RIETI Policy Seminar

Standards and Intellectual Property: Strategies Japan should adopt in light of current global trends

Handout

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http://www.rieti.go.jp/en/index.html

TYPE I & II ANTITRUST ERRORS AND STANDARD ESSENTIAL PATENTS – A NATURAL EXPERIMENT

RIETI SEMINAR ON STANDARDS & IP
TOKYO, DECEMBER 8, 2017

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* The views presented today are personal views

ERICSSON AT A GLANCE

NETWORKS
Create one network for a million different needs

IT
Transform IT to accelerate business agility

MEDIA
Delight the TV consumer every day

INDUSTRIES
Connect industries to accelerate performance

42,000	Patents
24,100	R&D Employees
31,6 B. SEK	In R&D

1 BILLION	Subscribers managed by us
2.5 BILLION	Subscribers supported by us
66,000	Services professionals

222,6 B. SEK	Net Sales
180	Countries with customers
111,000	Employees

Full year 2016 figures

STANDARDIZATION: PROCOMPETITIVE EFFECTS

-99%

Decrease in average mobile subscriber cost per megabyte between 2005 and 2013

Increase of 4G data-transmission speeds compared to 2G networks

X 12,000

-95%

Decrease in network infrastructure cost

Source: Boston Consulting Group, The Mobile Revolution, January 2015
https://www.bcgperspectives.com/content/articles/telecommunications_technology_business_transformation_mobile_revolution/

TYPE I & II ERRORS IN ANTITRUST

- Type I Error ("false positive"): Over-enforcement or over-intervention by antitrust agencies, that intervenes with fact patterns that are not anticompetitive and brings about anticompetitive effects

- Type II Error ("false negative"): Under-enforcement or under-intervention by antitrust agencies, that fails to address fact patters that are anticompetitive and thus allows them to take place

2012-2015 SUSTAINED DOJ ADVOCACY INTERVENING IN SDO POLICIES

May 2012 (DAAG presentation to ANSI IPR Policy Committee)

- "The Division will continue to…encourage improvements by SSOs"
- Complaining that "SSOs have been slow to change rules in response to conflict"

November 2012 (DAAG presentation to ANSI IPR Policy Committee)

- "Recommendations that SSOs consider procompetitive changes to their IP policies";
- DOJ Recommendations [to SDOs]:
  - Place some limitations on the right of the patent holder who has made a F/RAND licensing commitment to seek an injunction
  - Find ways to lower the transactions cost of determining F/RAND licensing terms"…. With this guidance in mind, go forth and discuss!"

SIX "SMALL" PROPOSALS FOR SSOS BEFORE LUNCH (OCTOBER 12, 2012)

- "The division has advised that standards bodies that set forth well-defined patent policy rules…can effectively promote competition…the division has identified other potential changes to the patent policies of standards bodies that could benefit competition…. After giving this issue a good deal of thought, I would like to identify for you some policy choices that standards bodies could implement which we believe would promote competition…:
- Place some limitations on the right of the patent holder…who seeks to exclude a willing and able licensee from the market through an injunction.
- Standards bodies might want to explore setting guidelines for what constitutes a F/RAND rate"
- "Standards bodies whose members choose to take steps such as these will help the market for the standardized product to work efficiently by lowering costs, increasing transparency and reducing uncertainty"

MORE INTERVENING ADVOCACY…

THE ROLE OF STANDARDS IN THE CURRENT PATENT WARS (DECEMBER 5, 2012)

"One of the actions we have taken is to advocate for changes at the SSO level to address the inability of the current F/RAND commitment to protect licensees from holdup. Specifically, we have encouraged SSOs to:

- Place some limitations on the right of the patent holder who has made a F/RAND licensing commitment who seeks to exclude a willing and able licensee from the market through an injunction. (…)

- Standards bodies might want to explore setting guidelines for what constitutes a F/RAND rate or devising arbitration requirements to reduce the cost of lack of clarity in F/RAND commitments. (…)

MORE INTERVENING ADVOCACY (CONT'D)

