AMERICAS ANTITRUST REVIEW 2022

Americas Antitrust Review 2022

Published in the United Kingdom
by Global Competition Review
Law Business Research Ltd
Meridian House, 34-35 Farringdon Street, London, EC4A 4HL

www.globalcompetitionreview.com

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ISBN: 978-1-83862-581-8

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

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Preface

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Like its sister reports covering the Asia-Pacific, and Europe, the Middle East and Africa, this review provides an unparalleled annual update from competition enforcers and leading practitioners on key developments in the field.

In preparing this report, Global Competition Review has worked with leading competition lawyers and government officials. Their knowledge and experience – and above all their ability to put law and policy into context – give the report special value. We are grateful to all the contributors and their firms for their time and commitment to the publication.

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Global Competition Review
London
August 2021

United States: IP and Antitrust

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IN SUMMARY

US enforcement agencies and courts have continued to struggle with how to balance robust protection for IP rights with antitrust concerns. In this article, we examine the most significant court decisions and enforcement actions at the intersection of these two issues. We highlight developments concerning the licensing and enforcement of standards-essential patents, patent pools and antitrust concerns when competitors settle IP disputes. During the Trump administration, the DOJ and FTC had sharply diverging views on the role that antitrust law plays in IP-enforcement disputes. This resulted in some dramatic showdowns, including the DOJ's submission of a statement of interest in opposition to the FTC. We conclude by examining suggestions that the Biden administration may be more aligned with the FTC's historical view.

DISCUSSION POINTS

- Landmark decisions regarding FRAND violations
- DOJ's willingness to approve patent pools including non-essential patents
- The Second Circuit on trademark settlement agreements
- The DOJ and FTC perhaps being more aligned going forward

REFERENCED IN THIS ARTICLE

- *Broadcom Corp v Qualcomm Inc, 5*01 F.3d 297, 314 (3d Cir. 2007)
- *Federal Trade Commission v Qualcomm Inc*, 969 F.3d 974 (9th Cir. 2020)
- *Continental Automotive Systems, Inc v Avanci LLC,* 485 F. Supp. 3d 712 (N.D. Tex. 2020)
- *Aspen Skiing Co v Aspen Highlands Skiing Corp*, 105 S. Ct. 2847 (1985)
- *Pacific Bell Tel Co v linkLine Communications, Inc*, 555 U.S. 438 (2009)
- *1-800 Contacts, Inc v Federal Trade Commission*, 1 F. 4th 102 (2d Cir. 2021)
- *Federal Trade Commission v Actavis, Inc*, 570 U.S. 136 (2013)

Standards-development activity and standards-essential patents

The past year and a half brought two significant developments in the world of standards-development, standards-essential patents, and antitrust. First, two significant court decisions held that alleged violations of FRAND commitments are matters for contract law, not antitrust. Second, the DOJ supplemented its 2015 business review letter concerning a standard-essential patent owner's right to obtain injunctive relief against patent infringement, but then the new Biden DOJ reclassified that supplement as 'advocacy' and reinstated the original 2015 letter.

SDOs and FRAND commitments and antitrust

Industries and technologies that require interoperability among devices often use standards-development organisations (SDOs) to bring stakeholders together to develop a common set of standards by which devices operate and communicate. Cooperative standards development is widely viewed as pro-competitive, since it may facilitate product interoperability and spur innovation in downstream products. Obviously, however, collective agreement on a single technology, to the exclusion of others, raises some antitrust concerns. One concern is 'hold up': once a technology is incorporated into a standard, implementers will be 'locked in' to using that technology because they have invested in developing standard-compliant devices. Patents claiming technology that is incorporated into a standard are called standards-essential patents (SEPs); a device that implements a standard necessarily practises SEPs. The hold-up concern is that an SEP owner could demand royalties that reflect this 'lock in' rather than the value of the technology if it were not chosen as part of a standard. In an effort to guard against hold-up, many SDOs require companies that contribute their technology to a standard to commit to license that technology on fair, reasonable and non-discriminatory (FRAND) terms. Some people also believe that an SEP owner should not be able to enjoin an implementer from practicing SEPs if that implementer is willing to take a licence on FRAND terms. The countervailing concern is 'hold out': some believe that restricting SEP owners' rights chills innovation by reducing the value of SEPs and allows implementers to free ride by refusing to take licences or delaying, knowing that the patent owner has little recourse.

