

Catholic University Journal of Law and Technology

Volume 28
Issue 2 Spring 2020

Article 9

2020

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Recommended Citation

Anita Alanko, *The New Madison Approach to Antitrust Law and Intellectual Property Law*, 28 Cath. U. J. L. & Tech 219 (2020).

Available at: <https://scholarship.law.edu/jlt/vol28/iss2/9>

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THE NEW MADISON APPROACH TO ANTITRUST LAW AND INTELLECTUAL PROPERTY LAW

Anita Alanko*

Imagine a world where intellectual property law and antitrust law live in perfect harmony, supporting each other's goals to foster a rich competitive economy with incentives to innovate for the betterment of society.¹ Makan Delrahim, assistant attorney general of the antitrust division at the Department of Justice ("DOJ"), recently announced "A New Madison Approach" as his vision of antitrust enforcement to achieve a world that supports both the innovators and those who use innovations through patent licensing.² Broadly, Delrahim advocates strong patent rights to encourage the efforts of both innovators and implementers in the context of standard setting organizations ("SSOs") and the licensing of patented technology.³ This is a shift from past

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¹ Proposing a hypothetical as a play on words found in case law, *see* *United States v. Westinghouse Elec. Corp.*, 648 F.2d 642, 646 (9th Cir. 1981) ("There is an obvious tension between the patent laws and antitrust laws. One body of law creates and protects monopoly power while the other seeks to proscribe it.").

² Makan Delrahim, Assistant Attorney Gen., Antitrust Div. of U.S. Dep't of Justice, The "New Madison" Approach to Antitrust and Intellectual Property Law, Address Before the University of Pennsylvania Law School (Mar. 16, 2018) (to the best of the author's knowledge, there is no "Old Madison Approach" and the "New Madison" title is inspired by the writings of President James Madison reflecting support for strong patent protection).

³ *Id.*; Richard A. Epstein & Kayvan B. Noroozi, *Why Incentives for "Patent Holdout" Threaten to Dismantle FRAND, and Why It Matters*, 32 BERKELEY TECH. L. J. 1383, 1383

antitrust scholarship, and Federal Trade Commission (“FTC”) Commissioner Terrell Sweeney quickly disagreed with a basic premise of the New Madison Approach.⁴ Shortly after Delrahim announced this approach, Commissioner Sweeney wrote that the FTC should “not abdicate its antitrust enforcement mission in this area” of patent hold-up.⁵

The New Madison Approach has four premises. First, patent hold-up is not an antitrust problem.⁶ If an entity makes a commitment to license on fair and reasonable terms, but fails to do so, contract or common law remedies are available.⁷ Second, SSOs should better protect against patent hold-out to ensure maximum incentives to innovate.⁸ The New Madison Approach urges that implementer hold-out is a greater hindrance to innovation than innovator hold-up, and the role of antitrust law is to ensure that both innovators and implementers do not harm competition by concerted action in violation of antitrust law.⁹ Third, patent holder injunction rights should be protected and not limited.¹⁰ Patent holders have the *right to exclude* others from making, using, offering for sale, selling, or importing into the United States the invention.¹¹ Therefore, a patent holder has the right to exclude by seeking an injunction, and to limit this ability of a patent holder allows for potential abuse by the implementer.¹² Fourth, a unilateral and unconditional refusal to license a valid patent should be per se legal.¹³ An inventor should not be forced to license to a competitor.¹⁴

The lofty goal of intellectual property law and antitrust law living in perfect

n.1 (2017) (explaining that innovators bring innovation to industry, implementers manufacture or commercialize products, and an implementer may also be an innovator).

⁴ TERRELL MCSWEENEY, HOLDING THE LINE ON PATENT HOLDUP: WHY ANTITRUST ENFORCEMENT MATTERS 1 (2018), https://www.ftc.gov/system/files/documents/public_statements/1350033/mcsweeney_-_the_reality_of_patent_hold-up_3-21-18.pdf.

⁵ *Id.* at 6.

⁶ Delrahim, The “New Madison” Approach to Antitrust and Intellectual Property Law, *supra* note 2.

⁷ *Id.*; Phillip B.C. Jones, *Violation of a Patent License Restriction: Breach of Contract or Patent Infringement?*, 33 IDEA: J. L. & TECH. 225, 227 (1993) (describing the protection of patent rights by federal statutory law or state contract law).

⁸ Delrahim, The “New Madison” Approach to Antitrust and Intellectual Property Law, *supra* note 2 (discussing that hold-out is when implementers do not take a license and practice efficient breach).

⁹ *Id.*

¹⁰ *Id.*

¹¹ 35 U.S.C. § 154(a)(1) (2012).

¹² Delrahim, The “New Madison” Approach to Antitrust and Intellectual Property Law, *supra* note 2 (noting that implementers have the incentive to infringe if injunctions are not available).

¹³ *Id.*

¹⁴ *Id.*

harmony is not easily achieved. There are passionate views on both sides of the debate, and it appears that the two leading competition enforcement agencies in the United States have differing views.¹⁵

This Comment traces the development and reasons two important competition agencies can reach differing opinions by reviewing the structure of the agencies, patent statutes, and case law. Furthermore, this Comment will offer an opinion on which approach should be followed. In Part I, this Comment will discuss the goals of the relevant antitrust laws, the overlapping authority of the DOJ and the FTC, and how politics can influence their decision whether or not to pursue an antitrust violation. Next, the roles of the United States Patent and Trademark Office (“USPTO”) and the United States International Trade Commission (“ITC”) will be described because they contribute to the relevant dialogue. The goals of the intellectual property system and the roles of an innovator and implementer will also be analyzed. The end of Part I will explain the standard essential patent, patent hold-up, and patent hold-out as they relate to the New Madison Approach.

Section II addresses the shift in policy proposed by the New Madison Approach. This section will explore the views of supporters of the Madison Approach, as well as examine the viewpoints of those who oppose this approach. There will also be a discussion about how these issues are handled in other jurisdictions.

Finally, Section III analyzes the New Madison Approach. Ultimately, intellectual property law and antitrust law can work together, but it requires a flexible approach in order for markets to decide the winners and losers in standards and technology. Having a variety of remedies available, including injunctions, ensures that parties will act reasonably. A thorough analysis and testing of the New Madison Approach can develop clear policy and guidance.

Because of the inherently unpredictable time frame of innovation, creating new products demands flexibility. Antitrust law should remember this need for flexibility when addressing patent hold-up and hold-out, injunctions, and unilateral refusals to license. The DOJ and FTC must work together so that this country can have a strong patent system that ultimately benefits the public.

¹⁵ Kate Gehl et al., *DOJ and FTC Signal Shifts in Antitrust Enforcement of Essential Patent Disputes*, JDSUPRA (Oct. 12, 2018), <https://www.jdsupra.com/legalnews/doj-and-ftc-signal-shifts-in-antitrust-97023/>.

I. INTRODUCTION TO THE RELEVANT LAW AND TERMS OF ART

A. Antitrust Law: Its Enforcers and Related Government Agencies

Antitrust law in the U.S. first started because large firms controlled the markets for basic goods, such as oil, sugar, and tobacco, by using “trusts.”¹⁶ The Sherman Act was enacted in 1890 and states, “Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce amount the several States, or with foreign nations, is declared to be illegal.”¹⁷ The broad terms of Section 1 of the Sherman Act are seen in other antitrust statutes, and the interpretation of them has caused differing opinions.¹⁸ The debate at hand is created by the various goals and perspectives on antitrust law that an enforcement agency or public enforcer can hold.¹⁹

Complicating the matter that enforcers may have different goals and perspectives is the fact that there are overlapping authorities who enforce antitrust law, in addition to private rights of action.²⁰ The two main competition authorities are the DOJ and FTC.²¹ State attorneys general also are public

¹⁶ ANDREW I. GAVIL ET AL., *ANTITRUST LAW IN PERSPECTIVE: CASES, CONCEPTS AND PROBLEMS IN COMPETITION POLICY* 1 (3d ed. 2017); Wayne D. Collins, *Trusts and the Origins of Antitrust Legislation* 81 *FORDHAM L. REV.* 2279, 2316 (2013) (describing the 1882 Standard Oil Trust in which trust beneficiaries gave assets to the Standard Oil Company in return for stocks, and beneficiaries gave their stock to a board of trustees to be held in trust for a Standard Oil Trust certificate; trustees controlled the operations of the various Standard Oil Companies).

¹⁷ Sherman Antitrust Act of 1890, 26 Stat. 209 § 1 (codified as amended at 15 U.S.C. § 1 (2012)).

¹⁸ Barak Orbach, *Foreword: Antitrust's Pursuit of Purpose*, 81 *FORDHAM L. REV.* 2151, 2152–55 (2013) (discussing perspectives such as the Borkean, Original Intent, Consumer Welfare, Anti-Trust, Consumer Surplus, Total Surplus and Competition perspectives); see Albert Allen Foer & Arthur Durst, *The Multiple Goals of Antitrust*, 63 *ANTITRUST BULL.* 494, 502 (2018) (discussing the consumer welfare model and suggesting a goal based on competition and cooperation); see generally, U.S. DEP'T OF JUSTICE ANTITRUST DIV., *ANTITRUST DIVISION MANUAL* (5th ed. 2012), <https://www.justice.gov/atr/file/761166/download> (listing antitrust statutes enforced by the Department of Justice); see also *Statutes Enforced or Administered by the Commission*, FED. TRADE COMM'N, <https://www.ftc.gov/enforcement/statutes> (last visited Apr. 14, 2020) (listing statutes enforced by the Federal Trade Commission).

¹⁹ David A. Hyman and William E. Kovacic, *Institutional Design, Agency Life Cycle, and the Goals of Competition Law*, 81 *FORDHAM L. REV.* 2163, 2173–74 (2013).

²⁰ GAVIL ET AL., *supra* note 16, at 62–63 (describing enforcement by the Department of Justice, the Federal Trade Commission, the attorneys general of the fifty states, and aggrieved individuals).