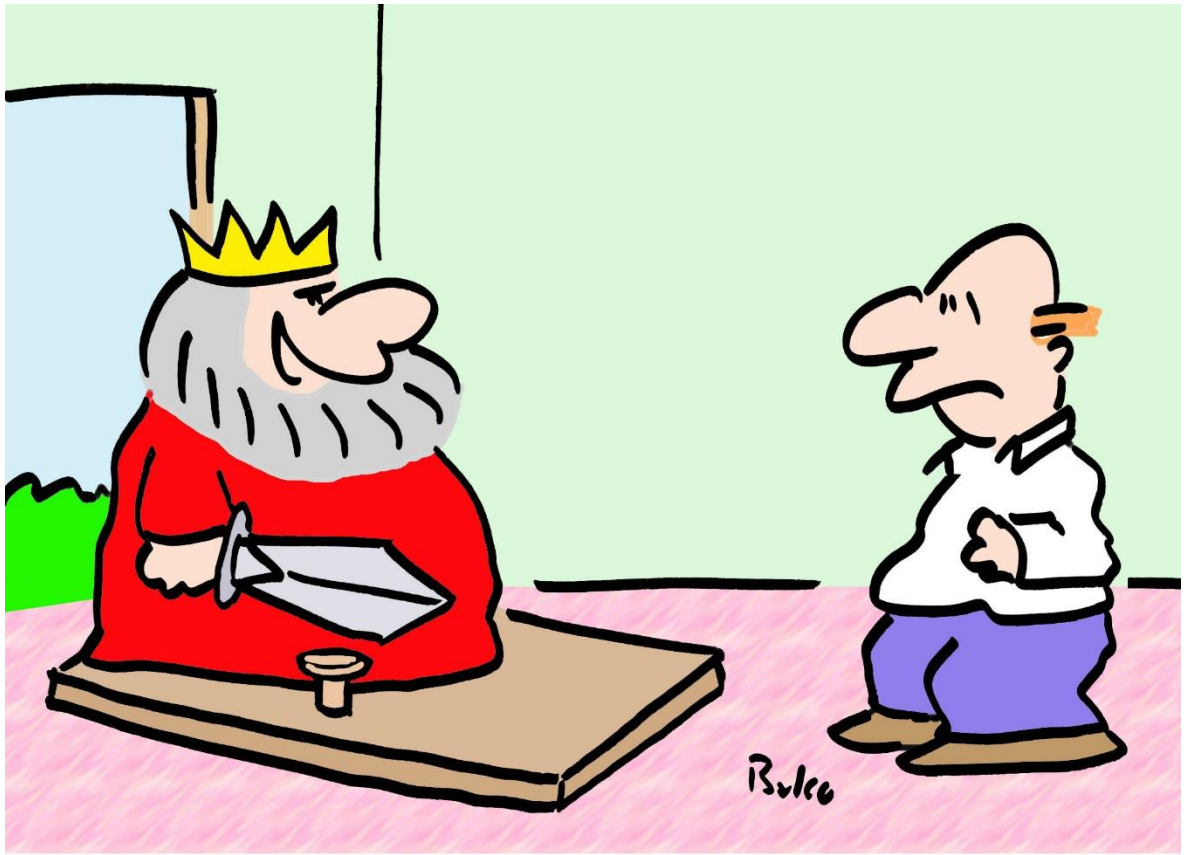
THE ROLE OF STANDARDS IN THE CURRENT PATENT WARS (DECEMBER 5, 2012)

- "The Division has been engaged for several years in sustained competition advocacy designed to help SSOs make their IP policies more procompetitive"
- We "outlined six specific proposals SSOs could implement to make their IP policies more procompetitive. The Division also has been actively engaged with the IP policy committees of the ITU, the European Telecommunications Standards Institute (ETSI), and the American National Standards Institute (ANSI)…. The Division has urged these bodies to [change their policies]….and generally to discourage precluding anyone from practicing the standard. In most cases, injunctions and exclusion orders (or the threat of one) do not encourage the beneficial use of a standard"

2013-2015 DOJ STATEMENTS RE EMPIRICAL EVIDENCE OF A COMPETITIVE PROBLEM ?

