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Does DOJ's Rebranding Of Patent Policy Letter Hint At More?

By **Matthew Perlman**

Law360 (May 5, 2021, 5:13 PM EDT) -- The U.S. Department of Justice recently set the antitrust community buzzing about a possible shift in patent policy when it reclassified a business review letter for a technology standards organization as a piece of advocacy, rather than listing it as formal guidance.

The seemingly mundane bureaucratic move raised questions both about the new administration's approach to patent policy and the tactics the previous administration used to push its views.

The DOJ has confirmed to Law360 that a supplement issued in September for a business review letter evaluating the Institute of Electrical and Electronics Engineers Inc.'s patent policy should be considered an effort of advocacy and not part of the original 2015 review.

The move, carried out by relocating the supplement from the business review section to the advocacy section of the antitrust division's website, effectively walks back recommendations the division made last year urging IEEE to consider revising its patent policy. The maneuver is a repudiation of the decision to amend an existing review letter, but may also signal a departure from the Trump administration's approach to patents.

The agency apparently reclassified the supplement on its website following the change in administration without first explaining the decision. However, acting Assistant Attorney General Richard A. Powers later issued a brief statement:

"The DOJ is restoring the 2015 business review letter to its original state by moving the 2020 competition advocacy letter to the competition advocacy portion of our website, and removing a watermark that had been placed on the 2015 letter," Powers said. "This action is a return to previous practice that is consistent with existing department regulations."

Such procedural minutiae might seem insignificant, except that the review centers on important issues in the standard-setting world, where patentholders and licensees of their intellectual property scramble for leverage in royalty negotiations.

It's also an area where leadership at the DOJ during the Trump administration made a marked and vocal departure from previous policy. The DOJ began advocating for an approach to patents that favors the rights of patentholders over previous concerns about their potential to demand unfair licensing fees and engage in other anti-competitive activity.

The division had also not issued an update to a business review letter before, making the IEEE supplement unprecedented and raising questions about the procedure more generally.

Kayvan B. Noroozi of Noroozi PC, whose work was cited in the 2020 update to the IEEE letter and by the prior administration's antitrust chief during speeches, told Law360 that one has to wonder if the move to reclassify the guidance was really just "good housekeeping of some sort, or is it really a substantive change" to patent policy or the division's approach?

"It is unlikely that the only motivation here is purely procedural housekeeping," Noroozi said. "I think it sends a signal that the current leadership of the DOJ antitrust division does not necessarily want to wholeheartedly embrace the 2020 letter."

But Noroozi also said it's too soon to tell how the new administration will ultimately approach policy surrounding standard-essential patents and that relegating the letter to a piece of advocacy suggests the new administration will at least be less "assertive with respect to this unfolding dynamic between the implementers and the innovators."

Michael A. Carrier, a professor at Rutgers Law School who sent a letter along with dozens of other academics raising concerns about the DOJ's patent policies during the Trump administration, told Law360 the approaches taken previously were far outside the "bipartisan antitrust mainstream."

"As a result, I expect that whoever leads the Antitrust Division will reverse some of these positions," Carrier said. "My guess is that re-classifying the 2020 supplement to the IEEE business review letter was one piece of low-hanging fruit."

How We Got Here

IEEE requested a business review letter in 2014 for proposed changes to the standard-setting group's patent policy to clarify the rights and obligations for those whose patents have been included in industry standards.

The DOJ issued a favorable review letter the following year finding IEEE's policy would promote the efficient adoption and licensing of standard-essential patents, or SEPs. In particular, the DOJ noted that the policy included limits on the ability of SEP holders to seek injunctions in court for patent infringement and recommended that licenses be provided on a component level, among other things intended to address the potential for patentholders to hold-up the licensing process.

But the direction of the antitrust division's policy in the standard-setting arena changed starkly during President Donald Trump's administration, with then-Assistant Attorney General Makan Delrahim giving a string of speeches promoting what he calls the "New Madison" approach.

