



The Antitrust Review of the Americas 2019

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The Antitrust Review of the Americas 2019

A Global Competition Review Special Report

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This article was first published in September 2018
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GLOBAL COMPETITION REVIEW

The Antitrust Review of the Americas 2019

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Cover image: [iStock.com/blackdovfx](https://www.istock.com/blackdovfx)

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ISBN: 978-1-78915-102-2

Printed and distributed by Encompass Print Solutions
Tel: 0844 2480 112

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United States

Department of Justice, Antitrust Division 1	Joint Ventures49
Patty Brink, Director of Civil Enforcement Ruediger Schuett, International Counsel	Darren S Tucker and Evan D Miller Vinson & Elkins LLP
Federal Trade Commission3	Mergers53
Ian R Conner Deputy Director of the Bureau of Competition	Mark D Alexander Axinn, Veltrop & Harkrider LLP
Cartels7	Pharmaceutical Antitrust57
David Higbee, John Cove, Jessica Delbaum, Djordje Petkoski, Ryan Shores, Todd Stenerson and Mark Weiss Shearman & Sterling LLP	Michael Gallagher, Eric Grannon, Heather McDevitt, Adam Acosta, Kevin Adam, Trisha Grant and Kristen O’Shaughnessy White & Case LLP
CFIUS Review 15	Private Antitrust Litigation70
Shawn Cooley and Christine Laciak Freshfields Bruckhaus Deringer US LLP	Carl W Hittinger, Danyll W Foix, Jeffrey W Duffy, M Mitchell Oates and Tyson Y Herrold Baker & Hostetler LLP
Class Actions20	Technology Mergers76
Carrie C Mahan, Adam C Hemlock and Eric S Hochstadt Weil, Gotshal & Manges LLP	Megan Browdie, Jacqueline Grise, Howard Morse and Julia Renehan Cooley LLP
Digital Platforms26	Vertical Restraints81
Scott Sher and Michelle Yost Hale Wilson Sonsini Goodrich & Rosati	Thomas J Collin and Jennifer S Roach Thompson Hine LLP
Energy30	
Layne Kruse, Anne Rodgers and Eliot Turner Norton Rose Fulbright	
Government Investigations34	Canada
Norman Armstrong, Jr and Jeffrey Spigel King & Spalding LLP	Competition Bureau86
Healthcare40	Matthew Boswell Interim Commissioner of Competition
Andrea Agathoklis Murino Goodwin Procter LLP	Merger Review92
IP and Antitrust44	Adam Kalbfleisch and Kyle Donnelly Bennett Jones LLP
John ‘Jay’ Jurata, Jr, Alex Okuliar and Emily N Luken Orrick, Herrington & Sutcliffe LLP	Pharmaceuticals98
	Arlan Gates, Nancy Hamzo and Eva Warden Baker McKenzie

Argentina

Competition Authority	104
Esteban M Greco, President	
Lucía Quesada, National director of competition advocacy	
Federico Volujewicz, Director of competition advocacy	

Brazil

Administrative Council for Economic Defence	108
Alexandre Barreto de Souza	
President	

Merger Control	111
Tito Andrade, Maria Eugênia Novis and	
Marcos Paulo Verissimo	
Machado Meyer	

Colombia

Superintendency of Industry and Commerce	117
Paola Andrea Carrillo Zuluaga	
Adviser to the Superintendent of Industry and Commerce	

Costa Rica

Overview.....	120
Claudio Donato Monge, Marco López Volio and	
Claudio Antonio Donato Lopez	
Zürcher, Odio & Raven	

El Salvador

Superintendency of Competition	124
Marlene Tobar	
Chief economist	

Mexico

Federal Economic Competition Commission.....	127
Alejandra Palacios Prieto	
Chairwoman	

Overview.....	129
Fernando Carreño and Paloma Alcántara	
Von Wobeser y Sierra, SC	

Panama

Authority of Consumer Protection and Competition Defence	137
Oscar García Cardoze	
General Administrator	