- “Hold-up exists in theory; Whether hold-up is happening [in practice] is a side show”
- “Hold-up is like Ebola” (!)
- It is impossible to directly prove hold-up but we [DOJ] know it exists out there. It’s like “dark matter” - not measurable but everyone knows it’s there (DAAG at Patents in Telecoms Conference, Washington DC, November 2015)
- **“**The problem is that industry has taken over the SDOs and therefor there’s a gridlock”; [industry participants at SDOs] act in the benefit of their own companies.” Implying the DOJ should intervene and decide what is good for the industry
- Two contract and patent court decisions, *Microsoft v. Motorola and Innovatio* (2012-2013) characterized as “evidence of a widespread hold-up problem”

WHEN THE GOVERNMENT INTERVENES – MARKET PLAYERS PAY ATTENTION



"Hi — I'm from the Government,
and I'm here to help you."

CITING THE DOJ ADVOCACY- IEEE CHANGES ITS PATENT POLICY

- March 2013: Phil Wennblohm (Intel) adds the topic “Changes to the patent policy” to agenda of the IEEE Patent Committee after the meeting has started
- The meeting minutes list then-DOJ DAAG October 2012 speech Six “Small” Proposals For SSOs Before Lunch and “DOJ challenges” as the impetus for the changing the policy
- A closed ad-hoc committee formed on the spot “to discuss the DoJ challenges and to provide recommendations to PatCom”; that ad-hoc drafts the new policy
- Over the next 18 months, whenever the change of the policy is questioned, IEEE staff and private-sector officers explain the need to change the policy is “because DOJ asked for such a change”

IEEE CHANGES ITS PATENT POLICY

- Closed door ad-hoc and secret drafting committee ignored virtually all comments from those holding positions different from its drafters

New policy elements include:

- A definition of “reasonable rate” that significantly devalues standard essential patents
  - (a) value to be based on the value added to the smallest saleable compliant implementation
  - (b) value to reflect relative contribution by other patent holders
  - (c) comparable licenses benchmark effectively irrelevant as a benchmark

    (relevant only if not negotiated where an injunction was not explicitly or implicitly threatened = never)

NEW IEEE PATENT POLICY (CONT'D)

- Effectively prevents essential patent holders who are willing to commit to grant RAND licenses under its new policy from seeking an injunction for infringement, regardless of the behavior of the infringer
- A newly defined "Compliant Implementation" definition resulting in mandatory licensing on the component level

See redline reflecting policy changes at http://grouper.ieee.org/groups/pp-dialog/drafts_comments/SBBylaws_100614_redline_current.pdf

› New policy was approved subject to a favorable business review letter form the DOJ Antitrust Decision; letter was issued on February 2, 2015

