top officials into positions of ephemeral authority."[53] He attributes particularly short-sighted decisions to the "political cycle" and to the fact that, when ill-advised policies eventually hurt the economy, "[s]omeone else will be running the Antitrust Division."[54]

Analysts have observed that "[t]he Obama administration recruited dozens of former Google employees to serve in the White House and at agencies like the Federal Trade Commission (FTC) and the Federal Communications Commission (FCC)."[55] Likewise, before his appointment to the DOJ, Mr. Delrahim had publicly disclosed (as required by law) his service as a lobbyist for Qualcomm through December 2016 on matters relating to "[i]ntellectual property and competition policy, including issues related to domestic and foreign antitrust enforcement,"[56] precisely the matters on which he was most active at the DOJ.[57] Indeed, one commentator observed that Mr. Delrahim believed that "anything done by a patentholder is necessarily pro-competitive."[58]

The Risks of a Policymaking Vacuum

In our current political system, it is inevitable that interested officials will come into power with changes in the administration, and often with views that differ from those of their predecessors. But it is *not* inevitable that public policy will pivot 180 degrees with each such change, or that decades of past precedent and agency guidance will be overturned within the space of a single administration.[59]

Yet, just such an upheaval has occurred in the realm of U.S. standardization policy because there is no explicit authority for developing such policy in the United States. The greatest statutory authority in the area of standardization resides with NIST, but this authority is incomplete, and NIST has not actively engaged in the intellectual property debates that have driven policymaking in this area over the past several decades.

The absence of any real U.S. policymaking authority or coordinator leaves a power vacuum in this key economic sector. Consequently, the area is ripe for appropriation by any agency or individual having the requisite appetite and resources. During the last administration, this agency was the DOJ Antitrust Division. Despite the Antitrust Division's designated role as one of two antitrust enforcement agencies, the Division under AAG Delrahim significantly expanded its policymaking profile in the area of standardization. The Division effectively became the self-appointed arbiter and coordinator of standardization policy, making public pronouncements on matters well beyond antitrust law, intervening in private litigation to promote its views, and criticizing judicial decisions and members of the judiciary who failed to adhere to its positions on key issues. In an effort to shape the law in ways favorable to patent holders, it openly challenged its sister enforcer, the FTC, in the *Qualcomm* case and enlisted to its cause other federal agencies, including NIST and the PTO. It even sought to influence ANSI's U.S. Standards Strategy, suggesting improvements such as an acknowledgement that patent holders be "appropriately compensated for their contributions."[60]

As an enforcement agency, the DOJ does not make law—even antitrust law—any more than the FBI makes the criminal trafficking and racketeering laws that it enforces. Yet the Antitrust Division's pronouncements are viewed as authoritative by many and, outside the United States, are often mistaken for binding legal precedent. This confusion, together with the uncertainty caused by clashing federal agencies, has left the law regarding standardized products and related intellectual property rights in a state of disarray. As a result, private firms cannot effectively plan their engagement in standardization activities, standards bodies cannot operate in the interests of their members, and consumers bear the cost of this uncertainty.

Rationalizing the Development of U.S. Standardization Policy

With no centralized focus for the development or coordination of U.S. standardization policy, it is not surprising that this policy landscape remains subject to capture and manipulation by interested agencies, rapidly flipping with changes in administration. Therefore, I propose that a centralized agency or office be designated, either by Executive Order or statute, as the official coordinator of federal policy concerning technical standardization, including the application of patent and copyright laws to standardized products, the licensing of standards-essential patents, and the efficient resolution of disputes concerning standards.

Although the creation of a centralized policy-coordinating authority would not in itself prevent capture or bias in policy making, it would at least ensure, through interagency processes, that all relevant government and private stakeholders have a voice in policy formulation. The policy authority could also operate under an overarching policy framework, enshrined in legislation, regulation, or Executive Order, that would be more resistant to sudden change than unilateral agency pronouncements. Another advantage of such a policy authority would be its ability to represent the U.S. government in increasingly important international discussions regarding standardization[61]—a function for which ANSI, as a private body, is not entirely suited.

