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Why the DOJ's latest IEEE move is a giveaway to Big Tech at the expense of US technology leadership

While the Department of Justice is still waiting for its next antitrust chief, it took the unusual step recently of moving a 2020 business review letter to a different part of its website. IP lawyer and consultant David Cohen argues that the SEP community should be concerned.

While an assistant attorney general for antitrust at the Department of Justice is yet to be nominated, let alone confirmed, on 16th April the media broke out surprising news that the Antitrust Division has moved its September 2020 [Business Review Letter \("BRL"\) to IEEE](#) from its BRL web page to its [comments](#) web page.

Acting Assistant Attorney General for Antitrust Richard Powers, a career DOJ official who is manning the position until a successor to Makan Delrahim is appointed, told the press that "[t]his action is a return to previous practice that is consistent with existing Department regulations".

Why is a tweak to a website newsworthy? And what's the real story here? You won't get an answer to that question from the DOJ, which is hiding behind vague procedural language, so let me break this down for you.

Between 2013 and early 2015, an Apple and Intel-led technology buyers' group initiated and led an imbalanced process that rewrote the patent policy of the IEEE, a standards development organisation whose flagship standard is Wi-Fi. As technology users, they rewrote it in a manner that significantly devalues proprietary cutting-edge technology that goes into Wi-Fi, in order to save Big Tech money for the use of other companies' technologies that their products utilise. In February 2015, the DOJ Antitrust Division [issued a BRL](#) to IEEE informing it that it did not intend to bring an enforcement action over the policy change. The 2015 BRL also made predictions about the future direction of US law relating to standard essential patents.

As I have written in detail [before](#), the effects of the new policy have proven counterproductive for IEEE standards, especially Wi-Fi. Worse yet from a broader US perspective is that in the following years, Big Tech 'volunteers' at IEEE have proactively [reached out](#) to Chinese antitrust enforcers to misrepresent the 2015 BRL to them as a supposed DOJ "endorsement" of the IEEE policy and to encourage them to investigate and fine other leading US technology companies such as [Qualcomm](#).

I was not the only one alarmed with these developments. Bipartisan voices from the US Senate's [IP subcommittee](#) as well as from former [leaders of the DOJ Antitrust Division, FTC and USPTO](#) were equally concerned about their long-term effects on US technological leadership.

The 2020 DOJ update to the 2015 BRL took account of these bipartisan concerns by making three points:

- First, it demanded that misrepresentation of the 2015 DOJ BRL in the US and abroad stop.
- Second, it explained how US case law since February 2015 developed in a different direction than the one predicted by the 2015 BRL.
- Third, it reviewed the negative effects of the IEEE policy. It then encouraged the standards body to consider these issues when assessing whether an update of its policy is now warranted.

In late February 2021, *IAM* broke the news that IEEE had decided to [open a review of its controversial patent policy](#), calling for "removal or revision of factors relating to royalty calculation and injunctive relief". As Apple and other Big Tech players' aligned financial interests are to kill this recently announced policy review, they lobbied the antitrust division to help their cause.

On the same day Acting AAG Powers announced the rejiggering of the website, the [ACT App Association](#) issued a triumphant [statement](#) crediting the development to its well-funded lobbying prowess. Regrettably, the statement also reverts to Big Tech's prior misrepresentations, characterising the DOJ move as "support[ing] [] IEEE-SA's... patent policy [regarding FRAND] licensing requirements . . . including a 'License to All' requirement and . . . clarifications on the availability of prohibitive orders, the valuation of SEPs, and other

important matters”.

While Big Tech scored some points here, the DOJ exercise is disturbing on multiple levels and marks an overall loss for the US.

- First, it encourages Big Tech to misrepresent US government positions both domestically and overseas (Powers' statement did not say DOJ supports the 2015 IEEE patent policy, let alone any of the other elements heralded by ACT, but the department is doing nothing to stop this misrepresentation).
- Second, while the Antitrust Division prides itself on [increasing transparency](#), this exercise was carried out in a highly opaque manner at a time when political leadership is missing – an unfortunate example of bad government.
- Third, it demonstrates Big Tech's sway over the current DOJ despite strong bipartisan concerns about Big Tech [market dominance](#), bipartisan concerns about the 2015 DOJ BRL and widespread [concerns](#) about strong tech ties to the current DOJ leadership.
- Finally, the potential ramifications for US leadership in cutting-edge wireless technology and, consequently, US national security are grave. Unlike China, the US does not subsidise its companies' costly investment in R&D for open standards development. Many US companies rely on licensing revenue for that.

While policies such as the IEEE's 2015 policy, which Big Tech says the DOJ now supports, will perhaps save Big Tech behemoths some money, they [threaten US leadership](#) in cutting edge wireless standards such as 5G and compromise the future of the IEEE, whose [standards board](#) is already increasingly comprised of Chinese players. Not for the first time, Big Tech seems to be far more interested in changing the ground rules to save a few pennies than in the United States' economic and political interests.

David L. Cohen provides legal services through his firm David L. Cohen, P.C. and IP consultant services through Kidon IP Corp.

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