²¹ See *A Brief Overview of the Federal Trade Commission's Investigative, Law Enforcement, and Rulemaking Authority*, FED. TRADE COMM'N, <https://www.ftc.gov/about-ftc/what-we-do/enforcement-authority> (last updated Oct. 2019) (showing the U.S. International Trade Commission can also address unfair competition, but that is not a focus

enforcers of antitrust law. Private parties can pursue claims before the ITC when goods are imported into the United States.²² Exclusion orders of the ITC are enforced by U.S. Customs and Border Protection of the U.S. Department of Homeland Security.²³

The antitrust division of the DOJ is charged with antitrust enforcement.²⁴ The assistant attorney general for the antitrust division is appointed by the president and confirmed by the Senate.²⁵ As the DOJ is part of the executive branch, the assistant attorney general is a political appointee who can be removed without cause at any time.²⁶ The DOJ performs both civil and criminal enforcement under the antitrust statutes and offers guidance to the business community with respect to antitrust laws.²⁷

The FTC and the FTC Act were created and enacted in response to a perceived deficiency in enforcement of the Sherman Act.²⁸ Section 5 of the FTC Act declares as unlawful “[u]nfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce.”²⁹ The FTC has five commissioners, each appointed by the president, by and with the advice of the Senate, and no more than three may be of the same political party.³⁰ This bipartisan commission also includes term limits on each commissioner of seven years.³¹ The president also appoints from the five commissioners one who serves as chair, and as such the chair usually changes when a new president is appointed.³² While each commissioner, including the chair, only gets one vote on matters, the chair can influence the direction in which the commission is taken.³³

of this comment).

²² 19 U.S.C. § 1337(a)(1)(A)(iii) (2012).

²³ 19 C.F.R. § 12.39(b) (2012).

²⁴ See ANTITRUST DIVISION MANUAL, *supra* note 18, at I-2 (stating that the mission of the Antitrust Division is “the promotion and maintenance of competition in the American economy”).

²⁵ *Id.*; 28 U.S.C. § 506 (2012).

²⁶ ABA SECTION OF ANTITRUST LAW, FTC PRACTICE AND PROCEDURE MANUAL 12 (2d ed. 2014); ABA SECTION OF ANTITRUST LAW, DOJ CIVIL ANTITRUST PRACTICE AND PROCEDURE MANUAL 12 (2d ed. 2018) (discussing actions that can be seen as politically motivated).

²⁷ 28 C.F.R. §§ 0.40–0.41 (listing the functions of the antitrust division).

²⁸ FTC PRACTICE AND PROCEDURE MANUAL, *supra* note 26, at 1–3; Marc Winerman, *The Origins of the FTC: Concentration, Cooperation, Control, and Competition*, 71 ANTITRUST L. J. 1, 13 (2003) (describing the influence of the *Standard Oil* decision announcing the rule of reason, declarations that “The Trusts Have Won”, and other influences leading to the creation of the FTC).

²⁹ 15 U.S.C. § 45(a)(1) (2012).

³⁰ *Id.* § 41.

³¹ *Id.*

³² FTC PRACTICE AND PROCEDURE MANUAL, *supra* note 26, at 67–68.

³³ *Id.* at 68–69.

The DOJ and FTC have overlapping authority and work together through a process of “clearance.”³⁴ They also collaborate to issue guidance and help firms predict when behavior could be anticompetitive, even though each case is fact-specific.³⁵ They have jointly issued “Antitrust Guidelines for Licensing of Intellectual Property” that provide helpful guidance to consider in the area of patent licensing.³⁶

Each state and the District of Columbia, American Samoa, Guam, the Northern Mariana Islands, Puerto Rico, and the Virgin Islands have an office of the attorney general.³⁷ State laws allow attorneys general to sue on behalf of their constituents in state and federal courts using either state antitrust statutes or federal statutes.³⁸ Multistate litigation can help reduce costs of enforcement through cost sharing arrangements and deputization of staff attorneys from one state to litigate in other states as assistant attorneys general.³⁹ As demonstrated in one example, the attorney general of New York successfully sued a pharmaceutical manufacturer, to enjoin its efforts to force patients to “product-hop” from one form of a drug with a shorter patent term to a different form of the drug with a longer patent term.⁴⁰ The state attorneys general also have an interest in protecting their state’s residents from patent related antitrust violations.

The USPTO issues U.S. patents and registers federal trademarks.⁴¹ As part of the most recent patent reform, the America Invents Act (“AIA”) allows the Patent Trial Appeal Board to review the patentability of claims under *inter partes* review (“IPR”) based on the petition of a third party who seeks to invalidate a patent.⁴² This new IPR procedure has been used to invalidate patents

³⁴ DOJ CIVIL ANTITRUST PRACTICE AND PROCEDURE MANUAL, *supra* note 26, at 49, 55–62 (discussing how through clearance, an enforcement agency gains jurisdiction based on agreements between the DOJ and FTC).

³⁵ U.S. DEP’T OF JUSTICE & FED. TRADE COMM’N, ANTITRUST GUIDELINES FOR THE LICENSING OF INTELLECTUAL PROPERTY 1 (2017), <https://www.justice.gov/atr/IPguidelines/download>.

³⁶ *Id.*

³⁷ NAT’L ASS’N OF ATTORNEYS GEN., STATE ATTORNEYS GENERAL POWERS AND RESPONSIBILITIES 7 (Emily Myers ed., 4th ed. 2018).

³⁸ *See generally* Emily Myers, *Chapter 15: Antitrust*, in STATE ATTORNEYS GENERAL POWERS AND RESPONSIBILITIES 313–17 (Emily Myers ed., 4th ed. 2018) (discussing how state antitrust statutes are generally similar to the Sherman Act and construed in the same manner as federal antitrust laws).

³⁹ *Id.* at 318–19.

⁴⁰ *Id.* at 321.

⁴¹ *See generally Patent Policy*, USPTO, www.uspto.gov/ip-policy/patent-policy (last updated Nov. 1, 2019) (providing information on intellectual property policy, practice, and procedures).

⁴² *See generally Inter Partes Review*, USPTO, <https://www.uspto.gov/patents-application-process/appealing-patent-decisions/trials/inter-partes-review> (last updated May

at an alarming rate; however, as certain rules have been tweaked, the “death knell” of patents may subside.⁴³

The ITC can also be a forum in which to assert antitrust claims. The ITC investigates alleged violations of the Smoot-Hawley Tariff Act of 1930 (“Tariff Act”).⁴⁴ These Section 337 Investigations address unfair methods of competition, such as the following under Section 1337(a)(1)(A):

Unfair methods of competition and unfair acts in the importation of articles ... into the United States, or in the sale of such articles by the owner, importer, or consignee, the threat or effect of which is – (i) to destroy or substantially injure an industry in the United States; (ii) to prevent the establishment of such an industry; or (iii) to restrain or monopolize trade and commerce in the United States.⁴⁵

U.S. industries can utilize the ITC to obtain relief from unfair competition when a product is being imported into the U.S.⁴⁶ Antitrust issues may arise when there is a threat “to restrain or monopolize trade and commerce....”⁴⁷ The ITC may issue an exclusion order⁴⁸ to stop the importation of a product or issue a cease and desist order for the unfair methods or acts.⁴⁹ However, any remedy is subject to a public interest inquiry.⁵⁰

In certain circumstances, the ITC also investigates claims of patent infringement for products covered by a U.S. patent or products made by a process covered by a U.S. patent.⁵¹ The remedies available for patent infringement are exclusion orders or cease and desist orders, which are available

9, 2017) (describing the *inter partes* review process); 35 U.S.C. § 311(b) (2011) (“[A] person who is not the owner of a patent” may petition for *inter partes* review).

⁴³ ABA SECTION OF ANTITRUST LAW, HANDBOOK ON THE ANTITRUST ASPECTS OF STANDARD SETTING 206–07 (2d ed. 2011); Victoria Graham, *Changing U.S. Patent Policy on Tech Standards Stirs Concerns*, BNA (Dec. 26, 2018), <https://www.bna.com/changing-us-patent-n57982094890/>.

⁴⁴ 19 U.S.C. § 1337(b)(1) (2012).

⁴⁵ *Id.* § 1337(a)(1)(A)(i)–(iii).

⁴⁶ *About Section 337*, U.S. ITC,

https://www.usitc.gov/intellectual_property/about_section_337.htm (last visited Jan. 29, 2020).

⁴⁷ 19 U.S.C. § 1337(a)(1)(A)(iii) (2012).

⁴⁸ *Id.* § 1337(d)(2)(A).

⁴⁹ *Id.* § 1337(f).

⁵⁰ *See id.* § 1337(d)(1) (“[U]nless, after considering the effect of such exclusion upon the public health and welfare, competitive conditions in the United States economy, the production of like or directly competitive articles in the United States, and United States consumers, it finds that such articles should not be excluded from entry.”); 18 U.S.C. § 1337(f)(1) (2012) (“[U]nless after considering the effect of such order upon the public health and welfare, competitive conditions in the United States economy, the production of like or directly competitive articles in the United States, and United States consumers, it finds that such order should not be issued.”).

⁵¹ 18 U.S.C. § 1337(a)(1)(B)(i)–(ii) (2012).

until the patent expires.⁵²

B. Intellectual Property Law and Its Enforcers

In contrast to antitrust law which can be simplistically characterized as *anti*-monopolistic, intellectual property law, on the other hand, *grants* monopoly power to innovators *for a limited period of time*.⁵³ The Constitution grants Congress the power to “promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.”⁵⁴ A patent holder can thus exclude others from practicing the invention by refusing to license the technology to others or by seeking an injunction.⁵⁵ There is no government agency that seeks to enforce patents. Instead, a patent holder must police his rights and initiate private causes of action on his own.⁵⁶ This can be a long and expensive process with no guaranteed remedies. Therefore, the right to exclude can be difficult to achieve,⁵⁷ especially because injunctive relief is heavily limited in the U.S. district courts under the *eBay* decision.⁵⁸

There are some critical relationships fundamental to understanding the New Madison Approach. An innovator exports innovation, such as patents or trade secrets, to others in the industry.⁵⁹ An implementer is a firm that uses the

⁵² *Id.* § 1337(d), (f).

⁵³ Dave Resser, *Differences Between Patent and Competition Laws*, MOD. CASTING (Aug. 22, 2018), <https://www.moderncasting.com/index.php/column/2018/08/22/differences-between-patent-and-competition-laws>.

⁵⁴ U.S. CONST. art. I, § 8; *see generally* 35 U.S.C. §§ 1–390 (2011) (showing the codification of patent acts).

⁵⁵ *Hartford-Empire Co. v. United States*, 323 U.S. 386, 432 (1945) (“[A] patent owner is not in the position of a quasi-trustee for the public or under any obligation to see that the public acquires the free right to use the invention. He has no obligation either to use it or to grant its use to others.”), *clarified*, 324 U.S. 570, 572 (1945) (paying of royalties on a *quantum meruit* basis).

⁵⁶ *Va. Panel Corp. v. MAC Panel Co.*, 133 F.3d 860, 873 (Fed. Cir. 1997) (explaining that a patent holder polices the market held by the patent).