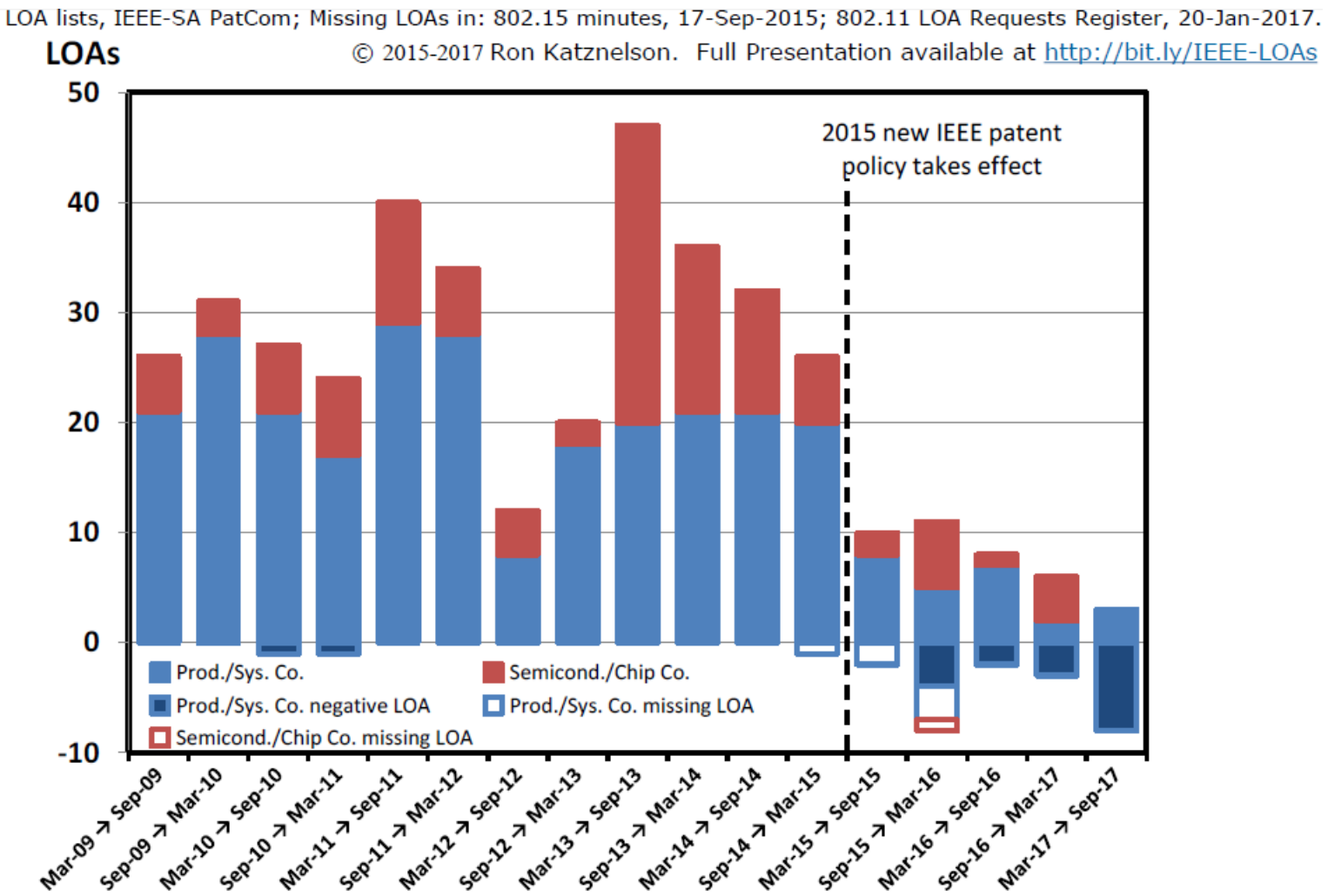
DOJ IEEE-II BUSINESS REVIEW LETTER RE NEW IEEE POLICY

- DOJ asked IEEE to say that the reason for the policy change was hold-up (!): http://www.gtwassociates.com/answers/DOJ%20PDF/IEEEBRL2015/PatentHoldUpasRationaleIEEE_Bus_Review_Document_02_11072014.pdf ; The IEEE reply letter does do, citing DOJ advocacy as support
- DOJ's February 2015 letter said new policy has "the potential to facilitate and improve the IEEE-SA standards-setting process" and "help[ing] parties" obtain "the benefit of the bargain they seek"
- DAAG February 5, 2016 speech praises IEEE move: "Our [Business Review] letter helped the IEEE clarify the scope of the licensing commitments….. which in turn will facilitate licensing negotiations and mitigate the risk of hold-up, giving implementers greater confidence in using the IEEE's standards for developing new products"
- Policy adoption process flaws were acknowledged