Two recent court decisions significantly advanced the law on the relationship between FRAND commitments and antitrust. Since the Third Circuit's 2007 decision in *Broadcom Corp v Qualcomm Inc*, it has been reasonably well accepted that a patent holder's deceptive or intentionally false conduct before an SDO followed by a refusal to license standard-essential patents on FRAND terms could potentially give rise to antitrust liability under section 2 of the Sherman Act. In *Broadcom*, the Third Circuit held that:

(1) in a consensus-oriented private standard-setting environment, (2) a patent holder's intentionally false promise to license essential proprietary technology on FRAND terms, (3) coupled with an SDO's reliance on that promise when including the technology in a standard, and (4) the patent holder's subsequent breach of that promise, is actionable anticompetitive conduct.[1]

There was less consensus, and the law was less clear, however, as to whether breaches of FRAND commitments without any fraud or deception before the SDO could violate the antitrust laws. The Ninth Circuit and a Texas district court have now resolved that question in the negative.

FTC v Qualcomm

In August 2020, a unanimous panel of the US Court of Appeals for the Ninth Circuit reversed the lower court's decision in *FTC v Qualcomm* and vacated a worldwide injunction against several of Qualcomm Incorporated (Qualcomm)'s licensing practices with respect to cellular communications SEPs.[2] The court held that (1) breaching a FRAND commitment is not an antitrust violation absent clear deception that results in the SEP holder's selection into the standard; (2) a refusal to license to rival chip manufacturers is not an antitrust violation; and (3) charging allegedly 'unreasonably high' royalty rates for SEPs was not an antitrust violation.[3] The Ninth Circuit denied the FTC's request for rehearing en banc and the FTC declined to pursue the case further.

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1 *Broadcom Corp v Qualcomm Inc*, 501 F.3d 297, 314 (3d Cir. 2007). The authors would like to thank summer associate Dillon Ostlund for his excellent contributions to this chapter.

2 *Federal Trade Commission v Qualcomm Inc*, 969 F.3d 974 (9th Cir. 2020).

3 id. The FTC also challenged certain agreements between Apple and Qualcomm as unlawful exclusive deals. The district court found that the agreements were unlawful, and the Ninth Circuit reversed that finding as well. We do not discuss the exclusive-dealing aspects of the Qualcomm case in this article.

District court proceedings

In January 2017, the FTC sued Qualcomm for equitable relief, alleging that Qualcomm's licensing practices constituted an unfair method of competition in violation of section 5(a) of the FTC Act.[4] Qualcomm owns many SEPs, and made FRAND commitments to SDOs. Some of Qualcomm's SEPs relate to cellular modem chips. Qualcomm does not license its SEPs to modem-chip manufacturers but, instead, licenses its SEPs to the device manufacturers that make finished devices implementing the standards. Qualcomm is also a leading supplier of modem chips for cellular communications. The district court found that Qualcomm had a dominant share of the markets for modem chips for phones that practised the CDMA standard and for 'premium' LTE-compliant phones. Qualcomm did not sell modem chips to device manufacturers who do not have a licence to the related Qualcomm patents. The FTC termed this practice 'no licence, no chips'.

In May 2019, the district court held that Qualcomm violated the Sherman Act (and, therefore, the FTC Act) by: refusing to license SEPs to competing modem chip manufacturers and imposing an anticompetitive surcharge on rival chip manufacturers through its 'no licence, no chips' policy.[5]

Ninth Circuit opinion

The Ninth Circuit reversed, making several important holdings relating to IP and antitrust.

The court rejected the FTC's argument that Qualcomm's refusal to license rival chipmakers violated its FRAND commitments and therefore section 2. The FTC argued on appeal that:

4 Section 5 of the FTC Act, prohibits 'unfair methods of competition, but also encompasses violations of sections 1 and 2 of the Sherman Act.