Peru

National Institute for the Defence of Free Competition and the Protection of Intellectual Property	139
Jesús Eloy Espinoza Lozada	
Head of the Technical Secretariat of the Commission for the Defence of Free Competition	

Global Competition Review is delighted to publish the 2019 edition of *The Antitrust Review of the Americas*, one of a series of three special reports that deliver specialist intelligence and research designed to help subscribers – general counsel, government agencies and private practice lawyers – successfully navigate the world’s increasingly complex competition regimes. Read in conjunction with *The European, Middle Eastern and African Antitrust Review* and *The Asia-Pacific Antitrust Review*, subscribers have unparalleled annual updates on the development of the world’s competition regimes.

In preparing this report, *Global Competition Review* has worked exclusively with leading competition practitioners. It is their wealth of experience and knowledge – enabling them not only to explain law and policy, but also to put them into context – which makes the report of particular value to all those doing business in the Americas today.

Although every effort has been made to ensure that all matters of concern to readers are covered, competition law is a complex and fast-changing field of practice, and therefore specific legal advice should always be sought. Subscribers to *Global Competition Review* will receive regular updates on any changes to relevant laws over the coming year.

Global Competition Review

London

August 2018

United States: IP and Antitrust

John 'Jay' Jurata, Jr, Alex Okuliar and Emily N Luken

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Patents and intellectual property (IP) rights continue to be increasingly evaluated in light of competition law policies and analysis. This trend endured in the United States in the past year, where antitrust principles continue to shape, and under some circumstances, limit patent rights. This article examines three important developments at the intersection of IP and antitrust law:

- the Federal Circuit narrowed the scope of its exclusive jurisdiction on patent appeals to exclude standalone Walker Process claims;
- federal courts issued decisions addressing the antitrust challenges with respect to the conduct of patent assertion entities (PAEs); and
- the governments' and federal courts' assessment of the rights associated with standard essential patents (SEPs) subject to a voluntary commitment to license on fair, reasonable, and non-discriminatory (FRAND) terms continued to evolve, including:
 - an apparent shift in policy by the Antitrust Division of the United States Department of Justice (DOJ); and
 - two noteworthy district court decisions involving FRAND-encumbered SEPs.

Federal circuit limits jurisdiction on Walker Process claims

The leading US circuit court with jurisdiction over patent appeals recently reinterpreted its jurisdiction to exclude standalone antitrust claims involving fraudulent patent assertion. In the United States, Walker Process¹ claims can arise when a patentee obtains a patent by knowing and willing fraud upon the US Patent Office and then attempts to enforce that patent against an alleged infringer. A Walker Process claim is often asserted in a patent infringement dispute as a counterclaim by the accused infringer but also can be brought as an independent antitrust cause of action separate and apart from any underlying infringement case. Prevailing on a Walker Process claim additionally requires establishing each element of a claim for unlawful monopolisation under section 2 of the Sherman Act.²

By statute, the United States Court of Appeals for the Federal Circuit has exclusive jurisdiction to hear patent appeals from district courts.³ However, in 2018, the Federal Circuit held in *Xitronix Corp v KLA-Tencor Corp*⁴ that the same statute does not extend to confer exclusive jurisdiction to hear antitrust Walker Process claims premised upon enforcement of a fraudulently obtained patent because such claims do not arise under the patent laws.

Xitronix involved the less traditional assertion of a Walker Process claim as a standalone claim, and the district court had granted summary judgment in favour of the patent-holder, KLA-Tencor.⁵ *Xitronix* appealed to the Federal Circuit, and KLA-Tencor did not dispute the issue of the Federal Circuit's jurisdiction. Instead, the Federal Circuit raised the issue sua sponte, and ordered multiple rounds of supplemental briefing, including a briefing to specifically address the US Supreme Court's decision in *Gunn v Minton*.⁶ A three-judge panel held that the Federal Circuit lacked jurisdiction and transferred the case to the Fifth Circuit, a decision that was upheld over a petition for a panel rehearing and rehearing *en banc*.⁷