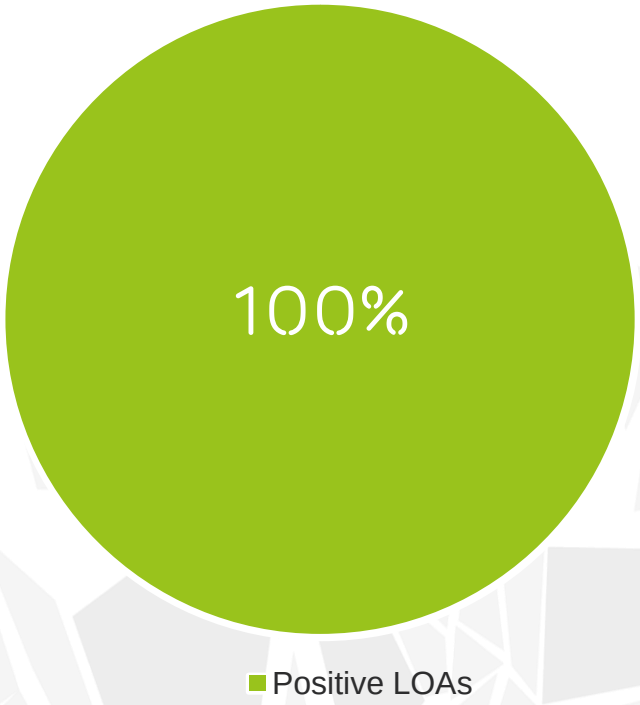
EFFECTS? A BREAKDOWN OF FRAND-BASED OPEN STANDARDIZATION

RAND ASSURANCES UNDER REVISED IEEE IPR POLICY

Since March 2015 IEEE policy adoption, the average net submission rate of licensing assurances declined by 90%

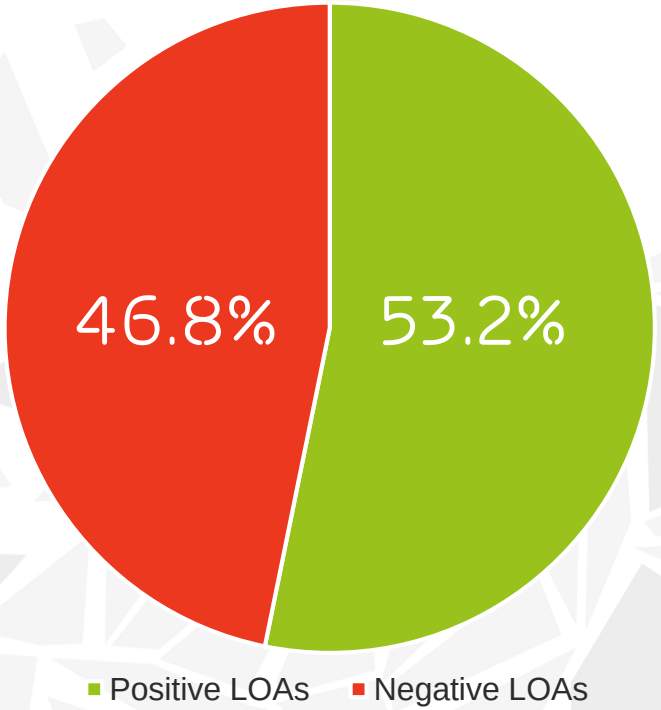


LETTERS OF ASSURANCE (LOAS) SUBMITTED TO IEEE-SA



All LOAs
(2011–2015)

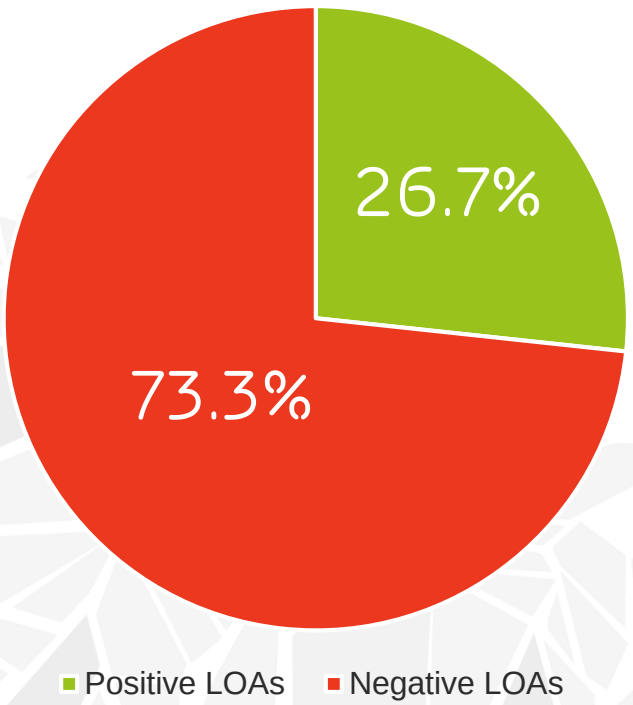
A BROKEN ECOSYSTEM



All LOAs
(1 Jan 2016–30 Jun 2017)

