

# The Future of the Past: Taking Stock of SEP Policy at the Outset of the Biden Administration

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**I**NTEROPERABILITY STANDARDS ARE THE lifeblood for many products and industries. Standards enable nearly every piece of interactive technology we use today—from cellular phones to computers—and the standardization process regularly drives advances in product substitution, quality, and price competition.

But every rose has its thorn, and the standardization process is no exception. In selecting patented technologies for adoption as part of an industry standard, standard-setting organizations (SSOs) may effectively clear the field of technological competition and render the selected technology essential for any firm that wishes to manufacture products that comply with the standard.<sup>1</sup> Firms that develop products that implement the standard may effectively lock in the technology and guarantee demand for the standard-essential patents (SEPs)—patents that are necessarily infringed by implementation of some or all of the standard. Industry standards thus may position owners of adopted technologies as market “gatekeepers,” who may harm competition and customers by charging unreasonable prices for licenses to their technology or refusing to grant licenses altogether.

Most SSOs endeavor to mitigate these anticompetitive risks through rules that require patent holders to inform the SSO that they own patents that might be essential to a proposed standard and to promise to grant licenses for purposes of implementing the standard. Most notably, SSOs generally require SEP holders to commit to granting licenses to any willing licensee on fair, reasonable, and non-discriminatory (FRAND) terms, so that SEP holders

cannot price discriminate, take unjustified price increases, or refuse to deal based on a potential licensee’s position in the distribution chain. Some SSOs also require SEP holders to commit that they will not seek exclusionary remedies in later patent infringement litigation.

Historically, the U.S. antitrust agencies also sought to mitigate these anticompetitive concerns by applying the Sherman Act and the FTC Act.<sup>2</sup> For decades, in fact, administrations of both parties took a consistent approach to abuses in SEP licensing, applying the antitrust laws to intellectual property like any other type of property. A central insight articulated by Rich Gilbert, Deputy Assistant Attorney General under Assistant Attorney General Anne Bingaman, was that intellectual property was a property right like any other—a right to exclude; accordingly, it was neither more nor less subjected to antitrust scrutiny.

That cohesion ended abruptly during the Trump administration. Below, we explore the evolution of SEP policy at the U.S. antitrust agencies, and we consider what may lie ahead at the start of the Biden administration.

## The Era of Rough Consensus (1995–2017)

In 1995, the U.S. antitrust agencies issued the Antitrust Guidelines for the Licensing of Intellectual Property. The Guidelines—a landmark document—launched an era of rough consensus between the agencies about the antitrust analysis of intellectual property rights generally, and SEPs in particular. They made clear that antitrust law “should not impose greater or lesser scrutiny for intellectual property than for other forms of property,” even if intellectual property is different in important ways.<sup>3</sup> The Guidelines formalized and built upon a framework that courts had for years been applying in antitrust cases.<sup>4</sup>

The Guidelines proved durable. Over the ensuing 20 years, across administrations from both parties, and in the face of a sea change in technological development, the agencies applied the antitrust laws to intellectual property like any other form of property. In June 2002, for example,

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all five FTC commissioners voted to charge Rambus, a memory chip designer, with monopolizing technology markets by participating in a collaborative standard-setting exercise while concealing that it was working to develop—and in fact had—patents that covered technology that would be incorporated in the proposed standards.<sup>5</sup> The Commission alleged and ultimately found that Rambus's conduct enabled it to hold up memory manufacturers for supracompetitive royalties.<sup>6</sup> Although the D.C. Circuit set aside the FTC's finding on evidentiary grounds, it did not dispute that deception during standard setting could trigger liability under Section 2 of the Sherman Act.<sup>7</sup>

In 2007, the Third Circuit in *Broadcom Corp. v. Qualcomm Inc.* famously acknowledged “a growing awareness of the risks associated with deceptive conduct in the private standard-setting process.”<sup>8</sup> It concluded that “a firm's deceptive FRAND commitment to an [SSO] may constitute actionable anticompetitive conduct” under Section 2 when (1) a patent holder makes intentionally false promises to license SEPs on FRAND terms, (2) the SSO relies on those promises when including the technology in a standard, and (3) the patent holder subsequently breaches its promises.<sup>9</sup> *Broadcom* followed, and built upon statements by Republican appointees who identified patent hold-up as a threat to competition in standardized markets.<sup>10</sup>

Over the following years, the FTC advocated that SEP holders must make an affirmative showing that an implementer is unwilling to take a FRAND license before securing exclusionary remedies.<sup>11</sup> The DOJ advocated for similar limits in a joint policy statement with the U.S. Patent and Trademark Office (USPTO),<sup>12</sup> and—in a 2015 business review letter that it issued to The Institute of Electrical and Electronics Engineers (IEEE)—stated that it would not challenge an SSO requirement that members forgo exclusionary relief in patent litigation in most circumstances.<sup>13</sup> Federal courts and other decision makers generally were aligned with the agencies' recommendations.<sup>14</sup>

### Disintegration of Consensus (2017–2021)

In 2017, the agencies updated their IP Licensing Guidelines for the first time since 1995.<sup>15</sup> FTC Commissioner Maureen Ohlhausen—who once said that the 1995 Guidelines offered “a sensible and balanced approach”<sup>16</sup>—warned of a “worrying trend” in which international regulators incorrectly use antitrust laws to regulate prices, thus diluting intellectual property rights.<sup>17</sup> She emphasized that the new Guidelines underscored “key principles” in the agencies' approaches, including that firms face no antitrust liability for unilaterally refusing to assist their competitors, and that there is no antitrust liability for overcharging without additional anticompetitive conduct.<sup>18</sup> Ohlhausen's emphasis on these principles signaled a shift by the agencies to a more non-interventionist approach to SEPs in three distinct facets: (1) monopolization claims under Section 2; (2) exclusionary remedies; and (3) certain forms of concerted conduct.