In concluding that it lacked jurisdiction, the Federal Circuit relied heavily upon *Gunn v Minton*, where the US Supreme Court held that a patent issue presented within a state law legal malpractice claim was insufficient to invoke exclusive federal jurisdiction. The Federal Circuit analogised the statutory language at issue in *Gunn* under the patent federal question statute⁸ to the language at issue in *Xitronix* under the statute granting the Federal Circuit exclusive jurisdiction to hear patent appeals. Just as the legal malpractice claim in *Gunn* did not 'arise under' federal patent law for purposes of exclusive federal jurisdiction, so too did the Walker Process claim not 'arise under' the patent laws for purposes of exclusive Federal Circuit appellate jurisdiction. Even though adjudication of the Walker Process claim would 'almost certainly require some application of patent law', it was not a 'substantial issue of patent law', and instead was more like a 'case within a case', which the *Gunn* court held was insufficient.⁹

The immediate impact of this decision would appear to be limited to only cases where Walker Process claims are brought as standalone claims. Succeeding on a Walker Process claim, regardless of the procedural posture in which the claim is asserted, remains a significant challenge to litigants in light of the stringent requirements necessary to prove fraud. Nonetheless, it will be interesting to ascertain what effect, if any, an increasing number of Courts of Appeals hearing Walker Process claims will have on the rate of success in asserting such claims. The Federal Circuit is not a court that takes lightly antitrust-based challenges in connection with patents.¹⁰

Antitrust decisions by courts addressing PAEs

PAEs are entities that own patents but do not produce, manufacture or sell any products; instead, their business models rely upon monetising their patents through licensing and infringement litigation.¹¹ In recent years, competition authorities have devoted increased attention to PAEs in light of, among other things, the litigation risk asymmetry between PAEs and companies that manufacture products that products practicing patents.¹² Some have argued that this litigation risk asymmetry can result in harm to competition where the costs associated with defending patent litigation rises to a level such that resources are shifted away from research and development, and incentives to innovate are diminished.¹³

Although PAEs have brought about an increase in patent litigation, there have been relatively few decisions directly addressing antitrust issues in connection with PAEs. Two cases from this past year are therefore notable:

- a district court opinion granting summary judgment in favour of a PAE on antitrust claims, but at the same time expressing concern over the PAE's licensing activities; and
- an appellate opinion dismissing antitrust claims where the PAE itself was the plaintiff.

Intellectual Ventures I LLC v Capital One Financial Corp

In this case, the district court granted summary judgment in favour of Intellectual Ventures (IV), a PAE, and several of its affiliates, on

Capital One's antitrust counterclaims that arose from an infringement case brought by PAE.¹⁴ Although the court ultimately declined to address the issue of whether IV possessed monopoly power in a relevant market, it engaged in a fairly lengthy discussion on the topic and the applicability of 'cluster markets'. Instead, the court ruled on more narrow grounds, finding that:

- IV was entitled to *Noerr-Pennington* immunity; and
- collateral estoppel barred Capital One from pursuing claims it had already unsuccessfully brought against IV in a parallel proceeding in federal court in Virginia.

Capital One's antitrust claims were grounded in a theory that IV's business model was to:

- accumulate a vast portfolio of important¹⁵ banking-related patents;
- conceal the details of those patents so that banks cannot independently determine whether they are in need of a licence; and
- serially litigate to coerce the banks to license the entire portfolio at an exorbitant price.

In light of this theory, Capital One's expert argued that the best way to evaluate IV's financial services patent portfolio was to apply a 'cluster market' approach, by which these related financial services patents would constitute a single-product market. Unsurprisingly, IV's expert disputed this market definition and argued, citing the joint DOJ and Federal Trade Commission (FTC) Antitrust Guidelines for the Licensing of Intellectual Property,¹⁶ that an appropriate market definition is a collection of patents that relate to numerous distinct technology markets. Though the case was disposed of on different grounds, Judge Grimm rejected IV's argument that Capital One's 'cluster market' analysis was unreasonable as a matter of law.

