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Of Antitrust and Patents: the Quiet Return of the Status Quo at the DOJ's Antitrust Division

BY ALLEN GRUNES *April 26, 2021*

Former antitrust AAG Makan Delrahim at the Stigler Center's 2018 Antitrust and Competition Conference: Digital Platforms and Concentration.

Without Senate-confirmed political leadership, the Department of Justice quietly reverts to an Obama-era policy that favors Big Tech.

The consistent theme running through Makan Delrahim's tenure as head of the Department of Justice's Antitrust Division was protecting dynamic innovation. More than any Assistant Attorney General in recent history, Delrahim saw antitrust as a way to keep the paths to innovation clear. This made him very focused on incumbents who took action to prolong their incumbency by keeping disruptive innovators at bay.

Delrahim himself was something of a disruptive innovator at DOJ. A protégé of Orrin Hatch, he was far from an ideologue. To give just one example, Delrahim brought counsel Doha Mekki into his front office, where her primary job was to focus on antitrust enforcement in labor markets. This is not something that one would regard as a "typical" Republican concern.

At times, his habit of questioning how things were done and thinking about how things could be done differently undoubtedly did not sit well. He brought cases that others thought should not be brought, and settled cases others thought should be litigated. He shuffled responsibility for commodities so that, for example, financial services, fintech, banking, and credit cards were all handled by the same section instead of being divided among different sections. His effort to bring about institutional and policy change at DOJ

is relevant to the Biden administration, an object lesson about how hard it is to turn the battleship either to the right or to the left.

In a small but significant way, the DOJ appears to have reverted back to its old pre-Delrahim course. Earlier this month, the DOJ demoted—some might say "buried"—a Business Review Letter containing Delrahim's views on "standard-essential patents." Moving a document from one place to another on a government website hardly seems like a significant change in direction. But in this case, it has been understood as a return to Obama-era policy.

Policy decisions about the relationship between patents and antitrust belong to the Biden administration, and should await the confirmation of the next Assistant Attorney General.

A Worrying Signal?

More than once, Delrahim's views about the importance of dynamic innovation led him to support tech firms, at least when those firms appeared as challengers to the status quo. This view, not politics, explains his decision to try to block AT&T's acquisition of Time Warner. The complaint in that case alleged that "AT&T/DirecTV executives have concluded that the 'runway' for the decline of traditional pay-TV 'may be longer than some think given the economics of the space,' and that it is 'upon us to utilize our assets to extend that runway'" against newer tech-based rivals like Netflix, Apple, and Amazon. Similarly, Delrahim's decision to challenge the Visa/Plaid merger was driven by the fact that Visa was the dominant incumbent ("monopolist") and Plaid was the "innovative and nascent competitor." The parties abandoned the merger.

Along the same lines, one can understand Delrahim's decision to terminate old consent decrees, as they tend to "fix" markets in place and time and may end up perpetuating incumbents' market position and chilling innovation. For example, the *Paramount* decrees mandated certain restrictions on film licensing. One must wonder whether those decrees were still serving competition when Disney, a company that was not subject to the decrees, decided to license movies as if it were. When a large incumbent voluntarily subjects itself to regulation, one may worry about whose interests are being served.

Delrahim summarized his views on the importance of innovation in the same speech in which he discussed the decision to terminate the old *Paramount* decrees: "[I]nnovation is cumulative; one new innovation can unlock an entire array of new innovations. Thus, if antitrust enforcers get an enforcement decision wrong and stifle or delay innovation, consumers not only will miss out on that particular product improvement, they also could lose the opportunity to enjoy dozens of additional new products or services." This view is consistent with historic antitrust agency positions. For example, the 2003 FTC IP report similarly recognized that "[i]nnovation often is a cumulative process, with each stage building on its predecessors."

> "Policy changes in antitrust, especially those that could reshape bargaining rights, affect innovation, and favor Big Tech over

> entrepreneurs, have real-world consequences and should await the confirmation of a new Assistant Attorney General."