In 2018, Assistant Attorney General Makan Delrahim began pushing the DOJ's policy on SEP enforcement in an entirely different direction. In a series of speeches reflecting his “New Madison” approach to intellectual property and antitrust law, Delrahim advanced a narrow vision of antitrust law's role in constraining hold-up and other unilateral conduct adjacent to standard-setting.<sup>19</sup> Most notably, Delrahim posited that “hold-up is fundamentally not an antitrust problem, and therefore antitrust law should not be used as a tool to police FRAND commitments that patent-holders make to standard setting organizations.”<sup>20</sup> Furthermore, Delrahim asserted that a patent holder's refusal to license cannot give rise to antitrust liability, even when practicing the patent is essential to compliance with an industry standard.<sup>21</sup>

**DOJ vs. FTC.** In an extraordinary, unprecedented and troubling move, the DOJ embarked on advocacy for the New Madison approach in open court, in opposition to its sibling agency in *FTC v. Qualcomm Inc.* Although Delrahim himself was recused from the case because of his prior lobbying work on behalf of Qualcomm,<sup>22</sup> the DOJ argued against the FTC and in favor of Qualcomm before the U.S. District Court for the Northern District of California, and then again (twice) before the U.S. Court of Appeals for the Ninth Circuit.<sup>23</sup> To our knowledge this is the first and only time one agency has opposed its sibling agency in court.

The DOJ's efforts bore fruit: The Ninth Circuit handed down a sweeping decision in which it reversed the district court's judgment that Qualcomm violated Section 2 of the Sherman Act, and the decision came close to categorically foreclosing FRAND breach as a premise for a Section 2 claim.<sup>24</sup>

With the *Qualcomm* decision in hand, the DOJ pivoted its advocacy efforts to focus on private antitrust litigation between auto parts maker Continental Automotive Systems Inc. and patent pool Avanci LLC. Continental alleged that Avanci and its members—who hold SEPs related to wireless communication in automobiles—refused to license non-automakers, resulting in unreasonably high royalties and an inability by component manufacturers to secure licenses. Continental alleged the behavior was at odds with the SEP holders' FRAND commitments and violated Sections 1 and 2 of the Sherman Act.<sup>25</sup>

The DOJ filed a statement of interest, in which it argued that a breach of FRAND obligations does not constitute exclusionary conduct. In the DOJ's view, a patent holder's efforts to maximize royalties after making FRAND commitments—including by deceiving the SSO, refusing to license, or charging unreasonable royalties—do not constitute unlawful exclusionary conduct.<sup>26</sup> The DOJ argued that antitrust law imposes no duty to license on FRAND terms, even if an SEP holder had agreed to FRAND contractual obligations.<sup>27</sup>

The district court sided with the DOJ and the defense, holding that regardless of circumstance, “It is not

anticompetitive for an SEP holder to violate its FRAND obligations.”<sup>28</sup> And the court concluded that deceiving an SSO can never “constitute[] the type of anticompetitive conduct required to support a § 2 claim,” in part because of its conclusion that the accumulation of market power in the hands of SEP holders is a natural, inevitable, and necessary consequence of standardization, regardless of how a patent holder abuses the standardization process.<sup>29</sup>

That holding—and the DOJ’s statement—broke from a decade of SEP antitrust jurisprudence, most notably *Broadcom*.<sup>30</sup> That line of cases recognized that while a patent holder’s exclusionary rights “confer[] a lawful monopoly over the claimed invention,” they do not enable exclusion of all technologies that compete to serve a given purpose.<sup>31</sup> To the contrary, patented technologies often compete with other patented and non-proprietary technologies, such that an individual patent’s “value is limited when alternative technologies exist.”<sup>32</sup> In *Broadcom*, the Third Circuit held that Broadcom adequately alleged that Qualcomm’s false FRAND commitments played a key role in ensuring that the relevant SSOs selected its patents for adoption into the standard and thereby harmed the competitive process.<sup>33</sup>

**An About-Face on Exclusionary Remedies.** The effort to replace the old consensus advanced on multiple fronts, not just within the litigation arena. While it was readying to line up opposite the FTC in the *Qualcomm* case, the DOJ rolled back the previous administration’s guidance and advocacy on the availability of exclusionary remedies in cases involving SEPs.<sup>34</sup> In December 2018, Assistant Attorney General Delrahim announced the DOJ’s withdrawal from its 2013 joint policy statement with the USPTO on remedies for SEPs subject to FRAND commitments.<sup>35</sup> The 2013 statement, Delrahim contended, did “not accurately convey . . . our position about when and how patent holders should be able to exclude competitors from practicing their technologies” and led some SSOs to “make it too easy for patent implementers to bargain collectively and achieve sub-optimal concessions from patents holders that undermine the incentive to innovate.”<sup>36</sup>

Little more than a year after it withdrew from the 2013 joint policy statement, the DOJ entered into a new joint policy statement with the USPTO and the National Institute of Standards and Technology.<sup>37</sup> The new guidance called for “[a]ll remedies available under national law, including injunctive relief and adequate damages, [to] be available for infringement of standards-essential patents subject to a F/RAND commitment, if the facts of a given case warrant them,” and rejected the notion “that injunctions and other exclusionary remedies should not be available in actions for infringement of standards-essential patents.”<sup>38</sup>

Similar themes emerged in 2020, when the DOJ released an unsolicited supplement to the IEEE business review letter—five years after the DOJ issued its initial letter. The DOJ intended that the supplement, which it acknowledged was “extraordinary,” would “supplement, update, and

append” the DOJ’s prior statements about IEEE’s approach to exclusionary remedies.<sup>39</sup>