One model for such a centralized office could be the OMB's U.S. Intellectual Property Enforcement Coordinator (IPEC). This White House office organizes federal agency responses and actions in its subject domain (intellectual property enforcement) and helps to formulate policy in a structured and efficient manner. Standardization policy, while related to IP enforcement, would not necessarily fit within the current remit of the IPEC, but another office modeled on IPEC could serve this function.

Another potential candidate to fill the role of standards policy coordinator is NIST. This agency already has the advantage of a charter that encompasses standardization, and it has recently begun to engage in the policy arena around standards and intellectual property. Consequently, it could be charged with this responsibility.

Standards policy should not, however, be entrusted to one of the antitrust enforcement agencies. These agencies should continue to police standardization activity for violations of the antitrust laws, but their advocacy and policy-making should end there. Antitrust authorities lack a broad view of the technical, policy, and legal issues implicated by standardization, and enforcement agencies are not ideally suited to achieve consensus or to coordinate the views of multiple stakeholders. Rather, these agencies should participate in the development of standardization policy through a centralized coordination mechanism that respects their views, but they should not act unilaterally in any capacity other than the direct enforcement of the antitrust laws.

Rationalizing and centralizing the existing patchwork of agencies that participate in the formulation of policy for standardization should significantly improve the consistency, predictability, and stability of this important area of economic activity. ■

[1] For a summary of the FTC's principal enforcement actions in this area, see Renata B. Hesse & Frances Marshall, *U.S. Antitrust Aspects of FRAND Disputes*, *in* Cambridge Handbook of Technical Standardization Law: Competition, Antitrust, and Patents 263 (Jorge L. Contreras ed., 2017), and Jorge L. Contreras, *Taking It to the Limit: Shifting U.S. Antitrust Policy Toward Standards Development*, 103 Minn. L. Rev. Headnotes 66, 69–71 (2018). Table 2 provides an overview of relevant enforcement actions. *Id.* at 70 tbl.2.

[2] *See, e.g.*, Fed. Trade Comm'n, The Evolving IP Marketplace: Aligning Patent Notice and Remedies with Competition (2011), https://www.ftc.gov/sites/default/files/documents/reports/evolving-ip-marketplace-aligning-patent-notice-and-remedies-competition-report-federal-trade/110307patentreport.pdf.

[3] *See* Hesse & Marshall, *supra* note 1, at 263; Contreras, *supra* note 1, at 69 tbl.1.

[4] *See, e.g.*, U.S. Dep't of Justice & Fed. Trade Comm'n, Antitrust Enforcement and Intellectual Property Rights: Promoting Innovation and Competition (2007).

[5] *See, e.g.*, Renata Hesse, Deputy Assistant Att'y Gen., Antitrust Div., U.S. Dep't of Justice, Six "Small" Proposals for SSOs Before Lunch, Remarks at the ITU-T Patent Roundtable 9 (Oct. 10, 2012), http://www.justice.gov/atr/public/speeches/287855.pdf.

[6] *See, e.g.*, Christopher R. Leslie, *The DOJ's Defense of Deception: Antitrust Law's Role in Protecting the Standard-Setting Process*, 98 Or. L. Rev. 379 (2020) (discussing speeches by AAG for the Antitrust Division Makan Delrahim); Mark R. Patterson, *The Patent-Antitrust Debate Annotated*, PatentlyO (July 23, 2018), https://patentlyo.com/patent/2018/07/patent-antitrust-anotated.html (analyzing Delrahim's speeches and the responses to them).

[7] *See* Stefan Meisner et al., *Gov't Amicus Efforts Show Antitrust Policy Via Advocacy*, Law360 (May 19, 2020) (stating that between 2017 and 2019, inclusive, the Antitrust Division filed 41 amicus curiae briefs or statements of interest in third-party cases, several of which involved standards). The most significant DOJ intervention in a standards-related case is in FTC v. Qualcomm Inc., 969 F.3d 974 (9th Cir. 2020). Other examples include HTC Corp. v. Telefonaktiebolaget LM Ericsson, No. 19-40170, 2019 WL 4126536 (5th Cir. June 18, 2019); Intel Corp. v. Fortress Inv. Grp., No. 19-07651, 2021 WL 51727 (N.D. Cal. Jan. 6, 2021); Cont'l Auto. Sys., Inc. v. Avanci, LLC, No. 19-02933, 2020 WL 5627224 (N.D. Tex. Sept. 10, 2020); Lenovo (United States) Inc. v. IPCom GmbH & Co., KG, No. 19-01389, 2019 WL 6771784 (N.D. Cal. Dec. 12, 2019); Statement of Interest of the United States, NSS Labs, Inc. v. Crowdstrike, Inc., No. 5:18-05711 (N.D. Cal. June 26, 2019).