5 *Federal Trade Commission v Qualcomm Inc*, 411 F. Supp. 3d. 658 (N.D. Cal. 2019). The FTC also challenged certain agreements between Apple and Qualcomm as unlawful exclusive deals. The district court found that the agreements were unlawful, and the Ninth Circuit reversed that finding as well. We do not discuss the exclusive-dealing aspects of the *Qualcomm* case in this article.

> *(1) Qualcomm entered into a voluntary commitment to deal with its rivals as part of the SSO process, which is itself a derogation from normal market competition, and (2) Qualcomm's breach of this contractual commitment satisfies traditional Section 2 standards [in that] it tends to impair the opportunities of rivals and . . . does not further competition on the merits.*[6]

The Ninth Circuit found that, even if Qualcomm had breached its FRAND commitment by refusing to license rivals, the FTC failed to show how the refusal impaired those rivals' competitive opportunities. While the FTC argued that Qualcomm's practices allowed it to charge higher patent royalties to OEMs than it could obtain from rival chipmakers, that harm to Qualcomm's customers did not constitute harm to competition in the relevant modem-chip markets.[7] The Ninth Circuit noted that the FTC had not alleged any intentional deception in the SDO process, distinguishing the case from *Broadcom v Qualcomm*.[8]

The Ninth Circuit also reversed the district court's related finding that Qualcomm had an antitrust duty to grant rival chipmakers licences to its SEPs under the *Aspen Skiing* rationale. In general, a business (even a monopolist) has no duty to deal with its competitors.[9] However, in *Aspen Skiing Co v Aspen Highlands Skiing Cor*p, the Supreme Court held that a monopolist could violate section 2 by refusing to deal with a competitor if (1) the monopolist unilaterally terminates a prior voluntary and profitable course of dealing; (2) the only conceivable rationale or purpose is to sacrifice short-term benefits in order to obtain higher profits in the long run from the exclusion of competition; and (3) the refusal to deal involves products that the defendant already sells in the existing market to other similarly situated customers.[10]

The district court found that Qualcomm's conduct fit *Aspen Skiing*, but the Ninth Circuit disagreed.[11] First, the panel found that Qualcomm did not terminate a 'voluntary and profitable course of dealing' because it never granted rival chipmakers exhaustive licences.[12] Second, it found that Qualcomm's licensing model was in response to changes in patent-exhaustion law and did not involve short-term profit sacrifice (and in fact was motivated by greater profits in both the short and long

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6 *FTC v Qualcomm*, 969 F.3d at 995.
7 id.
8 id. at 996–97.
9 See *Pac Bell Tel Co v linkLine Communications, Inc*, 555 US 438, 457 (2009).
10 *Aspen Skiing Co v Aspen Highlands Skiing Corp*, 105 S. Ct. 2847 (1985).
11 *FTC v Qualcomm*, 969 F.3d at 994–95.
12 id. at 994.

terms). Third, unlike in *Aspen Skiing*, there was no evidence that Qualcomm singled out any specific chip supplier for anticompetitive treatment in its SEP-licensing. On the contrary, it operated under a 'supplier neutral' policy, where all rivals were treated the same.[13] The panel thus held that the district court erred in finding that Qualcomm had a duty to deal under the circumstances of the case.

Finally, the Ninth Circuit reversed the district court's ruling that Qualcomm imposed an 'anticompetitive surcharge' through the 'no licence, no chips' policy. The district court found that Qualcomm's royalty rates were 'unreasonably high' and held that these too-high royalties to device makers disadvantaged Qualcomm's rival chipmakers. The Ninth Circuit rejected both conclusions. First, the court ruled that the district court had misinterpreted Federal Circuit law when it concluded that Qualcomm's royalties were 'unreasonable'.[14] Second, even if Qualcomm's royalties were 'unreasonable', they were not anticompetitive.[15] Fundamentally, the FTC failed to explain how high royalties charged to device makers impaired competition in the relevant chip markets. The Ninth Circuit faulted the district court for focusing on the alleged harms to OEMs (paying higher prices) rather than harm to competition in relevant chip markets.[16] The FTC argued that Qualcomm's high royalties allowed it to charge lower prices on its modem chips, undercutting its chip competitors who did not have offsetting patent-royalty revenue.[17] The Ninth Circuit held that this type of 'margin squeeze' was rejected as a basis for antitrust liability in *linkLine*.[18] In *linkLine*, AT&T controlled upstream access to lines for DSL providers and also sold DSL services itself. The providers complained that AT&T charged inflated wholesale access rates and then squeezed its competitors by selling retail DSL services at low

13 id.