The IEEE policy required that members agree not to seek exclusionary relief under most circumstances, and in 2015 the DOJ said the policy likely complied with antitrust laws. The supplement stated that the DOJ’s prior statements on the policy were “outdated” and misunderstood.<sup>40</sup> The DOJ now explained that a policy like IEEE’s may be “chilling innovation” by discouraging firms from participating in the standards-development process.<sup>41</sup> The supplement also stated that there was “no single correct way” to calculate reasonable royalties under FRAND policies, and it discouraged the IEEE recommendation of using the smallest salable patent-practicing unit (SSPPU) as a reference point to determine FRAND rates.<sup>42</sup> The DOJ emphasized that the 2015 letter should no longer be interpreted—whether by companies or international competition authorities—as supporting IEEE’s patent policy.<sup>43</sup> And the DOJ warned against the “radical theory” of applying the antitrust laws to SEP licensing negotiations and any resulting FRAND violations,<sup>44</sup> which it characterized as exclusively “contractual disputes between private parties.”<sup>45</sup>

But the DOJ’s efforts did not end with the supplement. Three months later, a counsel to then-Assistant Attorney General Delrahim bucked norms and attended a December 2020 meeting held by IEEE’s standards board.<sup>46</sup> IEEE subsequently announced that it would review its patent policy.<sup>47</sup> A group of licensors quickly urged IEEE to remove “one-sided language” and rescind the 2015 policy, prompting clashes with other stakeholders.<sup>48</sup>

**A Selective Approach to Concerted Conduct.** The DOJ also took a more hands-off approach to certain forms of concerted conduct, notably those involving patent pools and refusals to license “all comers.” Patent pools are horizontal agreements by patent holders to collectively license patents. Since at least 1995, the DOJ and FTC have recognized that “licensing arrangements among . . . competitors may promote rather than hinder competition if they result in integrative efficiencies” such as economies of scale or the integration of complementary capabilities, and the agencies generally will employ the rule of reason to evaluate the arrangements.<sup>49</sup> Unlike prior administrations, the Trump DOJ applied those concepts in ways that ostensibly blessed non-FRAND practices.

Among the most prominent examples of this approach was the DOJ’s response to Avanci LLC in a business review letter in November 2019. Avanci asked the DOJ to opine on the legality of its proposed 5G licensing program, whereby Avanci intended (1) to license only automakers—original equipment manufacturers (OEMs), as they are known in the industry—and (2) to give licensees discounts if they agreed not to “assert claims challenging the pooling agreement, licensing terms, or offers in litigation.”<sup>50</sup> Although the DOJ acknowledged that Avanci’s pool sought to upend existing licensing practices in the industry, whereby “suppliers in

the automotive industry typically take a license to any intellectual property necessary to produce a particular component,”<sup>51</sup> the DOJ concluded the program would not violate U.S. antitrust laws.

The Avanci Business Review Letter acknowledged that “making the license agreement available to all interested licensees” is a core FRAND principle and a criterion relevant to the antitrust analysis.<sup>52</sup> Indeed, non-discrimination among licensees has historically been a feature that the DOJ looks for in SEP pools.<sup>53</sup> Yet in its letter, the DOJ asserted that although the Avanci 5G “Platform’s field of use is limited to connected vehicles and not other components in the supply chain, such as telematics units, this limited field of use does not necessarily make the Platform anticompetitive.”<sup>54</sup> The DOJ appeared to adopt Avanci’s assertions that its platform would “result in numerous licensing efficiencies, such as simplifying scope, pricing, and royalty collection.”<sup>55</sup> And the DOJ accepted Avanci’s representation that its OEM-only licensing model is necessary because “the Vehicle manufacturer base is more visible, smaller in number, and more consistent over time” than component suppliers.<sup>56</sup>

The DOJ also evaluated a proposed bounty system by which the pool would pay SEP holders for suing alleged infringers of the pooled SEPs. Specifically, Avanci awards “points”—the means by which it distributes licensing revenue—to licensors that enforce or are prepared to enforce their essential patents and their efforts result in Platform licenses that benefit all licensors.<sup>57</sup> In addition, Avanci identifies to its members those potential licensees who will not accept a platform license, and Avanci reimburses the litigation costs of members who sue alleged infringers and succeed in forcing infringers to take a license to the Avanci platform.<sup>58</sup>

The DOJ characterized this system as procompetitive, in that it may “discourage hold out by licensees and assist with enforcement, which benefits both large and small licensors.”<sup>59</sup> It discounted the threat of over-enforcement, and characterized the attendant patent litigation as helpful in weeding out invalid or non-essential patents from Avanci’s pool. The DOJ did not analyze the potential anticompetitive effects that the bounty system could produce.

As to component suppliers, the DOJ wrote that excluding component suppliers from the platform “is unlikely to harm competition” because suppliers that want a direct license to “supply vehicle manufacturers that are not Avanci licensees” can simply negotiate one-on-one with licensors outside the platform.<sup>60</sup> That caveat, along with the DOJ’s warning that “[c]ompetitive concerns could arise if pool licensors collectively agreed not to license outside the pool,”<sup>61</sup> marked a more explicit acknowledgment of the potential competitive harm arising from concerted refusals to license than the DOJ had made just a few months earlier when it filed a Statement of Interest in the antitrust litigation between Continental and Avanci. In addition to its Sherman Act Section 2 claim, Continental alleged that Avanci and its members agreed

to boycott entire segments of the automotive industry by refusing to license SEPs to anyone but automobile OEMs.<sup>62</sup> When Continental, a component manufacturer, sought a license from each defendant, it allegedly “met with either refusals to offer a direct license, or no response whatsoever.”<sup>63</sup> Although the DOJ’s Statement discussed Section 2 issues at length, it said nothing about Continental’s concerted conduct allegations.<sup>64</sup>

### **New Administration, New Approach?**

As of early June 2021, the Biden administration’s approach to antitrust enforcement and SEPs remains uncertain, particularly given that key administration positions—including the Assistant Attorney General for Antitrust at the DOJ and the Director of the USPTO—remain unfilled. But there are some indications that a rebalancing may be underway.