[8] National Technology Transfer and Advancement Act of 1995, Pub. L. No. 104-113, § 12, 110 Stat. 775, 782 (1996) (codified as amended at 15 U.S.C. § 272(b)(3)).

[9] U.S. Patent & Trademark Off., Natl. Inst. Standards & Tech. & U.S. Dep't Justice, Policy Statement on Remedies for Standards-Essential Patents Subject to Voluntary F/RAND Commitments (Dec. 19, 2019), https://www.justice.gov/atr/page/file/1228016/download [hereinafter PTO-NIST-DOJ 2019 Policy Statement].

[10] *See* U.S. Dep't Justice & U.S. Patent & Trademark Off., Policy Statement on Remedies for Standards-Essential Patents Subject to Voluntary F/RAND Commitments (Jan. 8, 2013), https://www.justice.gov/atr/page/file/1118381/download [hereinafter DOJ-PTO 2013 Policy Statement].

[11] *See ANSI's Role*s, Am. Nat'l Standards Inst., https://www.ansi.org/about/roles.

[12] *See, e.g.*, Am. Natl. Standards Inst., United States Standards Strategy 2 (2020) (claiming that the strategy "has been developed through the coordinated efforts of a large and diverse group of constituents representing stakeholders in industry, standards developing organizations, consortia, consumer groups, government, and academia").

[13] Allied Tube & Conduit Corp. v. Indian Head, Inc., 486 U.S. 492 (1988); Am. Soc'y of Mech. Eng'rs v. Hydrolevel Corp., 456 U.S. 556 (1982).

[14] *See* Brian Johnson, *Asserting RAND Defenses at the ITC: 3 Common Pitfalls*, Law360 (Apr. 6, 2020) ("For well over a decade, respondents have been asserting RAND defenses" at the ITC). *See generally* Elizabeth I. Winston, *Standards Essential Patents at the United States International Trade Commission*, *in* Cambridge Handbook of Technical Standardization Law: Competition, Antitrust, and Patents 439 (Jorge L. Contreras ed., 2017).

[15] Letter from Ambassador Michael B.G. Froman, U.S. Trade Representative, Exec. Off. of the President, to Hon. Irving A. Williamson, Chairman, U.S. Int'l Trade Comm'n (Aug. 3, 2013) [hereinafter USTR ITC Disapproval Letter]. *See also* Winston, *supra* note 14, at 448–49.

[16] The most recent version of the Circular is Revision of OMB Circular A-119, Federal Participation in the Development and Use of Voluntary Consensus Standards and in Conformity Assessment Activities, 81 Fed. Reg. 4673 (Jan. 27, 2016). For a history of the evolution of this document, see Jorge L. Contreras, *Understanding 'Balance' Requirements for Standards Development Organizations*, CPI Antitrust Chron. (Sept. 23, 2019).

[17] *See* 1 C.F.R. § 51.5 (2019).

[18] *See* Am. Soc'y for Testing & Materials v. Public.Resource.Org, Inc., 896 F.3d 437 (D.C. Cir. 2018).

[19] *See, e.g.*, Richard Lloyd, *US Antitrust Chief Speech "Marks a Major Pro-IP and Pro-Innovator Shift in DOJ Policy,"* IAM Blog (Nov. 16, 2017) (observing "a 180-degree turn" in DOJ policy on SEP issues).

[20] Unlike courts, which are bound to apply the four-factor test for injunctive relief established in the Supreme Court's decision in *eBay Inc. v. MercExchange, L.L.C.*, 547 U.S. 388 (2006), the ITC has its own "public interest" test for deciding whether or not to issue an exclusion order.

