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As DOJ Confirms a Change in Antitrust Patent Policy, Lawyers Prepare for Shifting Demand

U.S. law has often shied away from enforcing essential patent obligations. That's set to change. The result could be "a significant change in the volume and nature of business for IP trial lawyers and their clients," one lawyer said.

BY BRUCE LOVE

What You Need to Know

- A DOJ spokesperson confirmed the agency will change its policy on SEPs and antitrust behavior.
- The change will mean big business for firms that combine highly technical IP offerings with complex litigation practices.
- U.S. law has often shied away from enforcing SEP obligations.

The Justice Department has confirmed it is looking to develop new policies surrounding how standard-essential patents might be used as tools for anticompetitive practices.

The change in policy will mean big business for law firms that can combine highly technical IP advice with their antitrust and litigation practices, with one lawyer likening the demanding skill set to "three-dimensional chess."

Standard-essential patents, or SEPs, are a fundamental piece of intellectual property for business and innovation because they are used under license so frequently by manufacturing companies other than the patent owners.

The policy change was hinted at during an online event in late May, when Richard Powers, the acting attorney general of DOJ's antitrust division, gave an indication that the government might be walking back the relaxed approach implemented by the DOJ under the Trump administration.

Office of the Attorney General at the U.S. Department of Justice in Washington, D.C. June 6, 2020.

A DOJ spokesperson confirmed in an email Tuesday to Law.com that it will change its policy on SEPs and antitrust behavior, with the agency still working out the details. The new administration, said the DOJ spokesperson, is rethinking what policies at the intersection of IP and antitrust will best serve competition and consumers.

"New Department leadership is working with career staff on developing a more balanced approach," said the DOJ spokesperson. "The department wants to develop neutral and balanced policies in this area that recognize the importance of both antitrust enforcement and

intellectual property protection to our economy and that do not favor one set of interests over others."

Such policy changes could result in a swell of business for law firms with deep, technical IP benches and strong experience representing the industry in enforcement actions, lawyers said.

Trump's DOJ had "taken its foot off the gas" when it came to SEPs as the focus of anti-competitive behavior, said one Washington-based lawyer, speaking on the condition of anonymity because he currently has active cases that involve both SEP enforcement and defense.

"It didn't mean we weren't busy as litigators. There was a lot of work enforcing SEPs against infringers and defending against infringement allegations," he said. "But we weren't busy in the antitrust arena. A greater focus on SEPs—not just by the DOJ but also other agencies—might mean more litigation, but it will also mean a more transparent field of play. It doesn't do companies any good for there to be unfettered SEP enforcement."

In 2015, a few months before Trump took office, in a letter to the Institute of Electrical and Electronics Engineers, the DOJ had expressed a view that SEP holders could fall foul of antitrust rules if they refused to share their patents under license without good reason.

Two years earlier, the Obama administration had vetoed an International Trade Commission patent ruling that Samsung had not abused Apple's SEP licensing. That veto signaled that flagrant abusers of SEPs could also find themselves the focus of antitrust authorities.

However, under Trump, the policy expressed in the IEEE letter was effectively walked back, and government agencies were generally less active over competitive concerns toward SEPs.

"But now the pendulum is swinging back," said Joshua Pond, a partner in the D.C. office of Crowell & Moring, whose practice centers on blocking and defending IP before the ITC. "Policy in this area is going through a restructure that will mean a significant change in the volume and nature of business for IP trial lawyers and their clients."

Pond said he expects an uptick in business over the next few years as Biden's policies refocus on IP protections generally and SEPs in particular.

"U.S. law has often shied away from enforcing SEP obligations. But that looks set to change, and with it the service offerings of law firms in the field. SEP enforcement and litigation is complex enough. But when you add antitrust, it becomes three-dimensional chess," said Pond, adding that he is expecting demand for attorneys with high-level IP trial experience not only at the IPC, but also the Northern District of California, Delaware and the Southern District of New York. "Clients are going to be wanting IP trial lawyers that have an understanding of those courts."

For the past few months, law firms have been positioning themselves for new business in their IP and antitrust practices. McKool Smith hired IP trial expert Blair Jacobs from Paul Hastings to launch a Washington office and expects to have at least 12 lawyers resident by the end of the year.

Of the DOJ's SEPs-antitrust policy change, Jacobs says traditionally, when the country moves from a Republican to a Democratic administration, antitrust laws are "used more frequently," and investigations are escalated.

"Big SEP holders have been proactively seeking guidance from the Department of Justice for a long time," said Jacobs.

For lawyers that defend and enforce SEPs and FRANDs—fair, reasonable and non-discriminatory patent usage—the threat of antitrust investigations becomes "another arrow in the quiver to use when negotiating" with the competition, said Jacobs.