14 id. at 998–99. The district court was concerned that Qualcomm based its patent royalties on finished device prices, rather than on the prices of smaller components like modem chips. Where multi-component finished products are involved, estimates of patent-infringement damages to 'reflect the value attributable to the infringing features of the product, and no more' are required. Ericsson v D-Link Sys, Inc, 773 F.3d 1201, 1226 (Fed. Cir. 2014). One way to accomplish this is to use a royalty rate based off of the smallest saleable patent practicing unit (SSPPU). id. at 1227. The Qualcomm district court held that the modem chip was the relevant SSPU in a mobile phone, and that Qualcomm's royalties based on finished devices were unreasonable. The Ninth Circuit held that a royalty is not per se unreasonable if based on something other than the SSPU. Fed Trade Comm'n Qualcomm, 969 F.3d at 998–99.

15 id. at 999–1000.

16 id.

17 id. at 1000–03.

18 id. at 1001.

rates. The Supreme Court held that AT&T was not required to deal with its competitors at wholesale, and could charge non-predatory low prices at retail.[19] In Qualcomm, there was no allegation that *Qualcomm* engaged in predatory pricing.

Continental Automotive Systems, Inc v Avanci, LLC

The United States District Court for the Northern District of Texas took an approach similar to the Ninth Circuit's in *Continental Automotive Systems, Inc v Avanci, LLC*. On 10 September 2020, that court held that an SEP holder's alleged violation of its FRAND obligations does not create a cause of action under section 2.[20]

Continental Automotive Systems makes telematics control units for vehicles. Continental sells its units to vehicle OEMs, who use the TCUs to provide cellular connectivity in cars.[21] That cellular connectivity requires compliance with cellular technology standards, like the ones at issue in *Qualcomm*. Continental complained that it could not obtain a licence to the relevant cellular SEPs. The relevant SEP holders had pooled their patents and agreed to license the patents only to automobile manufacturers, not to upstream component suppliers like Continental.[22] Continental argued that this refusal to license breached the SEP owners' FRAND commitments and the antitrust laws.[23] The court dismissed Continental's complaint for lack of antitrust standing and failure to state a claim under section 1 or section 2.[24]

The court held that Continental failed to plead antitrust injury because its alleged inability to obtain FRAND licences 'does not harm its competitive position or its position as a consumer of products used in devices'.[25] Continental could still produce TCUs; it just could not produce TCUs that would allow auto OEMs to avoid licensing the relevant SEPs. As the Ninth Circuit did in *Qualcomm*, the *Continental* court distinguished between potential harms to the OEMs in the downstream market and any harm to competition among upstream component suppliers.[26]

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19 *Pac. Bell Tel Co v linkLine Communications, Inc*, 555 US 438, 449, 452 (2009).
20 *Continental Automotive Systems, Inc v Avanci, LLC*, 485 F. Supp. 3d 712 (N.D. Tex. 2020).
21 id. at 722.
22 id. at 725.
23 id.
24 id. at 731, 732, 735. We do not discuss the section 1 claim in this article.
25 id. at729.
26 id. at 730.

Continental also argued that the SEP holders violated section 2 by attempting 'to abuse their monopoly power arising from the standardization process to exclude certain implementers from practicing the standards and extract supra-competitive royalty rates after companies are locked into standardised technology'.[27] The court held that 'it is not anticompetitive for an SEP holder to violate its FRAND obligations.'[28] It reasoned that a SEP holder may lawfully 'obtain additional monopoly power through inclusion in a standard' and that a lawful monopolist may charge monopoly prices. Any violation of the SEP holder's FRAND commitment was a matter for contract law, not antitrust.[29]