Most notably, on June 15, 2021, President Biden named Lina Khan, a notable Big Tech critic, Chair of the Federal Trade Commission.<sup>65</sup> Observers believe her appointment to the FTC and elevation to Chair mark a more aggressive approach to antitrust enforcement, including against major SEP holders like Qualcomm.<sup>66</sup> Indeed, Khan previously warned against the use of patents to enable anticompetitive conduct, arguing that “a handful of companies across sectors wield outsized control over key technologies” and that many of these firms “have come to monopolize these tools primarily through rolling up competitors and their patents.”<sup>67</sup> She warned that “[w]hile patents are vital for promoting innovation, they are also routinely abused, to weaken rivals as well as to stunt development by fencing off corporate estates.”<sup>68</sup>

On June 3, 2021, the Acting Assistant Attorney General for Antitrust at the DOJ, Richard A. Powers, also signaled a shift. He stated that “it’s fair to say the new administration is rethinking” its antitrust approach to intellectual property issues.<sup>69</sup> Powers acknowledged that many observers had criticized the prior administration’s positions, and that “[t]hose criticisms have in some respects been justified.”<sup>70</sup> Accordingly, the DOJ is “working through what a balanced approach looks like as we consider our IP policy moving forward,” and “no one should be surprised if you see some changes coming soon from us on that front.”<sup>71</sup> Powers did not offer any additional detail about the changes under consideration, when they might occur, or in what manner the DOJ would announce them.

A few months earlier, in March 2021, then-FTC Acting Chairwoman Rebecca Kelly Slaughter testified at a House Judiciary antitrust hearing on antitrust issues related to SEPs. Slaughter affirmed that there is “a role for antitrust law to play” in ensuring that SEP owners follow through on their FRAND commitments and do not “abuse” their enormous market power to “exclude competitors.”<sup>72</sup> Slaughter acknowledged that this perspective is different from how we traditionally view patents—“which are really rights to exclude”—but emphasized that SEP holders’ misuse of market power is an “important issue” on which the FTC must



focus.<sup>73</sup> In her written testimony that same day, Slaughter backed a more expansive use of Section 5 of the FTC Act—which makes deceptive or unfair practices in commerce illegal—to remedy patent-related “market-power abuses” that fall outside the purview of the Sherman and Clayton Acts.<sup>74</sup>

President Biden also appointed Bill Baer—the former DOJ Antitrust chief under President Obama—to his FTC transition team. As early as 2015, Baer acknowledged that antitrust enforcers “need to address” SEP abuses when a patent holder improperly uses its market power.<sup>75</sup> In May 2020, Baer suggested that antitrust enforcers develop “new policy guidance” regarding SEPs to “nudge the courts towards a less skeptical view of the need for assertive enforcement.”<sup>76</sup> Baer also co-authored a report urging President Biden “to revitalize antitrust enforcement”; to appoint agency heads who understand that market power is a “serious problem”; and to recognize that, ultimately, “business as usual will not suffice.”<sup>77</sup>

What these statements do not indicate is whether the Biden administration and its antitrust appointees can bridge the SEP-related gap between the DOJ and FTC that arose in *Qualcomm*. That process necessarily will take time, but the Biden administration could depart from the previous administration in several ways.

***Sherman Act Section 2 Considerations.*** While much remains uncertain about the Biden administration’s approach to SEP enforcement, the DOJ has already scaled back its advocacy, including in the *Continental* litigation. That case is currently on appeal in the Fifth Circuit, and both parties have filed their opening briefs. A number of amici weighed in on both sides, but the DOJ did not file a statement of interest—a stark change from the prior administration, which rarely missed an opportunity to file briefs in high-profile SEP disputes, including in *Continental* itself. Instead, the DOJ submitted a letter clarifying that while Avanci repeatedly cites the DOJ’s statement of interest filed in the district court, the DOJ did not file anything in the Fifth Circuit expressing its “current views of the antitrust issues raised by” the case.<sup>78</sup> The DOJ also offered to submit an amicus brief if requested by the court and approved by the Solicitor General.<sup>79</sup>

These actions provide the first glimpse into the Biden administration’s potential approach, and it appears to foreshadow the DOJ’s return to earlier views on *Broadcom* and the interplay between antitrust and standard-setting activities. Indeed, federal courts have long recognized that willfully acquiring monopoly power by means other than “skill, foresight and industry” violates Section 2 of the Sherman Act.<sup>80</sup> Any approach that would permit using deception to obtain monopoly power and exclude rivals would harm the competitive process.<sup>81</sup> This becomes increasingly true as more and more devices incorporate standardized components. And the mere fact that an SEP holder’s deception—and the resulting refusal to license on FRAND terms—may also be a breach of contract does not preclude applying the antitrust laws.<sup>82</sup>

The FTC largely picks up where it left off at the end of the Trump administration: articulating a role for antitrust law in curbing unilateral abuses in standards-adjacent activities. Although the Commission decided not to seek certiorari from the Supreme Court in *Qualcomm* after the Ninth Circuit denied its petition for rehearing en banc, then-Acting Chairwoman Slaughter noted in a press release that she continues “to believe that the district court’s conclusion that Qualcomm violated the antitrust laws was entirely correct and that the court of appeals erred in concluding otherwise.”<sup>83</sup> Slaughter expressed “concern . . . about the potential for anticompetitive or unfair behavior in the context of standard setting” and committed the FTC to “closely monitor conduct” in the standard-setting arena.

Taken together, these hints evince that competition enforcers in the Biden administration may view the antitrust laws as a critical tool in policing unlawful acquisition of monopoly power in the context of SEPs.

***Concerted Conduct Considerations.*** Between the Avanci Business Review Letter, the Ninth Circuit ruling in *Qualcomm*, and the district court ruling in *Continental v. Avanci*, the Biden administration comes to power during a more permissive era for SEP holders’ licensing practices: one in which their concerted decisions not to license large segments of industries is condoned or excused. While that type of environment enables greater royalty revenues for SEP holders—and potentially encourages some forms of innovation—it can also create supply-chain insecurity, production inefficiencies, and higher prices for other entities in the distribution chain.