Delrahim chose to place more focus on the potential for licensees of SEPs to collectively hold out for lower royalty rates, rather than having enforcers be overly guarded about patentholders accused of holding up the process. He also viewed disagreements about commitments made by patentholders to provide licenses on fair terms as contract or patent issues, and not an antitrust problem, as the Federal Trade Commission contended in a case filed against Qualcomm during the Obama administration.

In addition to Delrahim's speeches, the division also ramped up its amicus program during the Trump

administration, filing briefs in more private cases to try to influence the courts and weighing in on several to support SEP holders.

Though Delrahim was recused from the matter because of his past work for the company, the antitrust division also opposed the FTC's enforcement action targeting Qualcomm for monopolization over its SEP licensing practices, even arguing in front of the Ninth Circuit against its sister agency to help get the case tossed.

The positions staked out by the division received mixed reactions from stakeholders, academics and practitioners, with some contending the approach better balances the interests of patentholders and licensees and others saying it overlooks patentholders' market power.

Noroozi said the interest shown by the division and others is reflective of how important the topic is, saying there's a balance to be struck between companies that invest in research and innovation and those that package innovative technologies into consumer products.

"The harmony of that ecosystem … is a very significant question that has become more and more relevant to a broader section of the public," he said.

But Noroozi also said the DOJ's role on patent policy issues sometimes gets over-emphasized, calling its views "informative and persuasive," but "not binding in any sense."

"Ultimately, it's the courts that have to reach decisions around this ongoing debate," he said.

The Update

In September, the DOJ announced that the division was updating the 2015 IEEE letter over concerns that it was being miscategorized and because of changes in the industry and in policy since it was issued.

The supplement contends the original letter had been incorrectly held up by IEEE and others as an endorsement or approval of the group's patent policies, but then goes on to say the analysis itself was no longer in line with current U.S. law and policy. In particular, the revision took exception to the policy's constraints on patent owners seeking injunctions in court to stop alleged infringement and its recommendations about how royalty rates should be set.

While business review letters are intended to provide specific guidance to specific companies or groups at the time a request is made, Carrier, the Rutgers Law professor, said that in the standard-setting context they seem to have more lasting effect given how frequently the same issues recur. He also said he's not aware of the DOJ previously retracting or updating a business review letter, let alone "a mere five years after it was issued."

"If they're withdrawn whenever an [assistant attorney general] enters office with different views, that wouldn't be a positive development," he said.

Noroozi said the 2020 update goes against the normal procedure in that review letters are generally issued only when companies request them, but that it could be seen as trying to fill a gap, since there's no apparent way for the agency to raise concerns about how its past reviews are being interpreted or to offer a new analysis based on policy changes or other developments.

"The question is, how can the DOJ put forward important policy views like the ones expressed in the 2020 letter in a situation like this one, where the circumstances have been changing and the previously stated positions may require update or clarification?" Noroozi said.

Christopher J. Kelly, a partner with Mayer Brown LLP, told Law360 the IEEE issue could be a catalyst for developing an organized and principled approach to the way the antitrust division communicates significant policy changes.

"Do you use successive, warring business review letters to leapfrog each other? Do you give a speech? Is there any circumstance under which it's the right thing to do to simply pull the plug on a letter?" Kelly asked. "Going forward, people might want to give some thought to how to handle that."

President Joe Biden has yet to name a pick to lead the antitrust division, so there has not yet been much indication about how the DOJ will approach SEP policy moving forward. But if the DOJ does ultimately change course on its approach to patent policy, enforcers will have to grapple with some of the developments mentioned in the 2020 IEEE update, perhaps most notably the Ninth Circuit's August ruling in the FTC's case against Qualcomm.

That, Kelly said, could make a shift tricky.

"It may take some more thought to figure out what the next step is," Kelly said. "Whatever you think of the outcome, there certainly are elements of it that have a lot of force. So, if you're going to look to develop an antitrust policy that's contrary to the Qualcomm decision, you'd have to think very carefully about how you are going to go about that."

--Editing by Kelly Duncan.