Finally, Continental alleged that the defendants unlawfully obtained monopolies by making deceptive FRAND commitments. In dismissing this claim, the *Continental* court went beyond the Ninth Circuit's *Qualcomm* decision and expressly rejected the holding of *Broadcom v Qualcomm*: 'The Court does not agree with those cases concluding that deception of an SSO constitutes the type of anticompetitive conduct required to support a §2 claim'.[30] The court reasoned that using deception to obtain higher prices is not anticompetitive, and any exclusion of rival technologies during the standard-setting process constituted harms to competitors but not the competitive process itself.[31] The *Continental* decision is hardly the last word on this particular issue. Continental has appealed to the Fifth Circuit, and the appeal has not been decided at the time of writing. If the Fifth Circuit affirms, the Fifth and Third Circuits will be split on the question of whether the antitrust laws prohibit breaching a FRAND commitment that was deceptively made in the first place.

IEEE Business Review Letter

The IEEE is an SDO that has promulgated standards for, among other things, Bluetooth and WiFi connectivity. In 2014, the IEEE asked the US Department of Justice's Antitrust Division to review a change to its policies that prohibited SEP holders from seeking injunctive relief unless the target refused to comply with a court judgment of infringement, and recommended that FRAND royalties should be based on the SSPPU. In 2015, the Division stated that it had no present intention to challenge the new IEEE policy and believed it was consistent with antitrust law.

27 id. at 733.
28 id. at 734.
29 id.
30 Idid. at 735.
31 id.

The 2014 IEEE policy was, however, inconsistent with more recent Division views on SDOs, FRAND and antitrust. On 10 September 2020, the Division took the 'extraordinary step' of issuing an updated business review letter.[32] The letter stated that the 2015 business review letter reflected an 'outdated' analysis and that the policies underlying the 2015 letter could be 'discouraging participation in standards development at IEEE and possibly chilling innovation'.[33] The update stated that: (1) SEP holders have the same right to seek injunctive relief as other patent holders; (2) reasonable royalties on SEPs can be determined 'in a variety of ways', and that the Division does not agree with mandating that royalty rates be based on the SSPPU; and (3) SEP policies should 'encourage good faith bilateral licensing negotiations', without advantaging licensees over licensors.[34]

The change in presidential administration brought another reversal on the IEEE policy. In April 2021, the Acting Assistant Attorney General stated that the Division reclassified the 2020 supplemental business review letter as an effort of advocacy and not part of the 2015 original review.[35] The move back to the 2015 letter suggests that the Division under President Biden may return to the prior view that SEP owners should not be able to obtain injunctions against companies that claim they are willing to take a patent licence.

32 Press Release, Justice Department Updates 2015 Business Review Letter To The Institute Of Electrical And Electronics Engineers (20 September 2021), https://www.justice.gov/opa/pr/justice-department-updates-2015-business-review-letter-institute-electrical-and-electronics.

33 Letter from Makan Delrahim, Assistant Attorney General, to Sophia A. Muirhead (10 Sept., 2020) available at https://www.justice.gov/atr/page/file/1315291/download.

34 id.

35 Ben Remaly, 'DOJ appears to walk back Delrahim's IEEE business review letter', *Global Competition Review*, 15 April 2021.

Patent pools

On 13 January 2021, the DOJ issued a business review letter announcing its intention not to challenge the proposed joint patent licensing pool known as the University Technology Licensing Program (UTLP), concluding that the programme is unlikely to harm competition.[36] According to the Division, this was its first review of a patent pool involving non-SEPs.[37]

Patent pools 'may provide procompetitive benefits by integrating complementary technologies, reducing transaction costs, clearing blocking positions, and avoiding costly infringement litigation'.[38] But they also may be subject to abuse, as a means to fix prices, reduce output or exclude firms from competing in markets for goods incorporating the pooled technologies.[39] In particular, pools including substitutable patents 'may in effect fix the prices of substitutable technologies, which eliminates an opportunity for competition and may increase costs to licensees and ultimately consumers'.[40] Also, licensing exclusively through a patent pool could reduce competition with any of the technologies in the pool.[41]

36 Press Release, Dep't of Justice, Justice Department Issues Business Review Letter for Proposed University Technology Licensing Program (13 January 2021), https://www.justice.gov/opa/pr/justice-department-issues-business-review-letter-proposed-university-technology-licensing.