Potentially recognizing these dynamics, one of the Biden administration’s first actions related to SEPs was to restore the 2015 IEEE Business Review Letter and relegate the 2020 Supplement to the “advocacy” section of the DOJ’s website.<sup>84</sup> With this action, the DOJ appeared to signal the need for some guardrails against the power of SEP holders. Acting Assistant Attorney General Richard Powers explained that moving the 2020 Supplement to the “competition advocacy” portion of the DOJ’s website represents “a return to previous practice” consistent with DOJ regulations.<sup>85</sup> Put differently, the DOJ now appears to acknowledge that the 2020 Supplement (1) did not include an industry-wide consultation process as required by agency policy, and (2) improperly expanded the business review process, which leaves no room for supplements, to take sides in SSO activities.<sup>86</sup>

***A Potential Return to Prior Policy on Injunctions.*** Although the DOJ and the FTC under the Biden administration have yet to take a position on the availability of exclusionary remedies in SEP cases, there is at least one indirect indication of a return to pre-Trump administration policy: By moving the 2020 Supplement to the advocacy section of the DOJ’s website, the DOJ implicitly rejected the prior administration’s position—as expressed in the 2020 Supplement—that “[d]enying essential patent holders access to injunctive relief has the potential to lessen returns for inventors and thereby to harm incentives for future innovation.”<sup>87</sup>

This may be the first of a series of steps the DOJ takes in response to calls for greater clarity about remedies for SEP infringement and the antitrust consequences of seeking an injunction in a SEP infringement case.<sup>88</sup>

## Conclusion

Given the importance and prevalence of SEPs—as well as the heated, and long-running debate about the interaction of antitrust laws and SEP licensing conduct—interested parties should closely monitor public pronouncements on these topics as the Biden administration appoints new leadership at the FTC and DOJ. Observers should also keep a close eye on the agency enforcement policies, including potential amicus filings in the *Continental* case and the DOJ's approach to business review letters touching on SEP licensing.

That said, the agencies can influence the evolving SEP policy only so much. Courts too are important arbiters in the debate over SEP licensing obligations and how SEPs interact with antitrust law. The Ninth Circuit's decision in *Qualcomm* may have been a watershed shift in how courts view the interaction between SEP licensing practices and the role (or lack thereof) for the antitrust laws. If other courts follow the Ninth Circuit, the Biden administration may have difficulty shifting how SSOs and SEP holders approach licensing. The Fifth Circuit's decision in the pending *Continental* appeal will serve as an early litmus test of what lies ahead in the courts. ■

<sup>1</sup> See Herbert J. Hovenkamp, *FRAND and Antitrust*, 105 CORNELL L. REV. 1683, 1691–92 (2020) (“Ex ante, a patent may offer one of many alternative technological paths to a certain goal. However, ex post, after a standard has been adopted and others have developed their technologies in reliance, the range of acceptable alternatives can decrease dramatically.”).

<sup>2</sup> See generally Jorge L. Contreras, *A Brief History of FRAND: Analyzing Current Debates in Standard Setting and Antitrust Through a Historical Lens*, 80 ANTITRUST L.J. 39 (2015) (explaining the history of FRAND licensing as an antitrust remedy); see also JONATHAN B. BAKER, *THE ANTITRUST PARADIGM: RESTORING A COMPETITIVE ECONOMY* 170–72 (2019).

<sup>3</sup> Richard J. Gilbert, Deputy Ass't Att'y Gen. for Antitrust, Antitrust Div., U.S. Dep't of Justice, Address, *The 1995 Antitrust Guidelines for the Licensing of Intellectual Property* 2 (Apr. 6, 1995), <https://www.justice.gov/atr/file/519116/download> (“[T]hat the Agencies will apply the same general antitrust approach to intellectual property does not mean that intellectual property is the same as other forms of property. There are important differences, but the antitrust laws are sufficiently flexible to take these differences into account . . .”).

<sup>4</sup> See, e.g., *Atari Games Corp. v. Nintendo of Am., Inc.*, 897 F.2d 1572, 1576 (Fed. Cir. 1990) (“When a patent owner uses his patent rights not only as a shield to protect his invention, but as a sword to eviscerate competition unfairly, that owner may be found to have abused the grant and may become liable for antitrust violations when sufficient power in the relevant market is present.”).

<sup>5</sup> Press Release, Fed. Trade Comm'n, *FTC Issues Complaint Against Rambus, Inc.* (June 19, 2002), <https://www.ftc.gov/news-events/press-releases/2002/06/ftc-issues-complaint-against-rambus-inc>.

<sup>6</sup> Complaint, *Rambus, Inc.*, No. 9302, 2002 WL 1436415, at \*21 (FTC June 18, 2002); Opinion, *Rambus, Inc.*, FTC Dkt. No. 9302, 2006 WL 2330117, at \*2 (Aug. 2, 2006).

<sup>7</sup> *Rambus Inc. v. FTC*, 522 F.3d 456, 463 (D.C. Cir. 2008) (assuming without deciding that if a “more complete disclosure would have caused JEDEC to adopt a different (open, non-proprietary) standard, then [Rambus's] failure to disclose harmed competition and would support a monopolization claim”).

<sup>8</sup> 501 F.3d 297, 312 (3d Cir. 2007).

<sup>9</sup> *Id.* at 308–12, 314–15 (“This holding follows directly from established principles of antitrust law and represents the emerging view of enforcement authorities and commentators, alike. Deception in a consensus-driven private standard-setting environment harms the competitive process by obscuring the costs of including proprietary technology in a standard and increasing the likelihood that patent rights will confer monopoly power on the patent holder. . . . Deceptive FRAND commitments, no less than deceptive nondisclosure of IPRs, may result in such harm.”).

<sup>10</sup> Letter from Thomas O. Barnett, Ass't Att'y Gen. Antitrust Div., U.S. Dep't of Justice, to Robert A. Skitol, Esq. 10 (Oct. 30, 2006), <https://www.justice.gov/sites/default/files/atr/legacy/2006/10/31/219380.pdf>; Deborah P. Majoras, Chairman, Fed. Trade Comm'n, Remarks at Stanford Univ. 4 (Sept. 23, 2005), [https://www.ftc.gov/sites/default/files/documents/public\\_statements/recognizing-procompetitive-potential-royalty-discussions-standard-setting/050923stanford.pdf](https://www.ftc.gov/sites/default/files/documents/public_statements/recognizing-procompetitive-potential-royalty-discussions-standard-setting/050923stanford.pdf).