⁵⁷ David J. Teece, *Pivoting Toward Schumpeter: Makan Delrahim and the Recasting of U.S. Antitrust Towards Innovation, Competitiveness, and Growth*, ANTITRUST, Summer 2018, at 32, 37–38.

⁵⁸ *eBay Inc. v. MercExchange, L.L.C.*, 547 U.S. 388 (2006); *see also* Christopher B. Seaman, *Permanent Injunctions in Patent Litigation After eBay: An Empirical Study*, 101 IOWA L. REV. 1949, 1985–1990 (2016) (analyzing how injunction grant rates differ by technology, district, type of entity—either “Patent Assertion Entities” or “All Other Patentees”—and type of litigant—competitors or not competitors).

⁵⁹ Richard A. Epstein & Kayvan B. Noroozi, *Why Incentives for “Patent Holdout” Threaten to Dismantle FRAND, and Why It Matters*, 32 BERKELEY TECH. L. J. 1383, 1383 (2017).

innovator's patents or trade secrets to manufacture or sell products.⁶⁰ However, there is no obligation for the innovator to license patented technology to the implementer because the innovator holds the right to exclude and there is no duty to aid a competitor.⁶¹ At times, a party can be both an innovator and an implementer.⁶² Innovators and implementers can collaborate and form a patent pool as an economical way to develop the technology.⁶³

C. Standard Essential Patents

Patents that are included in a standard are called "standard essential patents."⁶⁴ SSOs provide a forum for the development of a standard by various groups, with each group influencing the standard's development according to the group's perspective with respect to its patented technology.⁶⁵ Some SSOs impose obligations to license in exchange for the adoption of the technology as part of the standard.⁶⁶ Upon development of the standard, implementers can then use the standard according to the requirements specified without expending the costs that the developers of the standard incurred.⁶⁷ While the standard-setting process has many advantages, it is a time and money intensive process to develop a standard.⁶⁸

Patent pools are created when patent holders add their patented technology to a "patent pool" in exchange for benefits, such as royalties.⁶⁹ Patent pools can also hold standard essential patents ("SEPs") that implementers of the technology must join or independently license from the patent holder in order to

⁶⁰ *Id.*

⁶¹ *Verizon Commc'ns Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398, 411 (2004) (commenting that antitrust is not an exception to the principle that there is no duty to aid competitors).

⁶² Epstein & Noroozi, *supra* note 59, at 1383.

⁶³ ANTITRUST GUIDELINES FOR THE LICENSING OF INTELLECTUAL PROPERTY, *supra* note 35, at 30 (describing pooling arrangements as agreements between two or more owners of patents to license patented technology with benefits such as reduced transaction costs and avoidance of infringement litigation).

⁶⁴ Elizabeth D. Lauzon, Annotation, *Standard-Essential Patent Licensing on "Fair, Reasonable, and Nondiscriminatory" (FRAND) Terms*, 16 A.L.R. Fed. 3d Art. 5, § 2 (2016).

⁶⁵ Kristen Jakobsen Osenga, *Ignorance over Innovation: Why Misunderstanding Standard Setting Organizations Will Hinder Technological Progress*, 56 U. LOUISVILLE L. REV. 159, 166 (2018).

⁶⁶ See HANDBOOK ON THE ANTITRUST ASPECTS OF STANDARD SETTING, *supra* note 43, at 18.

⁶⁷ Osenga, *supra* note 65, at 167, 171 (noting that "free-riding" is also a disadvantage of the standard setting process).

⁶⁸ *Id.* at 170–71.

⁶⁹ Michael Mattioli, *Power and Governance in Patent Pools*, 27 HARV. J. L. & TECH. 421, 424, 451 (2014).

use the technology related to the SEP.⁷⁰

Patent pools can raise anticompetitive concerns because of the risk of collusion to exclude products or firms in favor of SEPs.⁷¹ An SSO is a patent pool composed of a group of competitors who have agreed on a technology to the exclusion of alternatives.⁷² By joining forces, the competitors can hold substantial market power depending on the importance of the technology at hand.⁷³ As the group of competitors grows more successful and innovation progresses, they can demand higher royalties, and become more dominant SSO entities.⁷⁴ Market power alone is not a violation of antitrust laws, but if accompanied by anticompetitive conduct, a violation can be found.⁷⁵ Having a group of competitors openly discussing technology is a situation ripe for collusion; selecting FRAND terms for licensing a particular standardized product can equate to fixing prices and limiting the availability of substitutes.⁷⁶

Standards created by the government, industry collaboration, or by market selection raise antitrust concerns when they restrain trade or become so accepted that they are the dominant standard.⁷⁷ Patent holders in a standard have more bargaining power when they license, which can result in “patent hold-up” because those who have adopted a standard must license the intellectual property of the standard as opposed to other intellectual property.⁷⁸ As a result, patent hold-up can force implementers that use the standard to pay high licensing fees

⁷⁰ *Id.* at 448, 454 (explaining standards-based patent pools with allocation of royalties among participants).

⁷¹ HANDBOOK ON THE ANTITRUST ASPECTS OF STANDARD SETTING, *supra* note 43, at 2 (citing Peter Grindley et al., *Standards Wars: The Use of Standard Setting as a Means of Facilitating Cartels: Third Generation Wireless Telecommunication Standard Setting*, 3 INT’L J. COMM. L. & POL’Y 1, 32 (1999)) (explaining that a group of competitors can have an anticompetitive effect).

⁷² HANDBOOK ON THE ANTITRUST ASPECTS OF STANDARD SETTING, *supra* note 43, at 19.

⁷³ Peter J. Levitas et al., *Do New DOJ Leadership Statements on SEPs Signal a Change in Direction for Antitrust Enforcement Policy?*, INTELL. PROP. & TECH. L. J., Mar. 2018, at 3, 3.

⁷⁴ Steven Pepe et al., *INSIGHT: Licensing Strategies for SEP Licensors in the Internet of Things Age*, BLOOMBERG L. NEWS (Dec. 13, 2018), <https://news.bloomberglaw.com/tech-and-telecom-law/insight-licensing-strategies-for-sep-licensors-in-the-internet-of-things-age> (discussing the progression of 2G to 5G standards and the importance of licensing).

⁷⁵ ANTITRUST GUIDELINES FOR THE LICENSING OF INTELLECTUAL PROPERTY, *supra* note 35, at 4.

⁷⁶ *Id.* at 8.

⁷⁷ HANDBOOK ON THE ANTITRUST ASPECTS OF STANDARD SETTING, *supra* note 43, at 3; *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 488 (1977) (citing *Brown Shoe Co. v. United States*, 370 U.S. 294, 320 (1962)) (“antitrust laws, however, were enacted for ‘the protection of competition not competitors.’”).

⁷⁸ See Andy Updegrove, *FTC Seeks Input on Patent Holdup in Standards Development*, CONSORTIUMINFO.ORG (May 16, 2011), <http://www.consortiuminfo.org/standardsblog/articles/ftc-seeks-input-patent-holdup-standards-development>.

due to the high demands of the innovator.⁷⁹ Royalty stacking can occur when manufacturing requires the “stacking” of multiple standards to create the final product.⁸⁰

However, the procompetitive effects of standards are recognized and can outweigh any anticompetitive effects.⁸¹ For example, users can focus development on the adopted standard rather than wasting resources on potential technologies; additionally, costs are shared for research and development.⁸² Licensing through a SSO has procompetitive benefits of saving on the costs of contracting and selling intellectual property rights, which increases the value of the intellectual property to provide further incentives to innovate.⁸³ Complementary factors of manufacturing and distributing a product, and of providing and maintaining effective workforces can be leveraged through the use of standardized technology to provide procompetitive benefit.⁸⁴

After briefly discussing antitrust and intellectual property law, an analysis of the New Madison Approach also requires understanding the evolution of patent hold-up and patent hold-out in intellectual property law.⁸⁵

D. Patent Hold-up

An image of a bank robbery can help visualize what happens in patent hold-up: an SSO has a standard which requires the use of certain patents in order to practice the standard, but a patent holder refuses to license or extracts such high royalty fees that licensing is essentially impossible unless the high fees are paid.⁸⁶ In other words, the innovator extracts excessive royalties from implementers after the implementers have committed to the standard.⁸⁷ The would-be licensee is locked-in to the standard unless there is another way to practice the standard, but that may require using inferior technology at an extreme cost.⁸⁸

⁷⁹ Osenga, *supra* note 65, at 172.

⁸⁰ *Id.*; FTC v. Qualcomm Inc., No. 17-CV-00220-LHK, 2019 U.S. Dist. LEXIS 86219, at *88 (N.D. Cal. May 21, 2019) (describing testimony by LGE that aggregate royalties could reach 25% of the cell phone price, making it impossible to make a profit).

⁸¹ HANDBOOK ON THE ANTITRUST ASPECTS OF STANDARD SETTING, *supra* note 43, at 14.

⁸² Broadcom Corp. v. Qualcomm Inc., 501 F.3d 297, 309 (3d Cir. 2007).

⁸³ ANTITRUST GUIDELINES FOR THE LICENSING OF INTELLECTUAL PROPERTY, *supra* note 35, at 5.

⁸⁴ *Id.*

⁸⁵ James J. Tierney & Emily Luken, *The New Madison Approach Goes to Court*, ORRICK ANTITRUST WATCH (Jan. 23, 2019), <https://blogs.orrick.com/antitrust/2019/01/23/the-new-madison-approach-goes-to-court/> (discussing patent hold-up and hold-out in the first two premises of the New Madison Approach).

⁸⁶ HANDBOOK ON THE ANTITRUST ASPECTS OF STANDARD SETTING, *supra* note 43, at 19.

⁸⁷ Epstein & Noroozi, *supra* note 59, at 1384.

⁸⁸ Osenga, *supra* note 65, at 174.