37 Letter from Michael F Murray, Dep't of Justice, to Garrard R Beeney (13 January 2021), www.justice.gov/atr/page/file/1353001/download (UTLP Business Review Request).

38 Joint DOJ and FTC Guidelines for Licensing of Intellectual Property (12 January 2017) § 5.5, https://www.ftc.gov/system/files/documents/public_statements/1049793/ip_guidelines_2017.pdf.

39 id.

40 Letter from Makan Delrahim, Assistant Attorney General, to Mark H Hamer (Response to Avanci LLC request for business review letter) https://www.justice.gov/atr/page/file/1298626/download.

41 US Dep't of Justice & Fed. Trade Comm'n, Antitrust Enforcement and Intellectual Property Rights: Promoting Innovation and Competition (2007), Section III.D.2, available at https://www.justice.gov/atr/antitrust-enforcement-and-intellectual-property-rights-promoting-innovation-and-competition.

Historically, the Division had stated it did not intend to challenge SEP patent pools that included safeguards against these concerns. Including only actually essential SEPs ensured that a pool did not include substitute patents because '[e]ssential patents are necessarily complements, not substitutes',[42] and SEP pools generally included rules allowing its members to independently license the pooled patents.[43]

The UTLP differed from these prior patent pools because (1) it was made up of non-SEPs; and (2) members would license their patents exclusively through UTLP. The Division concluded that the makeup of the portfolio was not anticompetitive because UTLP expressly excluded substitute patents, and UTLP used independent technical experts to review patents and ensure that only complementary, and not substitute, patents were included.[44] The Division also concluded that exclusive licensing was pro--competitive in this context because it protected against free riding.[45] Unlike a patent pool made up of SEPs where the technology was well known, the UTLP itself curated and vetted the patents included in its portfolios; the complementary patents might not otherwise have been known or combined.[46] The Division also noted that the anticompetitive effects of exclusive licensing would be mitigated in this context because (i) unlike an SEP portfolio (which must be licensed as a whole), UTLP would license portfolio patents on an a-la-carte basis, and the UTLP members were unlikely to independently license these particular patents.[47]

The letter signals that the DOJ may be willing to forego challenging proposed pools that apply existing SEP pool guidance to non-SEP settings, particularly when the pool includes robust safeguards that will protect competition and where members do not otherwise license the patents at issue and do not compete in downstream markets.

Settlement of IP disputes

The past 18 months also included a significant appellate antitrust decision regarding settlement of IP disputes. In *1-800 Contacts, Inc v Federal Trade Commission*, the Second Circuit held that trademark settlement agreements were not immune from antitrust

42 Letter from Makan Delrahim, Assistant Attorney General, to Mark H Hamer (Response to Avanci LLC request for business review letter) https://www.justice.gov/atr/page/file/1298626/download.

43 id.

44 id.

45 id.

46 id.

47 id.

scrutiny, but reversed the FTC's condemnation of an agreement among competitors to not bid on one another's names in online advertising keyword auctions.[48] The decision gives significant deference to trademark policy, and may be appealed.

In August 2016, the FTC issued an administrative complaint against 1-800 Contacts, alleging that 1-800 Contacts' trademark settlements constituted unfair methods of competition. 1-800 Contacts had accused its competitors of infringing trademarks in connection with online advertising. In settling those disputes, 1-800 Contacts and competitors agreed not to use one another's trademarks as search advertising keywords. The Administrative Law Judge analysed the agreements under the rule of reason and concluded that 1-800 Contacts' proffered pro-competitive justifications did not outweigh the anticompetitive effects of reducing information available to consumers. On appeal, the Commission analysed the agreements under the 'inherently suspect' standard rather than the rule of reason, and concluded that the agreements violated section 5 of the FTC Act.[49] 1-800 Contacts appealed.

The Second Circuit vacated the Commission's order and remanded with instructions to dismiss the complaint.[50] The court made three important rulings.