IV was entitled to summary judgement, however, based on the *Noerr-Pennington* doctrine and collateral estoppel. *Noerr-Pennington* is a First Amendment-based doctrine that immunises activities seeking to petition the government for redress, including filing complaints before the courts. In this case, the court determined that *Noerr-Pennington* protected IV's infringement cases against Capital One, and the exception for 'sham litigation' was inapplicable because IV had initially succeeded on two patents claims in proceedings before a special master appointed by the court.¹⁷ As a result, it could not be said that IV's infringement case was 'objectively baseless', as required for the sham litigation exception to *Noerr-Pennington*. Additionally, the court held that IV was entitled to defensive use of collateral estoppel based upon a prior adjudication in federal court in Virginia.

Certain aspects of this decision will certainly be welcome to PAEs. Nonetheless, the court went out of its way (albeit in dicta) to express competition-related concerns over the PAE's conduct.¹⁸ Additionally, the decision lays groundwork for potential future antitrust challenges involving similar PAE conduct (to the extent such cases cannot be disposed of on *Noerr-Pennington* or other grounds):

*The exercise of monopoly power with regard to a single patent (or even a few patents) usually does not offend antitrust law. But it is another matter to acquire a vast portfolio of patents that are essential to technology employed by an entire industry and then to compel its licensing at take-it-or-leave-it prices because it is not economically feasible to determine if alternative technologies, not covered by the accumulation of patents, are available. This acquisition and compelled licensing could amount to the ability to exercise monopoly power on an entirely different scale.*¹⁹

Cascades Computer Innovation v RPX Corp

In *Cascades*,²⁰ the Ninth Circuit affirmed the district court's dismissal of an antitrust suit brought by a PAE. Cascades is a PAE that owns a portfolio of patents allegedly used to optimise Android devices. After it sought unsuccessfully to enter into licence agreements with several companies manufacturing devices using Android, Cascades:

- brought patent infringement lawsuits in federal court in Illinois against multiple manufacturers; and
- filed an antitrust case in federal court in California against multiple manufacturers as well as RPX, a defensive patent aggregator.

In that capacity, RPX purchases patents to defend against litigation, financed by subscription fees from members.

Cascades' antitrust theory was premised upon a hub-and-spoke conspiracy among RPX and its members to restrain trade in, and to monopolise the market for, Cascades' patents. Under that theory, RPX stood at the centre of the conspiracy (the hub), with agreements between RPX and the manufacturers forming the spokes and an agreement among the manufacturers as the rim of the conspiracy. According to Cascades, the impact of this alleged conspiracy – under which the defendants agreed not to deal with Cascades in licensing other than through RPX – was to drive down the price for Cascades patents. The district court had initially denied a motion to dismiss,²¹ but when a jury returned a verdict of non-infringement in the Illinois case, the court dismissed the antitrust claims.²²

The Ninth Circuit affirmed, holding that Cascades failed to sufficiently allege an antitrust injury, and therefore lacked antitrust standing because failure to license a non-infringed patent could not be a cognisable antitrust injury. Additionally, the court explained that the failure to license 'had no effect on the price or quality of any consumer goods,' because the defendants were not using the invention.²³

Given the preclusive effect of the jury verdict of non-infringement in the Illinois case, the Ninth Circuit's decision is not surprising. What is surprising here is the fact that the PAE was not itself the target of accusations of anticompetitive conduct, but rather, the plaintiff bringing such claims. Moreover, the claims were brought against a defensive patent aggregator, which purchases patents for the precise purpose of keeping them away from PAEs. This adds new subtext and nuance to the litigation asymmetry that some claim exists when manufacturing companies have to defend themselves against costly PAE infringement litigation.