Antitrust concerns are raised in patent hold-up when there is deceptive conduct during standard development.⁸⁹ A patent holder can falsely represent the scope of his patent protection or commit to licensing on fair and reasonable terms, knowing that he would not agree to license on the negotiated terms.⁹⁰

In the *Matter of Rambus, Inc.*, the FTC found that Rambus purposefully failed to disclose its patents and misled standard developers.⁹¹ Rambus did not disclose plans to amend standard-related patent applications while at the same time participating in the standard-setting process.⁹² Upon adoption of the standard by the SSO, Rambus revealed its patents and sued for patent infringement.⁹³ The FTC found that the SSO operated in good faith; members were required to disclose their patents, patent applications and agree to licensing on reasonable and non-discriminatory terms in an effort to prevent patent holdup.⁹⁴ The FTC found Rambus's concealment was exclusionary conduct that contributed to its acquisition of monopoly power, and that there was a causal link between the exclusionary conduct and the standards adopted by the SSO.⁹⁵

At the same time as the *Rambus* proceeding, *Broadcom v. Qualcomm* was decided.⁹⁶ The third circuit held that anticompetitive conduct can be found in a consensus-oriented private SSO when the SSO relies on an initial false promise to license on FRAND terms and that promise is breached.⁹⁷ Referencing the *FTC Rambus* decision, the court reasoned that deception harms competition.⁹⁸

Following the *Broadcom* decision, the Court of Appeals for the D.C. Circuit reversed the *FTC Rambus* decision.⁹⁹ The FTC's finding of monopolization was based on the alleged deception Rambus practiced: by its deception, Rambus acquired monopoly power or avoided paying licensing fees that the SSO would have otherwise required.¹⁰⁰ The court questioned whether there was sufficient evidence to find deceitful behavior, and additionally reasoned that monopolization cannot be predicated on an entity charging higher prices by practicing deceitful behavior.¹⁰¹ In order to be violative, the monopoly power

⁸⁹ HANDBOOK ON THE ANTITRUST ASPECTS OF STANDARD SETTING, *supra* note 43, at 117.

⁹⁰ *Id.* at 118.

⁹¹ *Rambus, Inc.*, No. 9302, 2006 FTC LEXIS 60, at *4 (F.T.C. Aug. 2, 2006).

⁹² *Id.* at *4–5.

⁹³ *Id.*; see *Rambus, Inc. v. FTC*, 522 F.3d 456, 459 (D.C. Cir. 2008).

⁹⁴ *Rambus, Inc.*, 2006 FTC LEXIS 60, at *4.

⁹⁵ *Id.* at *5.

⁹⁶ *Broadcomm Corp. v. Qualcomm Inc.*, 501 F.3d 297 (3d Cir. 2007).

⁹⁷ *Id.* at 314.

⁹⁸ *Id.*

⁹⁹ *Rambus, Inc. v. FTC*, 522 F.3d 456, 469 (D.C. Cir. 2008).

¹⁰⁰ *Id.* at 461.

¹⁰¹ *Id.* at 464.

must be coupled with exclusionary acts that harm the consumer or reduce the social welfare. Harm to one or two competitors is not sufficient.¹⁰² The court reasoned that the FTC failed to show the standard would not have been adopted if Rambus had disclosed its patents (i.e., if Rambus had not been deceitful); therefore, the SSO simply lost a licensing opportunity, which is not an antitrust harm.¹⁰³ In other words, there must be a causal link between the acts of deception and the adopted standard; the link cannot simply be a result of higher prices.¹⁰⁴

Another antitrust concern is when the patent holder later refuses to license on the agreed upon reasonable and non-discriminatory terms.¹⁰⁵ However, proving that a breach of a promise has an anticompetitive effect may be difficult, and another remedy is to bring suit for breach of contract.¹⁰⁶ The terms of the FRAND commitment need to be analyzed closely, as field-of-use restrictions and component level restrictions can limit the duty of licensing under a FRAND commitment.¹⁰⁷

Former acting assistant attorney general for the antitrust division at the DOJ, Renata Hesse, has offered six proposals for SSOs to consider in order to promote competition.¹⁰⁸ These proposals were important because they recognized that SSOs are diverse in structure and technology, and there is no one-size-fits-all approach; nevertheless, clarification was needed to enhance the chances of success and prevent the problem of hold-up.¹⁰⁹ Furthermore, Hesse advocated that the DOJ can look for competitive harm when standard essential patent holders do not abide by FRAND commitments.¹¹⁰

¹⁰² *Id.* at 463 (quoting *United States v. Microsoft Corp.*, 253 F.3d 34, 45 (D.C. Cir. 2001)).

¹⁰³ *Id.* at 466–67.

¹⁰⁴ HANDBOOK ON THE ANTITRUST ASPECTS OF STANDARD SETTING, *supra* note 43, at 122.

¹⁰⁵ *Id.* at 118.

¹⁰⁶ *Microsoft Corp. v. Motorola, Inc.*, 795 F.3d 1024, 1030 (9th Cir. 2015) (alleging breach of contract when Motorola failed to license on RAND terms its standard essential patents).

¹⁰⁷ ANTITRUST GUIDELINES FOR THE LICENSING OF INTELLECTUAL PROPERTY, *supra* note 35, at 1, 5.

¹⁰⁸ Renata B. Hesse, Deputy Assistant Attorney Gen., U.S. Dep't of Justice Antitrust Div., Six "Small" Proposals for SSOs Before Lunch, Remarks at the ITU-T Patent Roundtable (Oct. 10, 2012) (suggesting SSOs clarify FRAND commitments, make FRAND encumbrances convey to subsequent owners, permit cash-only licensing option, limit injunctions, create guidelines or arbitration provisions to determine FRAND rates, and determine which patents are truly essential to the standard).

¹⁰⁹ Renata B. Hesse, Deputy Assistant Attorney Gen., U.S. Dep't of Justice Antitrust Div., IP, Antitrust and Looking Back on the Last Four Years (Feb. 8, 2013).

¹¹⁰ Osenga, *supra* note 65, at 210.

E. Patent Hold-out

Patent hold-out results when a would-be licensee fails to take a license, and waits for the licensor to sue the licensee for either damages or an injunction to stop using the technology.¹¹¹ In other words, the implementer refuses to license in good faith, and the innovator must resort to litigation to obtain damages.¹¹² The implementer holds out because the time and expense of litigation can drive the innovator to just plainly give-up or even go insolvent.¹¹³

Commentators have emphasized that when SSO members negotiate standards and licenses, both innovators and implementers come to the table willingly and voluntarily.¹¹⁴ Innovators give up their right to exclude for their patented technology and give away confidential information by joining the SSO.¹¹⁵ In return, both sides strive to achieve fair royalty rates and reduce transaction costs, even though they may not know the value of each patent as the standard and technology progress.¹¹⁶ Commentators argue that when there is a failure to bargain in good faith, a variety of remedies should be available, including damages, injunctions, or a combination of both.¹¹⁷ If there is a threat of various harms, all parties have an incentive to abide by the promises made.¹¹⁸

However, the availability of injunctive relief is not universally accepted and sometimes even ignored by the courts.¹¹⁹ The governing case for injunctive relief is *eBay v. MercExchange*, which has made it difficult for an owner of a SEP to obtain injunctive relief in district court.¹²⁰ In *Apple v. Motorola*, Judge Sharon Post argued that while injunctions should not be categorically denied, an injunction is not always appropriate because an alleged infringer has the right to challenge a FRAND-committed patent before agreeing to pay royalties, or to receive extra royalties for infringement when there has been bad faith negotiations.¹²¹ Dissenting-in-part, Chief Judge Randall Rader argued that

¹¹¹ Epstein & Noroozi, *supra* note 59, at 1384 (explaining that patent holdout can also be thought of as “efficient infringement” or “efficient breach”).

¹¹² *Id.*

¹¹³ *Id.* at 1407.

¹¹⁴ *Id.* at 1393.

¹¹⁵ *Id.*

¹¹⁶ Mrinalini Kochupillai & Matthew A. Smith, *Patent Valuation with Consideration for Emerging Technologies*, 12 J. INTELL. PROP. RTS. 154, 154 (2007) (describing considerations for valuating patents).

¹¹⁷ Epstein & Noroozi, *supra* note 59, at 1403–04.

¹¹⁸ *Id.* at 1404.

¹¹⁹ *Id.* at 1413.

¹²⁰ *eBay Inc. v. MercExchange, L.L.C.*, 547 U.S. 388, 394 (2006); see Christopher B. Seaman, *Permanent Injunctions in Patent Litigation After eBay: An Empirical Study*, 101 IOWA L. REV. 1949, 1950–51 (2016).

¹²¹ *Apple Inc. v. Motorola, Inc.*, 757 F.3d 1286, 1342 (Fed. Cir. 2014) (Prost, J.,

Motorola should have been given the opportunity to show that Apple refused to license or even negotiate, and that by practicing hold-out, an injunctive remedy was appropriate.¹²² In addition, it is difficult and costly for innovators to assert patent rights when courts require asserting patents individually, but FRAND commitments are based on portfolios rather than individual standard essential patents.¹²³

In a recent case, Huawei claims that Samsung practiced patent hold-out by refusing to license. Samsung claims Huawei had consistently exhibited deceptive behavior in refusing to license on FRAND terms, amounting to antitrust violations.¹²⁴ Ultimately, in response to a motion for summary judgment, the district court found that Samsung provided insufficient evidence of a complete refusal to deal by Huawei.¹²⁵

Antitrust violations are sought because of the ability to receive trebled damages, but the antitrust laws also provide for injunctive relief.¹²⁶ Past views by the DOJ have supported proposed policy changes of the Institute of Electrical and Electronics Engineers, Incorporated (“IEEE”) Patent Policy to not pursue injunctive relief.¹²⁷ The DOJ issued a business review letter stating that IEEE’s updated policy clarified the FRAND terms, and could also help the problem of patent hold-up.¹²⁸ A limitation on injunctive relief was also supported.¹²⁹

concurring) (writing separately against the majority view that unilateral refusal to license gives rise to injunctive relief).

¹²² *Id.* at 1334 (Rader, J., dissenting).

¹²³ Anne Layne-Farrar, *Why Patent Holdout is Not Just a Fancy Name for Plain Old Patent Infringement*, COMPETITION POL’Y INT’L, Feb. 2016, at 1, 2.

¹²⁴ Huawei Techs. Co. v. Samsung Elecs. Co., No. 3:16-cv-02787-WHO, 2018 U.S. Dist. LEXIS 172103, at *953 (N.D. Cal. Sept. 25, 2018).

¹²⁵ *Id.* (describing Huawei’s negotiation at the same rate and pursuit of injunctive relief in China as insufficient evidence of maintaining monopoly power through exclusionary conduct).

¹²⁶ 15 U.S.C. § 26 (2012) (restitution and disgorgement are also available); *id.* § 54(a) (stating that the DOJ may bring criminal sanctions); *see id.* § 1.

¹²⁷ Levitas et al., *supra* note 73, at 3.

¹²⁸ Letter from Renata B. Hesse, Deputy Assistant Attorney Gen., U.S. Dep’t of Justice Antitrust Div., to Michael A. Lindsay, Attorney, Dorsey & Whitney L.L.P., and Inst. of Elec. & Elecs. Eng’rs, Inc. (Feb. 2, 2015).