[21] Third-Party United States Federal Trade Commission's Statement on the Public Interest at 1, Certain Gaming & Ent. Consoles, Related Software, & Components Thereof, Inv. No. 337-TA-745 (USITC June 6, 2012) [hereinafter FTC 2012 Public Interest Statement]. "RAND" means "reasonable and nondiscriminatory" and refers to the licensing terms on which members of the relevant SDOs agreed to license their SEPs to product manufacturers.

[22] DOJ-PTO 2013 Policy Statement, *supra* note 10.

[23] Certain Elec. Devices, Including Wireless Commc'n Devices, Portable Music & Data Processing Devices, and Tablet Computs., Notice of Final Determination, U.S. ITC Investig. No. 337-TA-794 (June 4, 2013).

[24] USTR ITC Disapproval Letter, *supra* note 15, at 3.

[25] Such cases include In re Certain Wireless Devices with 3G and/or 4G Capabilities & Components Thereof, ITC Investig. No. 337-TA-868, 2014 WL 2965327 (USITC June 13, 2014) (relating to Interdigital).

[26] PTO-NIST-DOJ 2019 Policy Statement, *supra* note 9.

[27] *Id*. at 4.

[28] *See, e.g.*, Bryan Koenig, *DOJ Antitrust Head Redoing Patent Accord To Help IP Owners*, Law360 (Dec. 7, 2018) ("The head of the U.S. Department of Justice's Antitrust Division has delivered one of the sharpest examples yet of the division's new emphasis on protecting patent holders . . . .").

[29] Letter from Renata B. Hesse, Acting Assistant Att'y Gen., U.S. Dep't of Justice, Antitrust Div., to Michael A. Lindsay, at 16 (Feb. 2, 2015).

[30] *Id.*

[31] *CPI Talks with Makan Delrahim, an Interview by Judge Douglas Ginsburg*, CPI Antitrust Chron. (June 2018) (quoting Delrahim saying, "I have lately expressed concerns that promulgating rules that limit the ability of patent holders to seek injunctions risks undermining incentives to innovate . . . . [and] could potentially violate the antitrust laws . . . . "). *See also* Contreras, *supra* note 1, at 73–75 ("Mr. Delrahim's latest comments send a clear warning to IEEE and to any other SDOs that may be considering an amendment to their patent policies along similar lines").

[32] *See, e.g.*, Ali Qassim, *Criticism of Standards Makers' Royalty Changes Continue*s, Bloomberg Patent Trademark & Copyright J. Daily Ed., June 7, 2016.

[33] *Id*.

[34] Koren W. Wong-Ervin, *Righting the Course: What the DOJ Should Do About the IEEE Business Review Letter*, CPI North America Column, Aug. 2017, at 3.

[35] Letter from Makan Delrahim, Assistant Att'y Gen., U.S. Dep't of Justice Antitrust Div., to Sophia A. Muirhead, Gen. Couns. & Chief Compliance Officer, Inst. of Elec. & Elecs. Eng'rs, Inc. (Sept. 10, 2020) at 1 [hereinafter DOJ 2020 IEEE Update Letter].

[36] *Id*. at 5–6 (citing no support other than a speech by Mr. Delrahim); s*ee also* Leslie, *supra* note 6, at 401–03 (analyzing and critiquing Mr. Delrahim's constitutional arguments).

[37] DOJ 2020 IEEE Update Letter, *supra* note 35, at 11.

[38] *See, e.g.,* Justus Baron et al., *Making the Rules: The Governance of Standard Development Organizations and Their Policies on Intellectual Property Rights*, JRC Science for Policy Report EUR 29655 at 162 (Mar. 2019) ("[A]s the shift at the DoJ shows, the application of competition or antitrust law might be undermined by a lack of consistency over time within a single authority, or a divergence as between authorities in the same jurisdiction (which is e.g. a possibility in the US, where the DoJ and FTC share the responsibility for enforcing antitrust law) or with other key jurisdictions (US, EU, China, among others). These limitations can reduce the precedential value of antitrust authorities' review of specific SDO practices.").