Often, as in some of the examples above, tech firms are the innovative upstarts. On the other hand, tech firms can also become entrenched incumbents. In such cases, Delrahim viewed antitrust as an equally important tool to permit competitive disruption by newer challengers. This was a theme of his 2019 speech in Israel and also explains his views on the importance of IP in general and patent law in particular.

As USC Professor Jonathan Barnett has shown, large integrated firms (including the largest tech firms) tend to benefit from weak patent laws. This is because they have other means to protect their innovations from appropriation by others. Strong patents tend to enable smaller, less integrated, more disruptive innovators. Weak patents tend to support larger, more hierarchical firms—in other words, entrenched incumbents.

It is worth pausing to consider this point for a moment. Quite a few years ago, I worked with Delrahim on an amicus brief supporting the respondent i4i in the *Microsoft v. i4i* case. i4i was an independent software company that held a patent on an improved method for editing computer documents. It sued Microsoft for willful infringement. Microsoft counterclaimed and sought a declaration that i4i's patent was invalid and unenforceable. In the Supreme Court, Microsoft, supported by many of the tech firms, argued for a lower burden in overcoming the statutory presumption of patent validity. The Federal Circuit had long required "clear and convincing" evidence; Microsoft and its allies wanted to lower this to a "preponderance" of the evidence. The Supreme Court (unanimously) rejected this effort.

In terms of remedies, Delrahim's view is that when it comes to the test for obtaining injunctive relief against infringement, "patent law already strikes a careful balance that optimizes the incentive to innovate." He is skeptical of arguments that there should be a general restriction on the remedies available to holders of "standard-essential patents" because of the possibility of "patent hold-up" in such cases, or that a restriction on available remedies is justified on antitrust grounds. For these and other reasons (including how other antitrust authorities were construing DOJ policy), Delrahim updated a 2015 business review letter to the IEEE on its patent policy. The 2020 business review letter signed by Delrahim noted that the right to seek an injunction is an "important right" that "promotes dynamic competition by ensuring that there are strong incentives to invest in new technologies."

Traditional antitrust was hostile to patents for a very long time, particularly in the decades after the Second World War. Compulsory licensing was often ordered in antitrust cases. Patents were, and to some extent still are, intuitively viewed as creating or raising entry barriers, as opposed to facilitating new entry. But that is not always the case. In particular, strong patents can enable individuals or small firms (with venture capital support) to enter markets dominated by large, vertically integrated firms. It gives these inventors a chance to compete against well-funded incumbents. But that only works with strong IP

protection. Otherwise, we are left with a battle between the giants and a potential drop in innovation in the broader economy. So although giant tech companies are often very hostile to antitrust enforcement, they are understandably happy to see antitrust used as a tool in the patent context to preserve their incumbency.

Earlier this month, the Antitrust Division removed the 2020 IEEE business review letter from other business review letters on its website (while leaving the older 2015 letter there), at a time when the top political antitrust post has not been filled and without any real explanation. In a brief comment, the Acting Assistant Attorney General characterized the move as procedural and not substantive. However, in the immortal words of the late John Dingell, "I'll let you write the substance . . . you let me write the procedure, and I'll screw you every time." Although the Acting AAG tried to minimize the significance of the change, others with an interest in weakening the rights of patent holders understandably saw cause for celebration: The change served to "restore" the 2015 IEEE letter and marked "the end of an error."

There have been calls for the Biden DOJ and FTC not to return to the Big-Tech-friendly status quo of the Obama years. Policy changes in antitrust, especially those that could reshape bargaining rights, affect innovation, and favor Big Tech over entrepreneurs, have real-world consequences and should await the confirmation of a new Assistant Attorney General. At the very least, before the government takes action that reasonably can be construed as a significant change in policy, there should be a lot more frankness, openness, and transparency. An aikido move like this one does not bode well for antitrust in the next four years and sets a bad example for antitrust agencies overseas.

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