

Ex-FTC chief says aggressive enforcement, broad remedies stifle IP innovation – Taipei symposium

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- Former US officials at conference co-sponsored by Qualcomm
- Extra-territorial remedies controversial in IP cases

Antitrust authorities should not assume IP-holders violate competition even where competitors appear harmed, and should refrain from issuing extra-territorial remedies in patent-related cases, a former chairman of the US Federal Trade Commission said in Taipei today (9 March).

“When designing remedies, it is important that antitrust agencies respect the limitations of traditional antitrust roles,” Jon Leibowitz said in a keynote speech at the International Symposium on IP Licensing and Competition Laws.

He said no good would come of enforcers using antitrust “as a way to dilute IP rights or devalue patents – as a fig leaf for industrial policy or to protect national interests – whether developed in their home country or abroad.”

“In today’s climate of increasing economic nationalism, you cannot ignore the possibility of a tit-for-tat retaliation – or even a trade war,” he added. Leibowitz is currently a partner in Davis Polk.

Leibowitz’s comments were echoed by several other US-based antitrust and IP lawyers and scholars attending the conference, which was organized by the law school of the National Taiwan University. Sponsors of the event included the Intellectual Property Office of Taiwan’s Ministry of Economic Affairs, the Board of Science and Technology of the Executive Yuan and Qualcomm, among others.

The Taiwan Fair Trade Commission (TFTC) is currently investigating alleged patent abuse by Qualcomm.

David Kappos, the former director of the US Patent and Trademark Office, said typical abuse theories of patent holdup and royalty-stacking have been proven “false”. Patent holdup occurs when switching costs may lock-in patent implementers. And royalty stacking refers to claims from multiple standard essential patent holders causing high cumulative royalties.

“While these theories are well-meaning and intuitive, neither patent holdup nor royalty stacking exists in any form that artificially inflates the costs of technology products or suppresses competition,” Kappos said.



Sector: TMT
Topics: Intellectual Property, Abuse Of Dominance/Single Conduct, International Trade & Disputes

Grade: Confirmed

Companies
Qualcomm Incorporated

Agencies
Taiwan Fair Trade Commission (TFTC)

There are no files associated with this Intelligence

He also said the way Taiwan handles IP-related cases would be “critical” to the country’s ambition to lead the IP sector.

“Public policies that weaken the strong patent protections and industry standards that have led to so much innovation in these areas are devolutionary,” Kappos said.

Wang Li-dar, associate professor of law at Taiwan’s National Chengchi University and a conference speaker, said there are legitimate reasons for antitrust regulators to intervene in the IP business.

“When SEP holders break FRAND (fair, reasonable and non-discriminatory) commitments, they do not keep their promises in good faith and are likely to turn standard-setting into anti-competitive practices,” he said. “That bad faith and the likelihood to be anti-competitive constitute the foundation for regulators to intervene.”

Wang insisted that patent holdup does exist, citing the 2013 US court ruling in *Microsoft v. Motorola*.

Andrew Guzman, dean and professor of law at the University of Southern California, and Koren Wong-Ervin, a former counsel for the FTC, said antitrust enforcers should not issue extraterritorial remedies in IP cases but rather apply solutions respectful of counterpart agencies.

Wong-Ervin said she was “very concerned” by the FTC’s 2013 consent agreement with Google/Motorola Mobility, as well as the Korea Fair Trade Commission’s recent Qualcomm decision, in both of which global remedies were imposed on SEP holders. The TFTC is also reportedly considering imposing worldwide restraints on Qualcomm’s enforcement of its global patent portfolio, she said in a report prepared for the conference.

“It’s hard to see when you’d need worldwide remedies,” Wong-Ervin said, adding such broad remedies likely aim at protecting domestic exporters who sell goods overseas.

“China National Development and Reform Commission’s (NDRC) decision against Qualcomm illustrated nicely remedies that recognize the principle of international comity, specifically limiting conducts of domestic market and domestic patents. This also honors sovereignty of other nations,” she said.

by Robert Lo in Taipei