[39] *See* Statement of Interest of the United States of America, FTC v. Qualcomm Inc., 411 F. Supp. 3d 658 (N.D. Cal. 2019) (No. 17-00220); United States Statement of Interest Concerning Qualcomm's Motion for Partial Stay of Injunction Pending Appeal, FTC v. Qualcomm Inc., 969 F.3d 974 (9th Cir. 2019) (No. 19-16122).

[40] Declaration of Under Secretary of Defense for Acquisition and Sustainment Ellen M. Lord, FTC v. Qualcomm Inc., 969 F.3d 974 (9th Cir. 2019) (No. 19-16122); Declaration of Department of Energy Chief Information Officer Max Everett, FTC v. Qualcomm Inc., 969 F.3d 974 (9th Cir. 2019) (No. 19-16122).

[41] *See, e.g.*, Gregory Luib, *Unprecedented Agency Divergence on Antitrust Enforcement*, Law360 (Aug. 6, 2019); Bryan Koenig, *In Qualcomm Dispute, A Broader Row Between FTC, DOJ*, Law360 (May 10, 2019). Professor Herbert Hovenkamp describes the rift between the agencies as follows: "The FTC tilts toward policies that favor new-economy informational technologies and places a premium on cooperative development. By contrast, the Justice Department is increasingly leaning toward old-economy perspectives that interpret cooperative agreements narrowly." Herbert Hovenkamp, *Justice Department's New Position on Patents, Standard Setting, and Injunctions*, Regulatory Rev., Jan. 6, 2019, at 3.

[42] *See* Contreras, *supra* note 1, at 79–80.

[43] *See Mission*, U.S. Dep't Justice, https://www.justice.gov/atr/mission (July 20, 2015) ("The mission of the Antitrust Division is to promote economic competition through enforcing and providing guidance on antitrust laws and principles."); *About the FTC*, Fed. Trade Comm'n, https://www.ftc.gov/about-ftc (last visited Mar. 13, 2021) ("Our Mission: Protecting consumers and competition by preventing anticompetitive, deceptive, and unfair business practices through law enforcement, advocacy, and education without unduly burdening legitimate business activity.").

[44] The FTC carefully disclaimed any antitrust implications of its 2012 Public Interest Statement. FTC 2012 Public Interest Statement, *supra* note 21, at 1 n.1.

[45] Apple Inc. v. Motorola, Inc., 869 F. Supp. 2d 901, 913–15 (N.D. Ill. 2012), *aff'd in part*, *rev'd in part*, 757 F.3d 1286 (Fed. Cir. 2014).

[46] Makan Delrahim, Assistant Att'y Gen., Antitrust Div., U.S. Dep't of Justice, Take It to the Limit: Respecting Innovation Incentives in the Application of Antitrust Law, Remarks as Prepared for Delivery at the USC Gould School of Law 12 (Nov. 10, 2017) ("I believe Judge Posner was badly mistaken in the *Apple v. Motorola* case, in which he held that IP owners who make FRAND commitments somehow sacrifice their right *even to seek* an injunction.").

[47] *eBay Inc.*, 547 U.S. at 388.

[48] AAG Delrahim later justified these comments as part of the DOJ's "advocacy" mission: an effort to share the Division's views "about what conditions will make the market most dynamic, innovative and competitive." Makan Delrahim, Assistant Att'y Gen., Antitrust Div., U.S. Dep't of Justice, The Long Run: Maximizing Innovation Incentives Through Advocacy and Enforcement, Keynote Address at the LeadershIP Conference on IP, Antitrust, and Innovation Policy 1 (Apr. 10, 2018). AAG Delrahim's enthusiasm for tackling non-antitrust issues may be evidenced by the self-designation of his policies as a "New Madison" approach, in honor of President James Madison, whose "dogged perseverance in favor of strong patent protections" the AAG appeared to admire. Makan Delrahim, Assistant Att'y Gen., Antitrust Div., U.S. Dep't of Justice, The "New Madison" Approach to Antitrust and Intellectual Property Law, Remarks as Prepared for Delivery at University of Pennsylvania Law School at 4 (Mar. 16, 2018). This label and emphasis are somewhat curious, given that President Madison lived a century before the enactment of the Sherman Antitrust Act, the principal legislation the DOJ Antitrust Division is charged with enforcing.