Source: IEEE-SA records of standards-related patent letters of assurance, available at https://standards.ieee.org/about/sasb/patcom/patents.html

BROKEN WI-FI



LOAs for Wi-Fi
(1 Jan 2016–30 Jun 2017)

Source: IEEE-SA records of standards-related patent letters of assurance for IEEE standard 802.11 & amendments, available at http://standards.ieee.org/about/sasb/patcom/pat802_11.html

EMPIRICAL STUDIES ON NEW IEEE POLICY EFFECTS

- DEVELOPMENT OF INNOVATIVE NEW STANDARDS JEOPARDIZED BY IEEE PATENT POLICY / Keith Mallinson (September 2017), *available at* http://www.4ipcouncil.com/application/files/6015/0479/2147/Mallinson_IEEE_LOA_report.pdf
- THE IEEE CONTROVERSIAL POLICY ON STANDARD ESSENTIAL PATENTS – THE EMPIRICAL RECORD SINCE ADOPTION / Ron Katznelson (October 2016, updated September 2017) *available at* http://bit.ly/IEEE-LOAs
- COMMERCIAL & ECONOMIC IMPACTS FROM IPR POLICY CHANGES / Ian Corden, Tim Miller, Sarongrat Wongsaroj, Sam Wood (March 2017) *available at* http://plumconsulting.co.uk/commercial-economic-impacts-ipr-policy-changes/

ANTICOMPETITIVE EFFECTS: WI-FI

- Access to future amendments of the WiFi standard no longer assured – in ¾ of LoAs submitted in past 18 months patent holders chose not to take on a voluntary RAND commitment
- Procompetitive ex-ante declarations severely limited by IEEE
- Unedited observations of 802.11 Executive Committee Meeting Participants (February 2016), see http://ieee802.org/minutes/2016_01/index.shtml:
  - "Number of negative LOAs have increased"
  - "uncertainty in IEEE 802 on whether the SASB will ratify a standard when there are missing LOAs"
  - "Negative LOAs that were not accepted by the PatCom administrator are not included in the [IEEE-]SA LOA database"

ANTICOMPETITIVE EFFECTS: WI-FI AND BEYOND

- "considerable debate and confusion among 802.11ah participants resulting in the delay of its completion"
- "There has been a loss of market momentum for 802.11ah"

› 4 December 2017 IEEE Patent Committee meeting statistics re letters of assurance over the preceding 3 months: 6 negative LOAs and 8 positive LOAs
Nearly half of the LoAs continue to be negative

› This means a large number of technology contributors are no longer willing to provide FRAND assurances to secure access to future IEEE standards

RECOGNIZING THE ERROR(S) OF OVER-INTERVENING IN THIS AREA

2017: DOJ RETURNS TO SOUND ANTITRUST ANALYSIS; REGRETS ONE-SIDED INTERVENTION

DOJ Assistant Attorney General for Antitrust Makan Delrahim: TAKE IT TO THE LIMIT: RESPECTING INNOVATION INCENTIVES IN THE APPLICATION OF ANTITRUST LAW (Remarks at USC Gould School of Law conference on Application of Competition Policy to Technology and IP Licensing, November 10 2017)

- Antitrust enforcers have strayed too far in favor of implementers
- A FRAND commitment is not a compulsory licensing scheme; a FRAND commitment does not sacrifice the right to seek an injunction

AAG FOR ANTITRUST MAKAN DELRAHIM SPEECH (CONT'D)