<sup>11</sup> See, e.g., Brief for Fed. Trade Comm'n as Amicus Curiae Supporting Neither Party at 7, *Apple Inc. and NeXT Software, Inc. v. Motorola, Inc. and Motorola Mobility, Inc.* (Fed. Cir. 2012) (Nos. 2012-1548, 2012-1549); Edith Ramirez, Chairperson, Fed. Trade Comm'n, Prepared Statement Before the U.S. Senate Comm. on the Judiciary Concerning Oversight of the Impact on Competition of Exclusion Orders to Enforce Standard-Essential Patents (July 11, 2012), [https://www.ftc.gov/sites/default/files/documents/public\\_statements/prepared-statement-federal-trade-commission-concerning-oversight-impact-competition-exclusion-orders/120711standard-patents.pdf](https://www.ftc.gov/sites/default/files/documents/public_statements/prepared-statement-federal-trade-commission-concerning-oversight-impact-competition-exclusion-orders/120711standard-patents.pdf); Edith Ramirez, Chairwoman, Fed. Trade Comm'n, Written Submission on the Public Interest of *In re Certain 3G Mobile Handsets and Components Thereof* (July 10, 2015), [https://www.ftc.gov/system/files/documents/public\\_statements/682011/150714publicinterestftc1.pdf](https://www.ftc.gov/system/files/documents/public_statements/682011/150714publicinterestftc1.pdf); Press Release, Fed. Trade Comm'n, *Google Agrees to Change Its Business Practices to Resolve FTC Competition Concerns in the Markets for Devices Like Smart Phones, Games and Tablets, and in Online Search* (Jan. 3, 2013), <https://www.ftc.gov/news-events/press-releases/2013/01/google-agrees-change-its-business-practices-resolve-ftc>.

<sup>12</sup> U.S. Dep't of Justice & U.S. Patent & Trademark Off., Policy Statement on Remedies for Standards-Essential Patents Subject to Voluntary F/RAND Commitments 8 (Jan. 8, 2013), <https://www.justice.gov/atr/page/file/1118381/download> (“[W]e recommend caution in granting injunctions or exclusion orders based on infringement of voluntarily F/RAND-encumbered patents essential to a standard . . .”).

<sup>13</sup> Letter from Renata B. Hesse, Acting Ass't Att'y Gen. Antitrust Div., Dep't of Justice, to Michael A. Lindsay, Esq. 10 (Feb. 2, 2015), <https://www.justice.gov/atr/page/file/1386871/download>.

<sup>14</sup> See, e.g., *Microsoft Corp. v. Motorola, Inc.*, 696 F.3d 872, 885 (9th Cir. 2012); *Apple, Inc. v. Motorola, Inc.*, No. 1:11-cv-08540, 2012 U.S. Dist. LEXIS 89960, at \*45 (N.D. Ill. June 22, 2012) (Posner, J., sitting by designation); Letter from Michael B.G. Froman, U.S. Trade Representative, to Hon. Irving A. Williamson, Chairman, U.S. Int'l Trade Comm'n (Aug. 3, 2013), [https://ustr.gov/sites/default/files/08032013%20Letter\\_1.PDF?utm\\_source=feedblitz&utm\\_medium=FeedBlitzEmail&utm\\_content=199752&utm\\_campaign=0](https://ustr.gov/sites/default/files/08032013%20Letter_1.PDF?utm_source=feedblitz&utm_medium=FeedBlitzEmail&utm_content=199752&utm_campaign=0).

<sup>15</sup> U.S. Dep't of Justice & Fed. Trade Comm'n, *Antitrust Guidelines for the Licensing of Intellectual Property* (2017), <https://www.justice.gov/atr/IPguidelines/download> [hereinafter 2017 Antitrust Guidelines for Licensing].

<sup>16</sup> ABA Section of Antitrust Law's Intellectual Property Committee, *Interview of Commissioner Ohlhausen*, PUBLIC DOMAIN 11–12 (Feb. 2016).

<sup>17</sup> Statement of Comm'r Mauren K. Ohlhausen, U.S. Dep't of Justice & Fed. Trade Comm'n, *Antitrust Guidelines for the Licensing of Intellectual Property* (Jan. 13, 2017), [https://www.ftc.gov/system/files/documents/public\\_statements/1049793/mkohlhausen\\_statement\\_ip\\_guidelines.pdf](https://www.ftc.gov/system/files/documents/public_statements/1049793/mkohlhausen_statement_ip_guidelines.pdf).