¹²⁹ *Id.* at 10 (“The Update’s express limitation on the availability of exclusionary relief may reduce any remaining uncertainty among implementers of IEEE-SA standards by limiting the ability of patent holders who have made an IEEE RAND Commitment to seek prohibitive orders that would prevent those willing to license from making, using, or selling products that comply with the standard. This provision may place additional limits on patent holders’ ability to obtain injunctive relief in a U.S. court, but it appears that, in practice, it will not be significantly more restrictive than current U.S. case law, and the added clarity may help parties reach agreement more quickly.”).

II. A SHIFT IN POLICY BY DELRAHIM

As the discussion of patent hold-up and hold-out above shows, intellectual property law and antitrust law have overlapping spheres of influence. David Teece advocated at a 1988 conference that antitrust laws should promote dynamic competition resulting from new products and new processes.¹³⁰ In a long-term competitive analysis with respect to intellectual property, products may be more expensive today due to innovators collecting royalties; however in the long-term, royalties enable companies to research, develop, and drive innovation to new levels, thereby enhancing consumer welfare.¹³¹ After a history of short-term planning for the field, the advocacy of Assistant Attorney General Makan Delrahim is a shift in thinking.¹³²

A. The New Madison Approach

Makan Delrahim gave a series of speeches to advocate for the New Madison Approach.¹³³ There are four elements to this approach: 1) patent hold-up is not an antitrust problem; 2) standard-setting organizations should better protect against hold-out to ensure maximum incentives to innovate; 3) patent holder rights should be protected, not persecuted; and 4) a unilateral and unconditional refusal to license a valid patent should be per se legal.¹³⁴

As to the first element, Delrahim argues that patent hold-up is fundamentally not an antitrust problem.¹³⁵ Antitrust law is directed to ensure consumer welfare and look for anticompetitive behavior that harms consumers.¹³⁶ Delrahim's view is that antitrust law should not be used to police FRAND commitments because they can be enforced by breach of contract claims.¹³⁷ Delrahim also argues that patent hold-up is "an enigma in the academic literature."¹³⁸

Expounding on the first element in a later speech, Delrahim argued that

¹³⁰ Teece, *supra* note 57, at 32.

¹³¹ *Id.* (providing examples of short-term analysis from FTC decisions breaking up AT&T/Bell labs and losing great research history and of NXP resulting in exporting technology to China).

¹³² C. Fairley Spillman, *Assistant Attorney General Makan Delrahim Signals Shift in Antitrust/IP Focus*, HIGHBEAM (Dec. 5, 2017), www.highbeam.com/doc/1G1-517505269.html.

¹³³ *See* Delrahim, The "New Madison" Approach to Antitrust and Intellectual Property Law, *supra* note 2.

¹³⁴ *Id.*

¹³⁵ *Id.*

¹³⁶ Allen Foer & Durst, *supra* note 18, at 502.

¹³⁷ Delrahim, The "New Madison" Approach to Antitrust and Intellectual Property Law, *supra* note 2.

¹³⁸ *Id.*

Section 2 of the Sherman Act is “agnostic to the price that a patent-holder seeks to charge” in FRAND commitments.¹³⁹ Good faith and fair dealing is applicable to contract law, but antitrust law does not turn on fair prices.¹⁴⁰ Further, as to commitments to charge non-discriminatory rates, Delrahim urges that the Sherman Act is indifferent to price discrimination and can even find price discrimination pro-competitive.¹⁴¹ Lastly, citing *Trinko*, Delrahim reiterates that courts are ill-suited for determining a reasonable licensing rate.¹⁴² Thus, while there may be contractual duties under FRAND commitments, antitrust laws are not necessarily implicated because FRAND commitments can be pro-competitive.¹⁴³

For his second element, Delrahim advocates that SSOs should protect against hold-out.¹⁴⁴ Implementers stand in a special position because they can wait to invest time and resources into a specific standard until after the innovators have already done all the work to develop the standard.¹⁴⁵ Therefore, implementers can threaten innovation, and a consensus approach recognizing the role of both innovators and implementers in choosing the standards and royalties should be used.¹⁴⁶ Recognizing hold-out as a possibility, SSOs should work to thwart their occurrence.

The third element states that the patent holder’s right to an injunction should be protected.¹⁴⁷ Injunctions should be recognized and available as part of a patent owner’s right to exclude others from using his invention; if not, SSOs can become de facto compulsory licensing schemes, which can discourage

¹³⁹ Makan Delrahim, Assistant Attorney Gen., Antitrust Div. of U.S. Dep’t of Justice, Antitrust Law and Patent Licensing in the New Wild West, Remarks at IAM’s Patent Licensing Conference in San Francisco (Sept. 18, 2018).

¹⁴⁰ *Id.* (“Even an act of pure malice by one business competitor against another does not, without more, state a claim under the federal antitrust laws; those laws do not create a federal law of unfair competition or ‘purport to afford remedies for all torts committed by and against persons engaged in interstate commerce.’” (quoting *Hunt v. Crumboch*, 325 U.S. 821, 826 (1945))).

¹⁴¹ *Id.* (referring to James C. Cooper et al., *Does Price Discrimination Intensify Competition? Implications for Antitrust*, 72 ANTITRUST L. J. 327, 369 (2005)).

¹⁴² *Id.* (describing antitrust law as failing to recognize a cause of action in which “antitrust courts [need] to act as central planners, identifying the proper price, quantity, and other terms of dealing—a role for which they are ill-suited.” (quoting *Verizon Commc’ns Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398, 408 (2004))).

¹⁴³ *Id.*

¹⁴⁴ *Id.* (referring to James C. Cooper et al., *Does Price Discrimination Intensify Competition? Implications for Antitrust*, 72 ANTITRUST L. J. 327, 369 (2005)).

¹⁴⁵ Delrahim, The “New Madison” Approach to Antitrust and Intellectual Property Law, *supra* note 2.

¹⁴⁶ *Id.*

¹⁴⁷ *Id.*; *eBay Inc. v. MercExchange, L.L.C.*, 547 U.S. 388, 391 (2006) (articulating the test for injunctions as irreparable injury, inadequate remedies, remedy is warranted, and public interest).

innovators from joining.¹⁴⁸ Delrahim has announced that the DOJ has withdrawn from a 2013 USPTO-DOJ Joint Policy Statement about remedies for standard-essential patents with FRAND commitments.¹⁴⁹ The Antitrust Division believes that the 2013 Joint Policy Statement can be confusing because it suggests that an injunction or exclusion order can harm competition and consumers.¹⁵⁰ In withdrawing from the 2013 Joint Policy Statement, Delrahim reiterates that patent hold-up and hold-out can both occur, and SSOs can stray away from procompetitive behavior.¹⁵¹

The final element is that the unilateral refusal to license a patent should be *per se* legal.¹⁵² A patent owner need not be forced to aid his competitor, and refusal to license should not be the basis for finding anticompetitive harm.¹⁵³

In other remarks about the New Madison Approach, Delrahim cautions against false positives or condemning lawful procompetitive conduct.¹⁵⁴ Delrahim argues that FRAND contract terms can be vague and antitrust actions seeking treble damages can chill innovation.¹⁵⁵ While false negatives or underenforcement under Section 2 of the Sherman Act may exist, Delrahim argues they should be rare.¹⁵⁶

The New Madison Approach seeks to spur innovation by strengthening the patent system, while also respecting antitrust law and its role in policing anticompetitive behavior. Delrahim announced the New Madison Approach

¹⁴⁸ Delrahim, The “New Madison” Approach to Antitrust and Intellectual Property Law, *supra* note 2.

¹⁴⁹ Makan Delrahim, Assistant Attorney Gen., Antitrust Div. of U.S. Dep’t of Justice, “Telegraph Road”*: Incentivizing Innovation at the Intersection of Patent and Antitrust Law, Remarks Before the 19th Annual Berkeley-Stanford Advanced Patent Law Institute (Dec. 7, 2018); U.S. DEP’T OF JUSTICE & U.S. PATENT & TRADEMARK OFFICE, POLICY STATEMENT ON REMEDIES FOR STANDARDS-ESSENTIAL PATENTS SUBJECT TO VOLUNTARY F/RAND COMMITMENTS 1, 9–10 (2013), <https://www.justice.gov/atr/page/file/1118381/download>.

¹⁵⁰ Delrahim, “Telegraph Road”*: Incentivizing Innovation at the Intersection of Patent and Antitrust Law, *supra* note 149.

¹⁵¹ *Id.* (describing how the Supreme Court has recognized the opportunity for anticompetitive activity in SSOs).

¹⁵² Delrahim, The “New Madison” Approach to Antitrust and Intellectual Property Law, *supra* note 2.

¹⁵³ *Id.*

¹⁵⁴ Delrahim, Antitrust Law and Patent Licensing in the New Wild West, *supra* note 139.

¹⁵⁵ *Id.*; see also Edward Cavanagh, *Detrebling Antitrust Damages in Monopolization Cases*, 76 ANTITRUST L. J. 97, 115 (2009) (“Treble damages encourage questionable Section 2 suits, magnify the cost of error, chill procompetitive behavior, and may stifle innovation.”).

¹⁵⁶ Delrahim, Antitrust Law and Patent Licensing in the New Wild West, *supra* note 139 (“Though such a situation may occur on rare occasions, I remain skeptical that it does so with regularity, given that the principal goal of standard setting is to select the superior technology among competing alternatives.”).

through a series of speeches, and has received responses both in favor and against it.¹⁵⁷

B. Support for New Madison Approach

In a letter addressed to Delrahim (“DOJ Support Letter”), a group of experts in antitrust law and intellectual property law supported the New Madison Approach and welcomed applying antitrust law equally to both innovators and implementers.¹⁵⁸ They reiterated that there is no hold-up problem.¹⁵⁹ They emphasized that injunctive relief has not been shown to produce consumer harm.¹⁶⁰ As evidence of the problem of past policy, they noted a change in practice from licensing at the end-user device level which enabled optimizing the complete system and network, to licensing according to particular components in a smartphone.¹⁶¹

David Kappos argues that hold-up is just a pretext for attacking intellectual property rights.¹⁶² As examples, he points to the FTC having initiated proceedings for antitrust violations based simply on threatening or seeking an injunction or ITC exclusion order.¹⁶³ Furthermore, he notes that DOJ Assistant Attorney General Hesse contemplated that simply seeking an injunction by a SEP owner that violates FRAND royalty terms can be an antitrust violation.¹⁶⁴

Ken Stanwood, an inventor, shares how a startup firm he worked for was willing to participate in standards development in part because injunctions were

¹⁵⁷ Tierney & Luken, *supra* note 85 (noting that while the approach has thus far only been advocated through speeches, the Antitrust Division may look to present its views in court or attempt to participate in FRAND cases).