Developments on FRAND-encumbered SEPs

SEPs are patents which have been voluntarily submitted by the owner and formally incorporated into a particular technological standard by a standard-setting organisation (SSO). Because standardisation can eliminate potential competitors for alternative technologies and confer significant bargaining power upon SEP-holders vis-à-vis potential licensees, many SSOs require that the patent holder commit to license its SEPs on FRAND terms to prevent the SEP-owner from potentially 'holding up' the licensee and extracting higher royalties or other terms after implementation of the relevant standard than it could have reasonably demanded beforehand.²⁴ Two developments are noteworthy in this area of the law. First, the DOJ has expressed a change in its enforcement policy and views as to FRAND-encumbered SEPs. Second, there were at least two significant district court decisions: one calculating a FRAND royalty, and another issuing an anti-suit injunction preventing a SEP-holder from enforcing an injunction it obtained abroad.

DOJ shift in policy

Through a series of speeches over the past year, the DOJ has articulated a stark change in its position on the role of competition law in regulating the FRAND commitment.

First, and perhaps most significantly, the DOJ has questioned the propriety of applying competition law to a SEP-holder's breach of a FRAND commitment, instead arguing that sufficient remedies exist in contract and other common law doctrines.²⁵ Additionally, the DOJ has espoused the view that hold-out (or reverse hold-up), whereby a potential licensee or group of licensees allegedly prolongs accepting a SEP licence until its royalty demands are met, is a bigger problem than hold-up on the part of licensors as it could skew investment incentives and chill innovation. The DOJ has indicated that this issue arises in part because of an asymmetry in the risk allocation as between entities that on balance invest to develop patentable IP and those entities that on balance focus on implementing that IP: patent owners by necessity must take a gamble in deciding whether to invest without any guarantee of payoff, giving implementers a degree of leverage over them.²⁶ Finally, the DOJ has taken the position that SEP-holders should be able to seek injunctions as a legitimate means of enforcing their IP rights without running afoul of the antitrust laws – and that placing limits on these rights risks transforming FRAND into a 'compulsory licensing scheme'.²⁷

These views represent a significant departure from the approach of prior administrations, which has not gone unnoticed. While some commentators and industry representatives have expressed concern over the legal and theoretical justifications for the DOJ's position,²⁸ others have applauded the new approach as bringing balance to the debate between the rights of patent-owners and companies that manufacture devices implementing standards.²⁹ In any event, the practical ramifications of this shift in policy have yet to be materialised, and it is an important space to monitor for future developments.

Unlike the DOJ, the FTC has not signalled a clear shift in its policy on FRAND-encumbered SEPs. Indeed, it is still actively litigating an unfair competition case it brought against Qualcomm stemming from Qualcomm's alleged FRAND abuses in connection with its patent licensing programme. Additionally, there have been some indications³⁰ that the new leadership at the FTC may be amenable to enforcing against conduct involving SEPs to a slightly greater degree than was evident during the tenure of acting chairman Ohlhausen.³¹

District court decisions

Although multiple federal district courts heard cases involving FRAND-encumbered SEPs, two are particularly worth mentioning: *TCL v Ericsson*,³² in which the court calculated a FRAND royalty, and *Huawei v Samsung*,³³ in which the court granted an anti-suit injunction preventing Huawei from enforcing an injunction it obtained in China against Samsung.

TCL v Ericsson

Relatively few courts have actually calculated a FRAND royalty, as opposed to ruling on some other fact of a FRAND dispute; *TCL v Ericsson* is thus significant in that it contributes to the fairly small but growing body of law concerning FRAND calculations.³⁴ The facts underlying the case arose from a long-standing dispute regarding Ericsson's portfolio of wireless communications SEPs. Ericsson had sued TCL for infringement in multiple jurisdictions abroad, and TCL filed a declaratory judgment action in the Central District of

California seeking a judicial declaration that Ericsson had breached its FRAND obligation. The parties agreed to abide by the district court's determination of the FRAND terms for a worldwide licence.

In a lengthy opinion, Judge Selna calculated a FRAND rate that was orders of magnitude below what Ericsson had initially demanded in its offers. Though much of the decision is highly fact-specific, at least two aspects are more broadly significant:

- the court's treatment of the non-discriminatory prong of FRAND; and
- its use of the top-down methodology.