[49] Letter from Rep. Jerrold Nadler, Chairman, H. Comm. on the Judiciary, & Rep. David N. Cicilline, Chairman, H. Subcomm. on Antitrust, Com., & Admin. Law, to Makan Delrahim, Assistant Att'y Gen., Antitrust Division, U.S. Dep't of Justice (Mar. 7, 2019).

[50] DOJ 9th Circuit Statement, *supra* note 39, at 2 ("[A] reduction in Qualcomm's leadership in 5G innovation and standard-setting, even in the short-term, could significantly impact U.S. national security by enabling foreign-owned firms to expand their influence. This is a critical period of time, and allowing foreign-aligned firms to drive the development of 5G standards could have long-term ramifications, including cyber-espionage.") (internal quotation marks and citations omitted); *see also id.* at 12–13. *But see* Brief of Amicus Curiae Professor Jorge L. Contreras in Support of Appellee and Affirmance, FTC v. Qualcomm Inc., 969 F.3d 974 (9th Cir. 2020) (No. 19-16122), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3494040 (refuting national security arguments).

[51] *See, e.g.*, Carlotta Alfonsi, *Taming Tech Giants Requires Fixing the Revolving Door*, 19 Kennedy Sch. Rev. 166, 166 (2019) ("[B]ig tech has cultivated a network of influential advocates both inside and outside of government."); Ernesto Dal Bó, *Regulatory Capture: A Review*, 22 Oxford Rev. Econ. Pol'y 203, 214 (2006) ("The fact that many regulators come from industry, or end up there, has long been thought to be a source of bias in regulatory decisions. . . . Coming from industry may induce regulators to make pro-industry decisions because of the regulator having been 'socialized' in an industry environment. . . . The possibility of post-regulatory employment is different: regulators may bias their decisions in order to enhance their chance of future employment in industry.")

[52] F. Scott Kieff & Anne Layne-Farrar, *Incentive Effects from Different Approaches to Holdup Mitigation Surrounding Patent Remedies and Standard-Setting Organizations*, 9 J. Competition L. & Econ. 1091, 1098–1100 (2013); *see also* F. Scott Kieff, *Pragmatism, Perspectives, and Trade:*

AD/CVD, Patents, and Antitrust as Mostly Private Law, 30 Harv. J.L. & Tech. 97, 119 (2017).

[53] J. Gregory Sidak, *The Antitrust Division's Devaluation of Standard-Essential Patents*, 104 Geo. L.J. Online 48, 72 (2015), https://www.law.georgetown.edu/georgetown-law-journal/glj-online/104-online/the-antitrust-divisions-devaluation-of-standard-essential-patents/.

[54] *Id*.

[55] Alfonsi, *supra* note 51, at 167.

[56] LD-2 Disclosure Form, Lobbying Report of Brownstein Hyatt Farber Schreck, LLP (July 20, 2017).

[57] AAG Delrahim recused himself from the DOJ's interventions in *FTC v. Qualcomm*.

[58] Leslie, *supra* note 6, at 425.

[59] FTC Commissioner Terrell McSweeny noted, in response to certain positions taken by the Trump DOJ, that the FTC's, and the prior DOJ's, approach to addressing patent holdup in the area of standardization was based on "over 15 years of scholarship and bipartisan study" and should not lightly be discarded. Terrell McSweeny, Fed. Trade Comm'r, Holding the Line on Patent Holdup: Why Antitrust Enforcement Matters 1 (Mar. 21, 2018).

[60] U.S. Dep't of Justice, Antitrust Div., Comments on the U.S. Standards Strategy 2 (Sept. 8, 2020).

[61] For example, there have been calls to constitute an international, nongovernmental tribunal to determine FRAND royalty rates. *See* Jorge L. Contreras, *Global Rate Setting: A Solution for Standards-Essential Patents*? 94 Wash. L. Rev. 701 (2019).