<sup>18</sup> *Id.*

- <sup>19</sup> Makan Delrahim, Ass't Att'y Gen. Antitrust Div., U.S. Dep't of Justice, Remarks at Univ. of Pa. Law School (Mar. 16, 2018), <https://www.justice.gov/opa/speech/file/1044316/download>.
- <sup>20</sup> *Id.* at 5.
- <sup>21</sup> *Id.* (“[C]onsistent with the fundamental right to exclude, from the perspective of the antitrust laws, a unilateral and unconditional refusal to license a patent should be considered *per se* legal.”).
- <sup>22</sup> Kirk Victor, *Are Delrahim's Actions Troubling? Antitrust Insiders Weigh In*, FTC WATCH (Dec. 16, 2019), <https://www.ftcwatch.com/articles/7176/print?section=ftcwatch> (“Though Delrahim is recused from Qualcomm, as is Simons, the DOJ's position in court filings reflects his stance as set out in several speeches and over many years.”).
- <sup>23</sup> Statement of Interest of the United States of America, FTC v. Qualcomm Inc. (N.D. Cal. 2019) (No. 5:17-cv-00220-LHK); United States' Statement of Interest Concerning Qualcomm's Motion for Partial Stay of Injunction Pending Appeal, FTC v. Qualcomm Inc. (9th Cir. 2019) (No. 19-16122); Brief of the United States of America as Amicus Curiae in Support of Appellant and Vacatur at 27–28, FTC v. Qualcomm Inc. (9th Cir. 2019) (No. 19-16122).
- <sup>24</sup> FTC v. Qualcomm Inc., 969 F.3d 974, 1005 (9th Cir. 2020) (“Qualcomm's practice of licensing its SEPs exclusively at the OEM level does not amount to anticompetitive conduct in violation of § 2, as Qualcomm is under no antitrust duty to license rival chip suppliers. To the extent Qualcomm has breached any of its FRAND commitments, a conclusion we need not and do not reach, the remedy for such a breach lies in contract and patent law.”).
- <sup>25</sup> Complaint, Cont'l Auto. Sys., Inc. v. Avanci, LLC, 485 F. Supp. 3d 712 (N.D. Tex. 2020).
- <sup>26</sup> Statement of Interest of the United States at 9–20, Cont'l Auto. Sys., Inc. v. Avanci, LLC, 485 F. Supp. 3d 712 (N.D. Tex. 2020) (No. 3:19-CV-02933-M).
- <sup>27</sup> *Id.* at 20–25.
- <sup>28</sup> Cont'l Auto. Sys., Inc. v. Avanci, LLC, 485 F. Supp. 3d 712, 734 (N.D. Tex. 2020).
- <sup>29</sup> *Id.* at 733, 735 (“An SEP holder may obtain additional monopoly power through inclusion in a standard. This additional market power is inevitable as a very frequent consequence of standard setting, and is necessary to achieve the benefits served by the standard, including procompetitive benefits.”).
- <sup>30</sup> Broadcom Corp. v. Qualcomm Inc., 501 F.3d 297 (3d Cir. 2007).
- <sup>31</sup> *Id.* at 314.
- <sup>32</sup> *Id.* (citing Northern Pacific Railway Co. v. United States, 356 U.S. 1, 10 n.8 (1958) (“Often the patent is limited to a unique form or improvement of the product and the economic power resulting from the patent privileges is slight.”)).
- <sup>33</sup> *Id.* at 313–14.
- <sup>34</sup> Delrahim, *supra* note 19, at 13–15 (warning that the unavailability of injunctions in cases involving SEPs would be tantamount to “a de facto compulsory licensing scheme for FRAND-encumbered patents deemed ‘standard essential,’ and could serve as a disincentive for innovation or for patent holders”).
- <sup>35</sup> Makan Delrahim, Ass't Att'y Gen. Antitrust Div., U.S. Dep't of Justice, Remarks at the 19th Annual Berkeley-Stanford Advanced Patent Law Inst. 6–7 (Dec. 7, 2018), <https://www.justice.gov/opa/speech/file/1117686/download> (“I would like to announce here today, in the interest of clarity and predictability of the laws, and among the patent law community with whom we share the goal of incentivizing innovation: The Antitrust Division is hereby withdrawing its assent to the 2013 joint ‘Policy Statement on Remedies for Standards-Essential Patents Subject to Voluntary F/RAND Commitments.’”).
- <sup>36</sup> *Id.* at 7.
- <sup>37</sup> Antitrust Div., U.S. Dep't of Justice, U.S. Patent & Trademark Off., Nat'l Inst. of Standards & Tech., 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>.
- <sup>38</sup> *Id.* at 4.
- <sup>39</sup> Makan Delrahim, Ass't Att'y Gen., Antitrust Div., Updated Response to IEEE's Request for Business Review Letter, U.S. Dep't of Justice 1 (Sep. 10, 2020), <https://www.justice.gov/atr/page/file/1315291/download> [hereinafter 2020 Supplement].
- <sup>40</sup> *Id.* at 1–3.
- <sup>41</sup> *Id.* at 1–2.
- <sup>42</sup> *Id.* at 6–8.
- <sup>43</sup> *Id.* at 2–3.
- <sup>44</sup> Bryan Koenig, *DOJ Antitrust Head Touts Pushback on ‘Radical’ IP Theory* LAW360 (Sept. 10, 2020).
- <sup>45</sup> 2020 Supplement, *supra* note 39, at 4.
- <sup>46</sup> Khushita Vasant, *IEEE Still Undecided over Way Forward After Change in US DOJ Patent Policy*, MLEX (Dec. 7, 2020).
- <sup>47</sup> Khushita Vasant, *Qualcomm, Apple, Huawei Clash over Patent Policy at Historic IEEE Committee Meeting*, MLEX (Mar. 24, 2021).
- <sup>48</sup> Khushita Vasant, *IEEE Urged to Adopt ‘Neutral Policies’ Ahead of Patent Committee Meeting Tomorrow*, MLEX (Mar. 22, 2021).
- <sup>49</sup> 2017 Antitrust Guidelines for Licensing, *supra* note 15, § 5.1.
- <sup>50</sup> Letter from Makan Delrahim, Ass't Att'y Gen. Antitrust Div., to Mark H. Hamer, Esq. 7 (July 28, 2020), <https://www.justice.gov/atr/page/file/1298626/download> [hereinafter Avanci Business Review Letter].
- <sup>51</sup> *Id.* at 21.
- <sup>52</sup> *Id.* at 12.
- <sup>53</sup> U.S. Dep't of Justice & Fed. Trade Comm'n, Antitrust Enforcement and Intellectual Property Rights: Promoting Innovation and Competition 72 (Apr. 2007), <https://www.ftc.gov/sites/default/files/documents/reports/antitrust-enforcement-and-intellectual-property-rights-promoting-innovation-and-competition-report.s.department-justice-and-federal-trade-commission/p040101promotinginnovationandcompetitionrpt0704.pdf>.
- <sup>54</sup> Avanci Business Review Letter, *supra* note 50, at 18.
- <sup>55</sup> *Id.*
- <sup>56</sup> *Id.* at 18–19.
- <sup>57</sup> *Id.* at 6.
- <sup>58</sup> *Id.*
- <sup>59</sup> *Id.* at 11.
- <sup>60</sup> *Id.* at 19.
- <sup>61</sup> *Id.* at 17.
- <sup>62</sup> Complaint, *supra* note 25.
- <sup>63</sup> Complaint at 4, Cont'l Auto. Sys., Inc. v. Avanci, LLC, No. 19-CV-02520-LHK, 2019 WL 6735604 (N.D. Cal. Dec. 11, 2019).
- <sup>64</sup> Statement of Interest of the United States, *supra* note 26.
- <sup>65</sup> David McCabe & Cecilia Kang, *Biden Names Lina Khan, a Big-Tech critic, as F.T.C. Chair*, N.Y. TIMES (June 15, 2021), <https://www.nytimes.com/2021/06/15/technology/lina-khan-ftc.html>.
- <sup>66</sup> Siri Bulusu, *FTC To Come Back Stronger After Dropping Qualcomm Litigation*, BLOOMBERG LAW (Apr. 2, 2021).
- <sup>67</sup> Lina Khan, *New Tools To Promote Competition*, DEMOCRACY J. (Fall 2016), <https://democracyjournal.org/magazine/42/new-tools-to-promote-competition/>.
- <sup>68</sup> *Id.*
- <sup>69</sup> Bryan Koenig, *Changes Coming to DOJ Antitrust IP Approach*, LAW360 (June 3, 2021).
- <sup>70</sup> *Id.*
- <sup>71</sup> Khushita Vasant, *US DOJ to Soon Unveil New Approach to Antitrust, Patent Policy Following ‘Justified’ Criticism*, POWERS SAYS, MLEX (June 3, 2021).
- <sup>72</sup> *Other Barks & Bites for Friday, March 19*, IPWATCHDOG (Mar. 19, 2021), <https://www.ipwatchdog.com/2021/03/19/barks-bites-friday-march-19-sen-tillis-urges-no-section-512-safe-harbors-future-ftas-federal-circuit-finds-authority-issue-mandamus-ptab-institution-denials-house-antitr/id=131158/>; Khushita Vasant, *US FTC's Slaughter Says Antitrust Law Must Ensure SEP Holders Don't Abuse Market Power*, MLEX (Mar. 19, 2021).