With respect to the non-discriminatory prong, *TCL v Ericsson* is among the first wave of cases to address this prong in detail. Judge Selna rejected the argument that a potential licensee needs to prove evidence of competitive distortion to demonstrate that a rate is discriminatory, an important distinction from a 2017 decision in the United Kingdom which held otherwise.³⁵ Additionally, Judge Selna expressed scepticism of volume discounts, noting that 'sales volume alone does not justify giving lower rates to otherwise similar firms'.³⁶

TCL v Ericsson is also noteworthy in that illustrates the use of top-down methodology to calculate a FRAND royalty. Under this approach, the aggregate royalty attributable to a standard under all SEPs is computed and the allocated to the SEP owner in suit (as opposed to the bottom-up methodology whereby the court attempts to analyse the value of the asserted SEPs in isolation, usually with reliance on comparable licences). Although this case did not directly involve any antitrust issues, Judge Selna's selection of the top-down methodology was influenced by competition law concerns. Specifically, Judge Selna adopted the approach, in part, because it prevents royalty stacking – an issue that arises when, in the aggregate, the royalties that licensees are required to pay becomes excessively burdensome.³⁷

Huawei v Samsung

In this case, Judge Orrick granted an anti-suit injunction to block Huawei from enforcing an injunction it obtained in China against Samsung to stop making or selling smartphones that a Chinese court held infringed two of Huawei's 4G LTE Chinese SEPs. The dispute involved failed efforts between Huawei and Samsung to cross-license each other's wireless communications SEPs. Huawei filed simultaneous infringement actions against Samsung in the Northern District of California and in China, but the proceedings in China resulted in an adjudication more quickly than the proceedings in the United States. In granting Samsung's motion for an anti-suit injunction, Judge Orrick closely analogised to *Microsoft v Motorola*,³⁸ where the Ninth Circuit affirmed the district court's decision to issue an anti-suit injunction preventing Motorola from enforcing an injunction it had obtained against Microsoft in Germany. Additionally, Judge Orrick clarified that, in ruling on a motion to enjoin a party from enforcing an injunction obtained abroad, it is not necessary to consider the traditional factors implicated in a preliminary injunction analysis, such as, a showing of a substantial threat of irreparable harm and that the injunction would be in the public interest.³⁹

Samsung brought an antitrust counterclaim in the action, which was not addressed in Judge Orrick's opinion. Thus, although the decision did not directly rule on any antitrust issues, it is consistent with previous court decisions and competition law policy recognising that injunctions should only be issued on FRAND-encumbered SEPs under relatively rare circumstances where monetary damages would not suffice as adequate compensation.⁴⁰