First, the Second Circuit concluded that trademark-litigation settlements were not immune from antitrust scrutiny.[51] In 2013, the Supreme Court held in *Federal Trade Commission v Actavis* that patent-litigation settlements among brand and generic pharmaceutical companies were subject to antitrust scrutiny.[52] The Supreme Court rejected the idea that patent-litigation settlements could not be anticompetitive as long as the settlement was consistent with the patent owner's right to exclude others from using its patents. Instead, the Supreme Court held that such settlements should be analysed under the rule of reason.[53] In *1-800 Contacts*, the Second Circuit agreed that the doctrine extended to intellectual property settlements generally, and emphasised that 'the mere fact that an agreement implicates intellectual property rights does not immunize an agreement from antitrust attack.'[54]

48 *1-800 Contacts, Inc v Federal Trade Commission*, 1 F. 4th 102 (2d Cir. 2021).
49 *In the Matter of 1-800 Contacts, Inc*, Dkt. No. 9372, 2018 WL 6078348 (FTC 2018).
50 *1-800 Contacts*, 1 F. 4th 102.
51 id. at 113.
52 *Federal Trade Commission v Actavis, Inc*, 570 US 136 (2013).
53 id. at 159.
54 *1-800 Contacts*, 1. F.4th at 113 (internal quotation omitted).

Second, however, the Second Circuit rejected the FTC's use of the 'inherently suspect' framework in part because the agreements involved intellectual property rights. The abbreviated inherently suspect analysis is appropriate only where business activities are plainly anticompetitive or courts have sufficient experience with the type of conduct at issue to condemn it without much further analysis.[55] The Second Circuit decided that agreements involving trademarks could not be readily assumed anticompetitive. Agreements to protect trademarks could be pro-competitive, and therefore should be analysed under the rule of reason.

Third, the Second Circuit applied the rule of reason framework and concluded that the FTC failed to show that any anticompetitive effects outweighed 1-800 Contacts' pro-competitive justifications. The court credited 1-800 Contacts' argument that the agreements protected its trademark rights and reduced litigation costs. Although the FTC argued that 1-800 Contacts' underlying trademark claims were meritless, the Second Circuit reasoned that trademark agreements could be pro-competitive (and perhaps should be presumed pro-competitive) even if they marginally advance trademark policies.[56] The court then determined the FTC failed to show that there was a less restrictive alternative to the trademark settlements. The court rejected the FTC's proffered alternatives, deferring to the 'arm's length [trademark] use agreements negotiated by parties to those agreements'.[57]

The Second Circuit's decision creates some new questions, and may be further appealed. For example, is unclear what, if any, relevance the validity of the underlying trademark claims has to any pro-competitive justifications. The authors are not aware of any case holding that the underlying conduct at issue here – bidding on a competitor's trademarks as advertising keywords – constitutes trademark infringement. One could argue, then, that a settlement agreement prohibiting the practice does not advance trademark interests or policy after all. The Second Circuit seemed to assume that the settlements were legitimate trademark settlements because there was 'a lack of evidence here that the Challenged Agreements are the product of anything other than hard-nosed trademark negotiations'.[58] A different record could require a more complicated analysis.

55 id. at 115–16.
56 id. at 120.
57 id. at 122.
58 id. at 120.

Looking ahead to the end of a DOJ/FTC feud over patent enforcement?

The US DOJ and FTC were in open conflict over IP and antitrust issues for the past few years. Under Assistant Attorney General Delrahim, the DOJ Antitrust Division developed a robust statement of interest/amicus brief programme, and did not hesitate to weigh in on important IP and antitrust issues. The DOJ weighed in directly on the FTC's dispute with *Qualcomm*, submitting an amicus brief challenging the district court's application of the antitrust laws and arguing that the FTC had failed to show the necessary harm to competition. While the DOJ had advanced views emphasising the pro-competitive benefits of robust IP protections and enforcement and seeing a more limited role for antitrust enforcers to intervene in patent-licensing disputes, the FTC had been taking a more expansive view in cases like *Qualcomm*. While we do not expect the agencies to always agree in the future, the DOJ's recent actions regarding the IEEE review letter may be a sign that the new administration will emphasise different concerns.

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ISBN 978-1-83862-581-8