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- <sup>73</sup> *Id.*
- <sup>74</sup> Rebecca K. Slaughter, Acting Chairwoman, Fed. Trade Comm’n, Prepared Statement Before the Subcomm. on Antitrust, Commercial and Administrative Law of the Judiciary Comm. 7 (March 18, 2021), <https://docs.house.gov/meetings/JU/JU05/20210318/111350/HHRG-117-JU05-Wstate-SlaughterR-20210318.pdf>.
- <sup>75</sup> Diane Bartz, *Don’t Cry to Us About Commercial Patent Fees—DOJ Official*, REUTERS LEGAL (Sept. 14, 2015).
- <sup>76</sup> Bill Baer, The Brookings Inst., Submission Before the U.S. House Comm. on the Judiciary Subcomm. Antitrust, Commercial, and Administrative Law (May 19, 2020), <https://www.brookings.edu/wp-content/uploads/2020/05/Bill-Baer-5.19.20-Submission-to-Subcommittee-on-Antitrust-Commercial-and-Administrative-Law-of-the-House-Judiciary-Committee.pdf>.
- <sup>77</sup> Bill Baer et al., *Restoring Competition in the United States*, WASHINGTON CENTER FOR EQUITABLE GROWTH (Nov. 2020), <https://equitablegrowth.org/research-paper/restoring-competition-in-the-united-states>.
- <sup>78</sup> Unopposed Motion of the United States for Leave to File a Letter Regarding Appellee’s Citation of its Statement of Interest Filed in the District Court, *Cont’l Auto. Sys., Inc. v. Avanci, LLC* (5th Cir. 2020) (No. 20-11032).
- <sup>79</sup> *Id.*
- <sup>80</sup> *United States v. Aluminum Co. of Am.*, 148 F.2d 416, 430 (2d Cir. 1945) (Hand, J.); see *Verizon Commc’ns Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398, 407 (2004) (Section 2 prohibits “the willful acquisition or maintenance of [monopoly] power” that does not reflect “growth or development as a consequence of a superior product, business acumen, or historic accident”).
- <sup>81</sup> *Walker Process Equip., Inc. v. Food Mach. & Chem. Corp.*, 382 U.S. 172, 174 (1965); *Conwood Co. v. United States Tobacco Co.*, 290 F.3d 768, 783 (6th Cir. 2002); *United States v. Microsoft Corp.*, 253 F.3d 34, 76–77 (D.C. Cir. 2001).
- <sup>82</sup> Hovenkamp, *supra* note 1, at 1708 (“Conditionally refusing to license a FRAND-encumbered patent when the relevant agreement requires licensing is clearly a breach of contract, but it can also be an antitrust violation when the conditions are met.”); see *id.* at 1686, 1696, 1727–28.
- <sup>83</sup> Press Release, Rebecca Slaughter, FTC Chairwoman, Statement by Acting Chairwoman Rebecca Kelly Slaughter on Agency’s Decision Not to Petition Supreme Court for Review of Qualcomm Case (Mar. 29, 2021), <https://www.ftc.gov/news-events/press-releases/2021/03/statement-acting-chairwoman-rebecca-kelly-slaughter-agencys>.
- <sup>84</sup> Khushita Vasant, *US DOJ Restores Obama-era Business Review Letter to IEEE on Patent Licensing, Rejects Delrahim Supplement*, MLEX (Apr. 15, 2021).
- <sup>85</sup> *Id.*
- <sup>86</sup> *Id.*
- <sup>87</sup> 2020 Supplement, *supra* note 39, at 6.
- <sup>88</sup> Letter from Gary P. Zanfagna, Chair, Antitrust Law Section, Am. Bar Ass’n, to President Joseph R. Biden, Presidential Transition Report on the State of Antitrust Enforcement at 18–19 (Feb. 5, 2021).