IP insider: The patent follies of antitrust zealots

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Consumers love new technology and innovative prowess in technology is a key source of economic strength. Yet patent systems – central drivers of that prowess – are under new waves of attack

Antitrust regulators in the United States and elsewhere around the world are on a crusade, driven by unsubstantiated claims and over-heated rhetoric. Under the banner of squelching anti-competitive practices, the US Justice Department and a number of federal trade commissioners are endorsing policies which would undermine the innovation that has revolutionised mobile communications, computing and electronic media.

It is hard to imagine an industry less in need of competitive intervention from a regulatory agency than wireless communications. In 1996 Motorola debuted the StarTAC flip-phone for $1,000. Customers paid about $1 a minute to talk – and talk was almost the only thing they could do. Today, customers can buy for less than $100 an off-brand smartphone which provides full internet service, video streaming, a camera and endless apps. Almost unlimited talk time and robust data packages are available for less than $50 a month.

So why the interest from antitrust?

The targets of the Justice Department's Antitrust Division are standard-essential patents (SEPs). These are patents for the essential enabling technologies that are incorporated into industry-wide technical standards for, say, 4G wireless smartphones.

Industry-wide standards are crucial to establishing mass markets. Just as electrical plugs need to fit outlets, the smartphones of different manufacturers need to communicate with a host of different networks and with each other. For years, manufacturers and technology developers have been hammering out these common standards through standards-setting organisations such as the Institute for Electrical and Electronics Engineers (IEEE).

Crucially, the standards-setting process includes a key requirement to ensure robust competition. Before a patented technology is incorporated into a standard, the patent owner must agree in advance to license its applicable patents to a virtually unlimited number of licensees on terms that are fair, reasonable and non-discriminatory (FRAND).

Based on the plummeting prices and soaring power of digital products in all forms, this system has been spectacularly successful. Yet despite all measurable indicators to the contrary, antitrust regulators appear convinced that patent rights are stifling competition and innovation across the electronics industry.

These regulators assert that SEPs give rise to patent hold-up. Hold-up theory posits that without government intercession, holders of essential patents will demand excessive royalties, which will impede new market entrants and may even prevent the commercialisation of a new technology altogether.

While the world still awaits a single documented instance of patent hold-up in the mobile telecommunications industry, several courts have identified instances of the opposite behaviour: patent hold-out – increasingly brazen manufacturers which simply refuse to license patents and dare patent owners to sue for infringement. While patent hold-outs work well for free riders that want royalty-free or very cheap access to technology developed by others through years of heavy R&D investment, it hurts the prospects for future innovation.

Good news for free riders?

Notwithstanding the lack of empirical evidence about patent hold-up, the US Justice Department's Antitrust Division recently gave formal approval to proposals by the IEEE that pave the way for free riders to conspire against inventors.

One key proposal would require that in order for a patented technology to become standard essential, the developer would have to give up almost all rights to seek a court injunction to stop companies from using the technology if the rights holder refused to license it. The only viable exception would be in the narrow circumstances where a company flatly refused to pay a court-determined FRAND licence royalty.

This is an open invitation to infringe. At the very least, it incentivises implementers to delay paying for proprietary technology as long as possible, because infringers will not have to pay any more money by forcing litigation – even if they lose at trial.

Since the Justice Department made its views known, many international licensing negotiations have ground to a halt. Without the credible threat of an injunction to stop them, infringers have good reason to run out the clock while pretending to negotiate.

Such delay tactics are extremely costly to innovators, given the ever-shorter half-life of new technology.

Ironically, the antitrust campaign could actually end up inhibiting competition. This is because patents provide a powerful incentive for new market entrants to invent disruptive new technologies and these technologies have repeatedly dislodged seemingly indomitable firms. Remember when people thought Kodak and Polaroid ruled the world?

It may be counterintuitive, but the best policy to advance antitrust's pro-competitive goals is actually to strengthen the patent system.

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It comes down to a simple choice – do we want to lean to the past or the future? If the antitrust activists have their way, we will be sacrificing the vital innovations of tomorrow to obtain, at best, minuscule price reductions today. That would be tantamount to eating our seed corn and would play right into the hands of some foreign competitors.