¹⁵⁸ Letter from Jonathan Barnett et al., to Makan Delrahim, Assistant Attorney Gen., Antitrust Div. of U.S. Dep’t of Justice (Feb. 13, 2018), <https://cpip.gmu.edu/wp-content/uploads/sites/31/2018/02/Letter-to-DOJ-Supporting-Evidence-Based-Approach-to-Antitrust-Enforcement-of-IP.pdf>.

¹⁵⁹ *Id.* (citing articles by Epstein, Layne-Farrar, Feletovic, Ginsburg, Llobet, Mallinson, Padilla, Putnam, Sidak, Tsai and Wright).

¹⁶⁰ *Id.* (“[N]o empirical study has demonstrated that a patent-owner’s request for injunctive relief after a finding of a defendant’s infringement of its property rights has ever resulted either in consumer harm or in slowing down the pace of technological innovation.”).

¹⁶¹ *Id.*

¹⁶² David J. Kappos, *The Antitrust Assault on Intellectual Property*, 31 HARV. J. L. & TECH. 665, 676 (2018).

¹⁶³ *Id.* at 676 (citing Complaint 19–20, 23, In re Robert Bosch GmbH, FTC Docket No. C-4377 (2012); Complaint at 19, 25–27, In re Motorola Mobility LLC & Google Inc., FTC Docket No. C-4410 (2013)).

¹⁶⁴ *Id.* at 676–77.

available.¹⁶⁵ Injunctions were part of “a working patent system.”¹⁶⁶ Now, he believes a startup firm may be more likely to hold inventions as trade secrets due to efficient infringement by larger, multinational corporations.¹⁶⁷

An alliance of companies wrote a letter to Department of Commerce Secretary Wilbur Ross and USPTO Director Andrei Iancu in support of the New Madison Approach and the DOJ withdrawal from the 2013 Joint Policy Statement with the USPTO.¹⁶⁸ The companies reiterate that as licensors and licensees in technology such as 5G technology, they rely on the FRAND licensing framework to help recoup the costs of research and development.¹⁶⁹ The companies believe that the 2013 Joint Policy Statement “encouraged and emboldened strategic long-term infringement” and the problem of patent hold-out worsened.¹⁷⁰

Senator Thom Tillis and Senator Chris Coons, who lead the intellectual property committee of the Senate Judiciary Committee, wrote a letter applauding the decision to withdraw from the 2013 Joint Policy Statement.¹⁷¹ They stated that the 2013 Joint Policy Statement “created unnecessary confusion, emboldened strategic infringers, and had the potential to discourage investment by American companies, innovators, and entrepreneurs in critical technologies.”¹⁷² They encouraged Delrahim to work with the USPTO on a revised policy statement about licensing and enforcement of standard essential patents and patents with FRAND commitments.¹⁷³

C. Disagreement with the New Madison Approach

Steve Sunshine has suggested that the New Madison Approach is “in sharp

¹⁶⁵ Ken Stanwood, *SEPs Need Injunctions Too*, LAW360 (Feb. 8, 2019), <https://www.law360.com/articles/1121992/print?section=ip>.

¹⁶⁶ *Id.*

¹⁶⁷ *Id.*

¹⁶⁸ Letter from Ericsson, Nokia, Philips, and Qualcomm, to Wilbur Ross, Sec’y of Commerce, and Andrei Iancu, Dir. of U.S. Patent & Trademark Office (Mar. 18, 2019), <https://innovationalliance.net/wp-content/uploads/2019/03/Ericsson-Nokia-Philips-Qualcomm-Letter-to-Ross-Barr-Iancu-Delrahim-and-others-18-March-2019.pdf> (describing the support by Ericsson, Nokia, Philips and Qualcomm of the New Madison Approach).

¹⁶⁹ *Id.*

¹⁷⁰ *Id.*

¹⁷¹ Letter from U.S. Senate, Comm. on the Judiciary, to William Pelham Barr, U.S. Attorney Gen., and Makan Delrahim, Assistant Attorney Gen., Antitrust Div. of U.S. Dep’t of Justice (Oct. 21, 2019).

¹⁷² *Id.*

¹⁷³ *Id.*; see Tiffany Hu, *Sens. Tell DOJ to Fix ‘Growing Divide’ with USPTO Over SEPs*, LAW360 (Oct. 23, 2019), <https://www.law360.com/articles/1212528/sens-tell-doj-to-fix-growing-divide-with-uspto-over-seps>.

contrast” to previous administrations and “perhaps most of the mainstream bar.”¹⁷⁴ In a letter (“FTC Letter”) expressing her own views, then FTC Commissioner Terrell McSweeney maintains that patent holdup is a problem.¹⁷⁵ She argues patent hold-up can be anticompetitive, which has been extensively studied, and highlights a review (“2007 Report”) of the problem.¹⁷⁶ The 2007 Report showed consumer harm in higher prices and decreased investment in the development and implementation of standards.¹⁷⁷ An additional report also found that “hold-up in the standard setting context can be particularly acute.”¹⁷⁸ McSweeney argues that patent hold-up is “merely ‘a variant of the classic hold-up problem.’”¹⁷⁹

As evidence of patent holdup, McSweeney observes that courts have found that the FRAND royalties were 1/150th or 1/500th of a reasonable rate as calculated by a neutral arbitrator.¹⁸⁰ McSweeney urges that, consistent with past practice, a case-by-case approach should be used to determine whether patent hold-up violates antitrust law.¹⁸¹

Another commentator believes that the FTC antitrust action against Qualcomm, when considered in light of the New Madison Approach, “suggests divergence” between the FTC and the DOJ.¹⁸² FTC Commissioner Kelly Slaughter has a “strongly different view”¹⁸³ than that of the DOJ under the New Madison Approach.

Prior to the New Madison Approach, several cases supported the views

¹⁷⁴ *Antitrust in the Technology Sector: Policy Perspective and Insights from the Enforcers*, SKADDEN (Mar. 6, 2019), <https://www.skadden.com/-/media/files/publications/2019/03/paantitrustperspectivesinsightsenforcers030119take.pdf>.

¹⁷⁵ MCSWEENEY, *supra* note 4, at 1.

¹⁷⁶ U.S. DEP’T OF JUSTICE & FED. TRADE COMM’N, ANTITRUST ENFORCEMENT AND INTELLECTUAL PROPERTY RIGHTS: PROMOTING INNOVATION AND COMPETITION 8 (2007).

¹⁷⁷ MCSWEENEY, *supra* note 4, at 2.

¹⁷⁸ FED. TRADE COMM’N, THE EVOLVING IP MARKETPLACE: ALIGNING PATENT NOTICE AND REMEDIES WITH COMPETITION 28 (2011).

¹⁷⁹ MCSWEENEY, *supra* note 4, at 3; ANTITRUST ENFORCEMENT AND INTELLECTUAL PROPERTY RIGHTS: PROMOTING INNOVATION AND COMPETITION, *supra* note 176.

¹⁸⁰ See generally *Microsoft Corp. v. Motorola, Inc.*, 795 F.3d 1024 (9th Cir. 2015); *Realtek Semiconductor Corp. v. LSI Corp.*, No. 5:14-mc-80197-BLF-PSG, 2014 U.S. Dist. LEXIS 123503, at *4 (N.D. Cal. Sept. 3, 2014).

¹⁸¹ MCSWEENEY, *supra* note 4, at 5.

¹⁸² *Antitrust in the Technology Sector: Policy Perspective and Insights From the Enforcers*, *supra* note 174 (noting that the FTC v. Qualcomm antitrust action comes in close timing with the New Madison Approach announced by the DOJ); *FTC v. Qualcomm Inc.*, 411 F. Supp. 3d 658 (N.D. Cal. 2019).

¹⁸³ Alexei Alexis & Victoria Graham, *FTC’s Slaughter Opposes DOJ’s Policy on Standard-Setting Patents*, BLOOMBERG L. (Feb. 14, 2019, 5:19 PM), <https://news.bloomberglaw.com/mergers-and-antitrust/ftcs-slaughter-opposes-doj-policy-on-standard-setting-patents> (“I agreed with the (2013) statement, and I don’t agree with withdrawing it ... I don’t like when agencies diverge.”).

eventually adopted in the 2013 Joint Policy Statement.¹⁸⁴ In general, the prior administration believed that money damages, as opposed to injunctions, were a more appropriate remedy of a standard-essentials patent subject to a FRAND commitment.¹⁸⁵ However, the 2013 Joint Policy Statement did also recognize that exclusion orders can be appropriate; for example, where a putative licensee refuses to pay or even negotiate to determine FRAND terms.¹⁸⁶

Another commentator believes that withdrawing from the 2013 Joint Policy Statement is “a step backwards” and that courts should continue, rather than change policy approaches, to police FRAND agreements for fair pricing when the parties cannot come to an agreement.¹⁸⁷ Rather than promoting innovation, others believe that the New Madison Approach increases the risk of litigation to manufacturers that made products subject to SSO patents and decreases incentives to innovate.¹⁸⁸ Another believes the New Madison Approach “represents a threat to U.S. competitiveness in standardized technologies” and uncertainty is a disincentive to invest in SSO technology.¹⁸⁹ One critique is that withdrawing from the 2013 Joint Policy Statement threatens pro-competitive collaboration because collaboration will become more unpredictable.¹⁹⁰

FTC Chairman Joseph Simons gave a speech in which he included remarks about intellectual property, which both supports and opposes the New Madison Approach.¹⁹¹ He voiced agreement with the DOJ Antitrust Division’s position that a Sherman Act violation requires not only a breach of a FRAND commitment, but that the breach contributes to acquiring or maintaining monopoly power or unreasonably restrains trade.¹⁹² Simons noted that patent hold-up can be an antitrust violation, but also that patent hold-out with collusion among potential adopters or licensees can also result in antitrust violations.¹⁹³

¹⁸⁴ Tierney & Luken, *supra* note 85 (citing decisions such as *Broadcom Corp. v. Qualcomm Inc.*, 501 F.3d 297 (3d Cir. 2007), where a false FRAND commitment was made to convince an SSO to include its patents; *Research in Motion v. Motorola, Inc.*, 644 F. Supp. 2d 788 (N.D. Tex. 2008); and *Microsoft Mobile Inc. v. Interdigital, Inc.*, No. CV 15-723-RGA, 2016 WL 1464545 (D. Del. Apr. 13, 2016), to show that antitrust law is appropriate for standard-essential patents with a FRAND commitment).

¹⁸⁵ *Id.*

¹⁸⁶ POLICY STATEMENT ON REMEDIES FOR STANDARDS-ESSENTIAL PATENTS SUBJECT TO VOLUNTARY F/RAND COMMITMENTS, *supra* note 149, at 7.