Notes

- 1 382 US 172 (1965).
- 2 15 USC Section 2.
- 3 28 USC Section 1295(a)(1).
- 4 882 F3d 1075 (Fed. Cir. 2018).
- 5 2016 WL 7626575 (WD Tex. 26 August 2016).
- 6 568 US 251 (2013).
- 7 892 F3d 119 (Fed. Cir. 2018). Judge Newman penned a dissenting opinion from the denial of the petition for a rehearing en banc.
- 8 28 USC Section 1338(a).
- 9 883 F3d at 1078.
- 10 See, eg, *CSU, LLC v Xerox Corp (In re Independent Serv Orgs Antitrust Litig.)*, 203 F.3d 1322 (Fed. Cir. 2000) (recognising that a patent holder may 'refuse to sell or license in markets within the scope of the statutory patent grant' without incurring antitrust liability).
- 11 PAEs are also commonly referred to as non-practising entities (NPE) and – in the pejorative – 'patent trolls'.
- 12 See, eg, Federal Trade Commission, Patent Assertion Entity Activity Study (October 2016), available at https://www.ftc.gov/system/files/documents/reports/patent-assertion-entity-activity-ftc-study/p131203_patent_assertion_entity_activity_an_ftc_study_0.pdf.
- 13 See, eg, Fiona Scott Morton & Carl Shapiro, Patent Assertions: Are We Any Closer to Aligning Reward to Competition? NBER Innovation Policy and the Economy (October 2015), available at www.nber.org/papers/w21678.
- 14 280 F Supp. 3d 691 (D Md. 2017).
- 15 The opinion contains several references to the patents as 'essential', but they do not appear to have been FRAND-encumbered SEPs.
- 16 Available at <https://www.justice.gov/atr/IPguidelines/download>.
- 17 Courts are divided as to whether successful assertion of a patent necessarily triggers Noerr-Pennington immunity. One district court has held that a single valid claim immunises the entire suit from antitrust liability, regardless of intent. But more recent decisions by other district courts have concluded that a lawsuit can constitute sham litigation even if the complaint contains some valid claims. Compare *Dentsply Int'l v. New Tech. Co.*, 1996 WL 756766, at *2 (D Del. 1996) with, eg, *In re Wellburtin SR Antitrust Litigation*, 749 F Supp. 2d 260, 266 (ED Pa. 2010); *Novelty, Inc v Mountain View Mktg*, 2010 WL 1325436 at *2 n.2 (SD Ind 30 March 2010).
- 18 280 F Supp. 3d at 704 ('[I]t is hard to deny that there is something concerning from an antitrust perspective about the way in which IV engages in its licensing business.').
- 19 Id at 698.
- 20 *Cascades Computer Innovation v RPX Corp*, No. 16-15782, 719 Fed. Appx. 553 (9th Cir. 2017).
- 21 No. 12-cv-01143-YGR, 2013 WL 6247594 (ND Cal. 3 December 2013).
- 22 No. 12-cv-01143-YGR, 2016 WL 705982 (ND Cal. 23 February 2016).
- 23 719 Fed. Appx at 555 n.1.
- 24 See, eg, Prepared FTC Statement Before the US Senate Committee on Judiciary Subcommittee on Antitrust, Competition Policy and Consumer Rights Concerning Standard Essential Patent Disputes and Antitrust Law (30 July 2013), available at https://www.ftc.gov/sites/default/files/documents/public_statements/prepared-statement-federal-trade-commission-concerning-standard-essential-patent-disputes-and/130730s_tandardessentialpatents.pdf.
- 25 See, eg, Makan Delrahim, Assistant Att'y Gen, Antitrust Div, Remarks at the USC Gould School of Law's Center for Transnational Law and Business Conference (10 November 2017), available at <https://www.justice.gov/opa/speech/assistant-attorney-general-makan-delrahim-delivers-remarks-usc-gould-school-laws-center>.
- 26 See, eg, Makan Delrahim, Assistant Att'y Gen., Antitrust Div, 'The "New Madison" Approach to Antitrust and Intellectual Property Law' (16 March 2018), available at <https://www.justice.gov/opa/speech/assistant-attorney-general-makan-delrahim-delivers-keynote-address-university>.
- 27 See id; see also Makan Delrahim, Assistant Att'y Gen, Antitrust Div, 'The Long Run: Maximizing Innovation Incentives Through Advocacy and Enforcement', (10 April 2018), available at <https://www.justice.gov/opa/speech/assistant-attorney-general-makan-delrahim-delivers-keynote-address-leadership-conference>.
- 28 See Letter *Re Speeches on Patents and Hold-up* (17 May 2018), available at <https://cdn.patentlyo.com/media/2018/05/DOJ-patent-holdup-letter.pdf>; ACT – The App Association, et al, White Paper, Standards, Licensing, and Innovation: A Response to DOJ AAG's Comments on Antitrust Law and Standard Setting (20 May 2018), available at www.cccianet.org/wp-content/uploads/2018/05/Multi-Assn-DOJ-White-Paper-053018.pdf.
- 29 See Letter to AAG Delrahim (13 February 2018), available at <https://www.competitionpolicyinternational.com/wp-content/uploads/2018/05/2018-05-18-Delrahim-Letter-to-Carrier-and-Muris1.pdf>.
- 30 See D Bruce Hoffman, Acting Director, Bureau of Competition, FTC, 'Competition Policy and the Tech Industry – What's at stake?' Remarks at Computer & Communications Industry Association (12 April 2018), available at https://www.ftc.gov/system/files/documents/public_statements/1375444/ccia_speech_final_april30.pdf.
- 31 See Maureen Ohlhausen, Commissioner, FTC (then Acting Chairman), 'Strong Patent Rights, Strong Economy' Speech (13 October 2017), available at https://www.ftc.gov/system/files/documents/public_statements/1264483/ohlhausen_-_hillsdale_speech_10-13-17.pdf.
- 32 SACV 14-341 JVS(DFMx) and CV 15-2370 JVS (DFMx), 2017 WL 6611635 (CD Cal. 21 December 2017).
- 33 No. 3:16-cv-02787-WHO, 2018 WL 1784065 (ND Cal. 13 April 2018).
- 34 See, eg, *Microsoft Corp v Motorola, Inc*, 2013 WL 2111217 (WD Wash. 25 April 2013); *In re Innovatio IP Ventures, LLC Patent Litigation*, 2013 WL 5593609 (ND Ill. 3 October 2013).
- 35 *Unwired Planet v Huawei*, EWHC 711 (Pat) (4 May 2017), available at www.bailii.org/ew/cases/EWHC/Patents/2017/711.html.
- 36 2018 WL 1784065 at *33.
- 37 2017 WL 6611635 at *8.
- 38 871 F Supp. 2d 1089 (WD Wash. 2012), aff'd, 696 F3d 872 (9th Cir. 2012).
- 39 2018 WL 1784065 at *4. Judge Orrick reaffirmed this principle in denying Hauwei's motion to amend or reconsider but noted that, even if the traditional factors applied, the result would not change. 2018 WL 3037924 (19 June 2018).
- 40 See, eg, *Apple v Motorola*, 757 F3d 1286, 1332 (Fed. Cir. 2014); *Microsoft v Motorola*, 696 F3d at 877. As discussed supra, the current DOJ has questioned this policy.