- Hold-out is a more serious antitrust risk than hold-up
- Collective hold-out (reverse hold-up) is a more serious impediment to innovation and is now a DOJ priority
- Enforcement of patents, whether essential to a standard or not, including through seeking an injunction, is not an antitrust violation
- Violation of a FRAND commitment is not an antitrust violation and should be dealt with through contract law; antitrust enforcers should practice humility
- Patents are a form of property, and the right to exclude is at their core
- Risk of technology-buyers' cartel in standard development organizations

AAG MAKAN DELRAHIM SPEECH (CONT'D)

- DOJ Antitrust division skeptical of imbalanced SSO patent policies; elements of new IEEE patent policy used to demonstrate an example of an imbalanced policy
- DOJ Antitrust Division will focus on innovation and dynamic competition and utilize a balanced approach
- DOJ to focus on collusive conduct in SDOs more generally; SDOs urged to review their bylaws to ensure antitrust compliance
- Freely negotiated licenses and cross-licenses are the solution

The speech recognizes the Type I antitrust error of 2012-2015 DOJ advocacy/intervention; Hints at a recognizing a Type II error as well (failure to stop IEEE technology buyers cartel)?

FTC CHAIRMAN OHLHAUSEN OFFERS SIMILAR OBSERVATIONS

The Elusive Role of Competition in The Standard-setting Antitrust Debate (Stanford Law Review, Summer 2017):

- The use of antitrust law in patent cases is often misguided
- In particular, Ohlhausen criticizes as violating “core antitrust principles” regulatory theories holding that patentees “violate antitrust law if they try to enjoin a “willing licensee”
- Finds the FTC over-reliant on Section 5 of the FTC Act when attempting to “capture conduct that goes beyond the reach of the Sherman Act

FTC CHAIRMAN OHLHAUSEN (CONT'D)

› Explains certain standard essential patent related conduct "assailed by antitrust-enforcement bodies is not a problem born of the competitive process," and instead "reflects incomplete contracting at the time of standardization, ensuing choices by firms to lock into technologies for which they lack licenses, and harm that can occur only when a court would likely grant the sought-after relief"

Strong Patent Rights, Strong Economy Speech (October 13, 2017)

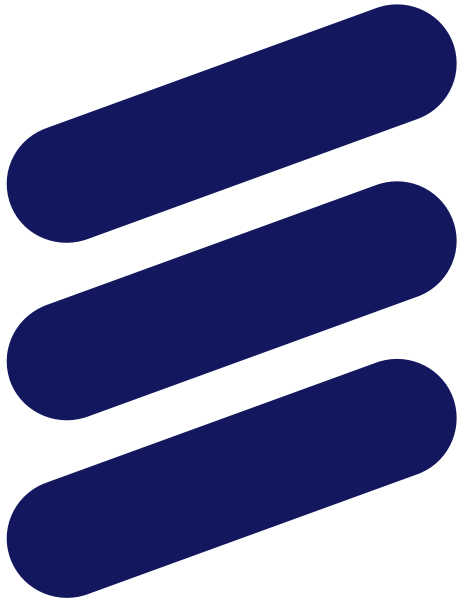
› "policymakers should take an economically and empirically grounded approach to IP issues"

› "infringement litigation plays an important role in protecting patent rights. The ability to sue others for copying your invention is crucial to establishing the property boundaries necessary to promote innovation

› respect for patent rights is fundamental to advance innovation

CONCLUSION

- Reality has shown that government intervention pushing for clarity broke down the open standardization system
- DOJ and the FTC return to traditional antitrust enforcement and policy that is:
  - Grounded in solid empirical evidence
  - Humble in its degree of intervention in private market activity (the government shouldn't put its thumb on the scales)
  - Recognizes the close tie between IPR protection and R&D and innovation
  - Views collusive conduct as an antitrust enforcement priority, rather than unilateral conduct
  - Values dynamic competition (innovation) as much as static (price) competition
  - Reaffirms the U.S. multilateral WTO TRIPs obligations
  - Recognizes freely negotiated licenses (= a market solution) as the best solution



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