¹⁸⁷ Victoria Graham, *Changing U.S. Patent Policy on Tech Standards Stirs Concerns*, BLOOMBERG L. (Dec. 26, 2018), <https://www.bna.com/changing-us-patent-n57982094890/>.

¹⁸⁸ *Id.*

¹⁸⁹ *Id.*

¹⁹⁰ *Id.*

¹⁹¹ See Joseph Simons, Chairman, Fed. Trade Comm’n, Prepared Remarks at the Georgetown Law Global Antitrust Enforcement Symposium (Sept. 25, 2018).

¹⁹² *Id.*

¹⁹³ *Id.*

Simons reiterated that the FTC uses an “economically ground[ed] and fact-based enforcement” of antitrust law.¹⁹⁴

D. Approach to Similar Issues in Other Jurisdictions

Given the wide reach of multinational firms and intellectual property available around the world, it is useful to understand how other countries handle the issues of patent holdup and patent hold-out, the use of injunctions, and the unilateral refusal to license. Companies would like to have predictable competition enforcement around the world, and just as in intellectual property, harmonization of efforts would be desirable.¹⁹⁵

In Europe, the Treaty of the Functioning of the European Union has competition rules in Articles 101 and 102.¹⁹⁶ Similar to Section 2 of the Sherman Act, Article 102 sanctions the abuse of dominant position.¹⁹⁷ In a case before the European Court of Justice, dominance was defined as “a position of economic strength enjoyed by an undertaking which enables it to prevent effective competition” in a relevant market by power independent of its competitors, customers and consumers.¹⁹⁸ In another case, abuse is defined as behavior that “influence[s] the structure of a market,” weakening the degree of competition by its undertaking and by its effect, “hindering the maintenance of the degree of competition still existing in the market.”¹⁹⁹

The rules on competition apply to standard-setting activities, and standardization is encouraged because of the efficiencies it creates.²⁰⁰ The EU has issued horizontal agreement guidelines discussing how a standardization agreement that affects a parties’ ability to develop alternative standards or to commercialize products according to a different standard may infringe Article 101.²⁰¹ However, when SSOs adopt standards on nondiscriminatory, open and transparent procedures, they are not likely to infringe Article 101 because parties

¹⁹⁴ *Id.*

¹⁹⁵ Makan Delrahim, Assistant Attorney Gen., Antitrust Div. of U.S. Dep’t of Justice, Oversight of the Enforcement of the Antitrust Laws, Statement Before the Senate Subcommittee on Antitrust, Competition Policy and Consumer Rights (Oct. 3, 2018).

¹⁹⁶ *See* Treaty on the Functioning of the European Union, Oct. 26, 2012, 2012 O.J. (C 326) 88–89.

¹⁹⁷ HANDBOOK ON THE ANTITRUST ASPECTS OF STANDARD SETTING, *supra* note 43, at 206.

¹⁹⁸ *Id.* (citing Case 27/76, *United Brands v. Comm’n*, 1978 E.C.R. 207).

¹⁹⁹ *Id.* (citing Case 85/76, *Hoffman-La Roche v. Comm’n*, 1979 E.C.R. 461, 3 CMLR 211 (1979)).

²⁰⁰ *Id.* at 206–07.

²⁰¹ *See generally*, *Guidelines on the Applicability of Article 101 of the Treaty on the Functioning of the European Union to Horizontal Co-operation Agreements*, 2011 O.J. C11/1, [https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52011XC0114\(04\)&from=EN](https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52011XC0114(04)&from=EN).

may choose to use different standards or form products based on different standards.²⁰² These guidelines also state that “agreements that promote economic interpenetration in the common market or encourage the development of new markets and improved supply conditions” are looked upon favorably.²⁰³ In addition, when standards have restrictions, they must be “no more than what is necessary to ensure their aims, whether this is technical compatibility or a certain level of quality.”²⁰⁴ Generally, all may participate in standard setting; however, membership may be restricted if otherwise inefficiencies develop.²⁰⁵ Industry standards must license proprietary information on FRAND terms.²⁰⁶ In draft guidelines, it is encouraged that “[t]he IPR [intellectual property rights] policy [of the SSOs] should also require that all holders of essential IPR in technology which may be adopted as part of a standard provide an irrevocable commitment in writing to license their IPR to all third parties on fair, reasonable, and nondiscriminatory terms.”²⁰⁷ To discourage holdup, the draft guidelines also state that “the IPR policy should require good faith disclosure of those intellectual property rights ... that might be essential for the implementation of a standard under development before that standard is agreed.”²⁰⁸

In the European equivalent to the American case of *Rambus*, Rambus was also accused of failing to disclose its intellectual property during the development of standards in Europe; Rambus then asserted their rights when the standards were adopted, resulting in an abuse of a dominant position because of excessive pricing.²⁰⁹ Rambus eventually agreed to charge a reasonable and nondiscriminatory royalty rate.²¹⁰

The difficulty of enforcing the prohibition on excessive prices under Article 102 is recognized.²¹¹ Determining what is an excessive price can be difficult and involves comparing the price to competing products.²¹² In *United Brands*, an excessive price was defined as one that “has no reasonable relation to the

²⁰² HANDBOOK ON THE ANTITRUST ASPECTS OF STANDARD SETTING, *supra* note 43, at 212–13.

²⁰³ *Id.* at 214.

²⁰⁴ *Id.* at 215 n. 42.

²⁰⁵ *Id.*

²⁰⁶ *Id.* at 216.

²⁰⁷ *Id.* at 216 n. 49.

²⁰⁸ *Id.* at 219 n. 57.

²⁰⁹ *Id.* at 224 n. 82 (explaining how Rambus had infringed Article 102 of the TFEU because of unreasonable royalties).

²¹⁰ Stephan Dorn, *Frandy EU Decision In Rambus Case*, IPEG (2010), <https://www.ipeg.com/frandy-eu-decision-in-rambus-case/>.

²¹¹ HANDBOOK ON THE ANTITRUST ASPECTS OF STANDARD SETTING, *supra* note 43, at 206, 230.

²¹² *Id.*

economic value of the product supplied.”²¹³ Commentators have argued that excessive prices are anticompetitive only in exceptional circumstances.²¹⁴

III. ANALYSIS

Through a series of speeches, the DOJ has shifted policy in the enforcement of antitrust law in the field of intellectual property. This is perhaps a natural result of recent history. For perspective, a merging of events occurred in the U.S. patent system: the passage of the America Invents Act (“AIA”), significant court decisions, and the rise of patent trolls; these events created uncertainty in the strength of patent rights.²¹⁵

The AIA was passed in 2011 changing the U.S. from a first-to-invent system to a first-inventor-to-file system.²¹⁶ The AIA also established *inter partes* review, and the Patent Trial and Appeal Board (“PTAB”) became the “death squad” of patent holders as third parties successfully challenged patents.²¹⁷ The 2013 Joint Policy Statement included statements that questioned the availability of injunctions.²¹⁸

Patent trolls were perceived to be abusing the patent system because Patent Assertion Entities (“PAEs”) used aggressive litigation to sue companies with dubious claims of patent infringement.²¹⁹ The Obama White House published a report describing that PAEs had threatened over 100,000 companies in 2012, and the number of suits has tripled in the previous two years.²²⁰

The 2006 *eBay* decision made it more difficult to obtain an injunction.²²¹ Rather than having injunctions as a default remedy, under *eBay*, companies had to show, among other factors, that they suffered irreparable injury.²²² While it is

²¹³ *Id.* at 230 (citing Case 27/76, *United Brands v. Comm’n*, 1978 E.C.R. 207).

²¹⁴ *Id.* at 231.

²¹⁵ Jimmy Hoover, *SHOCK CLAIM: Supreme Court, AIA Gutted Patents, Ex-Fed. Circ. Chief Says*, MILLENNIUM REP. (Oct. 21, 2017), <http://themillenniumreport.com/2017/10/shock-claim-supreme-court-aia-gutted-patents-ex-fed-circ-chief-says/>.

²¹⁶ Leahy-Smith American Invents Act of 2011, Pub. L. No. 112-29, 125 Stat. 284 (codified as amended in scattered sections of 35 U.S.C.).

²¹⁷ Rob Sterne & Gene Quinn, *PTAB Death Squads: Are All Commercially Viable Patents Invalid?*, IPWATCHDOG (Mar. 24, 2014), <http://www.ipwatchdog.com/2014/03/24/ptab-death-squads-are-all-commercially-viable-patents-invalid/id=48642/> (recounting Judge Rader’s comments that the Patent Trial Appeal Board is a “death squad” for patents).

²¹⁸ See POLICY STATEMENT ON REMEDIES FOR STANDARDS-ESSENTIAL PATENTS SUBJECT TO VOLUNTARY F/RAND COMMITMENTS, *supra* note 149, at 8.

²¹⁹ PRESIDENT’S COUNCIL OF ECON. ADVISERS, NAT’L ECON. COUNCIL, AND THE OFFICE OF SCI. & TECH. POLICY, PATENT ASSERTION AND U.S. INNOVATION (2013), https://obamawhitehouse.archives.gov/sites/default/files/docs/patent_report.pdf.

²²⁰ *Id.*

²²¹ *eBay Inc. v. MercExchange, L.L.C.*, 547 U.S. 388, 390, 392–94 (2006).

²²² *Id.* at 391.

argued that injunctions have decreased in part because of more savvy defenses, at least from 2017 to 2018, the number of permanent and preliminary injunctions has nonetheless decreased.²²³ Under subsequent court decisions, *Alice* and its progeny, patents were increasingly found invalid as lacking utility.²²⁴

Against this backdrop, the administration and leadership at the DOJ changed. Makan Delrahim, through the New Madison Approach announced a shift in policy.²²⁵ The director of the USPTO argued that inventors should be encouraged to take risks and innovate, and that “in our zeal to eliminate ‘trolls’ . . . we have over-corrected and risk throwing out the baby with the bathwater.”²²⁶ He called for narrowly tailored measures to find where faults exist, and “to seek balance, consistency, predictability, and reliability in our IP systems.”²²⁷ The USPTO announced shifts in policy in IPR proceedings and an effort to clarify office claim rejections in light of *Alice*.²²⁸

The New Madison Approach is the executive branch’s pushback to an erosion of patent rights. The New Madison Approach forces the issue of whether or not patent hold-up is a problem.²²⁹ Those who say it is a problem point to unfair terms or deceit practiced by those who hold intellectual property rights. Those who say patent hold-up is not a problem highlight the importance of intellectual property in driving the economy; by being short-sighted to save a dollar today,

²²³ Ryan Davis, *Patent Injunctions Drop Sharply in 2018*, LAW360 (Jan. 31, 2019), <https://www.law360.com/articles/1121976> (urging that infringers are showing patentee’s harm results from something other than patent infringement and that as good corporate citizen, the infringer is not a cause of the irreparable harm).