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Jay is a first-chair trial lawyer who advises clients in antitrust conduct investigations, mergers and acquisitions, and high-stakes litigation. He is deeply involved in issues at the intersection of antitrust and IP, and speaks and publishes regularly on topics such as standard-essential patents (SEPs), FRAND, patent assertion entities (PAEs) and patent trolls. Recently, Jay helped resolve the Korea Fair Trade Commission's challenge to Microsoft Corporation's acquisition of the Nokia devices and services business, with no changes to Microsoft's pre-acquisition patent licensing practices. He also obtained a multimillion-dollar jury verdict on behalf of iBiquity Digital Corporation in its SEP licensing dispute with Continental Automotive Systems.



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Alex advises and represents clients in government mergers and conduct investigations and defends against private antitrust litigation. Before joining the firm in 2015, Alex was an antitrust adviser to US FTC Commissioner Maureen Ohlhausen and a trial attorney in the US DOJ Antitrust Division's Networks and Technology Enforcement Section. He was heavily involved in shaping and implementing federal policies for IP issues, including SEPs, PAEs, patent pools, and pharmaceutical patent litigation 'reverse payment' settlements. He recently contributed a chapter to the widely read *Intellectual Property and Antitrust Handbook* (second edition 2015) and is currently co-editing an update to the *Handbook on the Antitrust Aspects of Standard Setting* (forthcoming). Alex is co-chair of the Intellectual Property Committee of the American Bar Association's Section of Antitrust Law.



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The firm's antitrust practice draws upon deep experience in navigating the most complex antitrust issues that clients face – dominant firm conduct, mergers, joint ventures, distribution restrictions, and antitrust compliance are only some of the areas in which we regularly advise clients. We have particular fluency in antitrust issues facing technology companies. Lawyers in our practice group have served in the Antitrust Division of the US Department of Justice, the US Federal Trade Commission, the European Commission and the UK's Office of Fair Trading (now part of the UK Competition and Markets Authority) – a decided edge when representing clients in lawsuits and investigations brought by government regulators.

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