²²⁴ See generally Jonathan Stroud, *Patent Post-Grant Review After Alice*, 69 BAYLOR L. REV. 56, 62 (2017) (describing the results of an ABA *Alice*-Task Force that showed in 2014–2016, that generally 20–30% of patents survived an invalidity challenge under *Alice*).

²²⁵ See David Clonts et al., *Assistant Attorney General Makan Delrahim Signals Shift in Antitrust/IP Focus*, AKIN GUMP STRAUSS HAUER & FELD LLP (Dec. 5, 2017), <https://www.akingump.com/en/news-insights/assistant-attorney-general-makan-delrahim-signals-shift-in.html>.

²²⁶ Andrei Iancu, Dir., U.S. Patent & Trademark Office, Remarks Delivered at the Eastern District of Texas Bar Association Inaugural Texas Dinner (Oct. 18, 2018).

²²⁷ *Id.* But see Dave Simpson, *Execs Slam Iancu’s ‘Downplaying’ of Patent Troll Concerns*, LAW360 (Feb. 14, 2019), <https://www.law360.com/articles/1129558/execs-slam-iancu-s-downplaying-of-patent-troll-concerns> (explaining that many executives are arguing that patent trolls are still a problem).

²²⁸ Notice Regarding a New Pilot Program Concerning Motion to Amend Practice, 84 Fed. Reg. 9497 (Mar. 15, 2019) (providing for amendment during IPR to allow claims to remain valid); 2019 Revised Patent Subject Matter Eligibility Guidance, 84 Fed. Reg. 50 (Jan. 7, 2019) (providing guidance to patent examiners for determining patent eligibility under *Alice/Mayo*); U.S. PATENT & TRADEMARK OFFICE, OCTOBER 2019 UPDATE: SUBJECT MATTER ELIGIBILITY (2019), https://www.uspto.gov/sites/default/files/documents/peg_oct_2019_update.pdf.

²²⁹ See generally Delrahim, The “New Madison” Approach to Antitrust and Intellectual Property Law, *supra* note 2 (explaining that hold-up is not an antitrust problem).

the economy foregoes unknown advances in technology that the act of providing and developing standards can provide.

The antitrust question is whether there has been more consumer harm than benefit when a monopolist practices patent hold-up. Patents grant an exclusive right; a monopolist can refuse to deal, practice price discrimination, or have exclusionary practices.²³⁰ A rule of reason analysis is used to determine whether there has been a violation of antitrust law.

On the other hand, patents grant a time limited right to exclude, and flexibility is demanded because the intellectual property system provides incentives to further innovate.²³¹ What may be perceived as exorbitant royalty rates can enable the company to conduct further research and promote the progress of science. The incentive to make money attracts those willing to invest time and energy into developing new ideas. The intellectual property system enables startup companies to take an idea, patent it, and earn licensing revenues, which can be reinvested in the company for more research and development.²³² Small companies can grow to become large multinational companies because the original owner or inventor was able to leverage their patent portfolio. What may appear to be consumer harm may, over time, result in consumer benefit because a patent holder has been able to effectively leverage patent rights.

In addition, patent protection lasts a short time, and the time to reap the benefits of a patented technology will shorten as technology is replaced by newer and improved ideas.²³³ It is therefore not a simple matter to say that patent hold-up harms the consumer when the price seems unfair on its face. The facts and circumstances vary by case, and each case demands a full analysis.

As supported by *Trinko*, there is no duty for a patent holder to aid his competitor.²³⁴ A patent owner has the right to exclude others from practicing his invention.²³⁵ This includes the right to seek an injunction. Being widely

²³⁰ See generally Stephan Kinsella, *Are Patents "Monopolies"?*, MISES INST. (July 13, 2009), <https://mises.org/wire/are-patents-monopolies-0> (explaining the discriminatory and exclusionary practices of patents that result in a monopoly in the market).

²³¹ *Patent Monopoly: Everything You Need to Know*, UPCOUNSEL, <https://www.upcounsel.com/patent-monopoly> (last visited Jan. 7, 2020).

²³² Jacqueline Hooper, *Safeguard Your Startup With An Intellectual Property Strategy*, ENTREPRENEUR MIDDLE EAST (Oct. 16, 2018), <https://www.entrepreneur.com/article/321714>.

²³³ See generally Kappos, *supra* note 162, at 671 (noting that temporary patent protections build off of antitrust laws rather than run afoul of them, because patent laws allow for inventors to reap the rewards of their products while others are incentivized to make their own better product).

²³⁴ See *Verizon Commc'ns Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398, 401, 411, 415–16 (2004).

²³⁵ See generally Delrahim, "Telegraph Road": Incentivizing Innovation at the Intersection of Patent and Antitrust Law, *supra* note 149 ("Our forefathers thought that patent rights . . . [which specifically include] the ability to exclude competitors . . . critical to

successful and achieving dominance by itself is not antitrust harm; the dominance must be accompanied by some exclusionary act that creates anticompetitive harm, and even then, it must be analyzed on a case by case basis in relation to the procompetitive effects of the case.

On the other hand, the right to exclude is not unqualified. In *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, Aspen Skiing had a course of dealing with Aspen Highlands in offering an all-Aspen, six-day ticket.²³⁶ Aspen Skiing eventually withdrew participating in the all-Aspen ticket and substituted it with a three-area ticket that excluded Aspen Highlands.²³⁷ As a result, Aspen Highlands' market share decreased by almost 50 percent and it lost revenues with associated skiing services.²³⁸ The court held that the right to refuse to deal is not unqualified.²³⁹ In the patent context, the facts and circumstances of a case may find that a patent holder who has a course of dealing in contracting and abiding by FRAND commitments, may not unilaterally withdraw from those commitments solely to maintain monopoly power.

In an FTC antitrust action against Qualcomm, Judge Lucy H. Koh found Qualcomm had a duty to license standard essential patents to rivals.²⁴⁰ The district court relied on the ninth circuit's discussion of *Trinko* and *Aspen Skiing* in *MetroNet Services Corp. v. Qwest Corp.*²⁴¹ Agreeing with *MetroNet*, the district court discussed that in *Aspen Skiing*, there were three factors not present in *Trinko*: 1) terminating a course of dealing that was voluntary and profitable; 2) refusing to deal despite receiving retail pricing, which suggested anticompetitive conduct; and 3) refusing to provide a competitor a product already sold to other customers.²⁴² In an analogous fashion to *MetroNet's* three factors, the court found that Qualcomm had a duty to deal because: 1) Qualcomm terminated a voluntary and profitable course of dealing; 2) it was motivated by anticompetitive malice in refusing to license; and 3) a retail market existed for

promoting innovation in our country.”).

²³⁶ *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585, 589 (1985).

²³⁷ *Id.* at 594.

²³⁸ *Id.*

²³⁹ *Id.* at 600 (“[T]he absence of a duty to transact business with another firm is, in some respects, merely the counterpart of the independent businessman’s cherished right to select his customers and his associates. The high value that we have placed on the right to refuse to deal with other firms does not mean that the right is unqualified.” (citing *Lorain Journal Co. v. United States*, 342 U.S. 143 (1951))).

²⁴⁰ *FTC v. Qualcomm Inc.*, 411 F. Supp. 3d 658, 762 (N.D. Cal. 2019); see *Aspen Skiing Co.*, 472 U.S. at 605 (“If a firm has been ‘attempting to exclude rivals on some basis other than efficiency,’ it is fair to characterize its behavior as predatory....”).

²⁴¹ *Qualcomm Inc.*, 411 F. Supp. 3d at 759; see also *MetroNet Services Corp. v. Qwest Corp.*, 383 F.3d 1124, 1132–34 (9th Cir. 2004).

²⁴² *Qualcomm Inc.*, 411 F. Supp. 3d at 759.

licensing at the modem chip level.²⁴³

While private standard-setting organizations have the right to set up rules for how they conduct business, having a variety of remedies available ensures the best final result for all. Contractual remedies are available when there are FRAND disputes.²⁴⁴ Antitrust remedies of treble damages, injunctive relief, or criminal sanctions can be pursued when warranted.²⁴⁵ However, it is only by having an equilibrium in which a variety of remedies are available that the system can be flexible and strong enough to meet the varied issues of the day. Injunctive relief is a valuable remedy and limiting its availability can cause harm.

The quintessential right of a patent holder is the right to exclude others from practicing the patented invention.²⁴⁶ This right should only be withdrawn under circumstances that warrant it. As explained above, it is not a simple matter to toy with the intellectual property system that has brought about great innovation and advances in society over hundreds of years. Incentives exist to promote the progress of science and using antitrust law to upset that balance should be reserved for unique circumstances.

The EU has a different method of enforcement than the U.S., so it is hard to compare the two systems of enforcement.²⁴⁷ However, it is useful to know that FRAND is highly valued and good faith bargaining is expected in the EU. In the U.S., contract law expects that two willing parties, who voluntarily negotiate a license agreement, do so in good faith and expect fair and reasonable terms. Otherwise, a party can just walk away if the terms are not suitable. Both the U.S. and Europe struggle with the balance of intellectual property rights and competition policy. It may just be that there must be a struggle with a constant back and forth to reach an equilibrium among parties in an SSO.

The New Madison Approach is an important shift from former views of a bias against injunctions, towards a viewpoint in which injunctions are a viable and valuable option.²⁴⁸ As noted by inventor Ken Stanwood, small companies should not be bullied around by large multinational corporations.²⁴⁹ Companies that

²⁴³ *Id.* at 759–62.

²⁴⁴ See J. Gregory Sidak, *The FRAND Contract*, 3 CRITERION J. ON INNOVATION 1, 3–4 (2018).

²⁴⁵ See Wayne D. Collins, *Trusts and the Origins of Antitrust Legislation*, 81 FORDHAM L. REV. 2279, 2340–42 (2013).

²⁴⁶ *Rights Granted Under U.S. Patent Law*, BITLAW (Jan. 19, 2020), <https://www.bitlaw.com/patent/rights.html>.

²⁴⁷ *Update on EU Patent and European Patent Litigation*, IPEG, <https://www.ipeg.com/update-on-eu-patent-and-european-patent-litigation/> (last visited Apr. 13, 2020).

²⁴⁸ Delrahim, *The “New Madison” Approach to Antitrust and Intellectual Property Law*, *supra* note 2.

²⁴⁹ See *generally id.* (quoting Madison as stating “monopolies are ‘among the greatest

enter into contracts with FRAND agreements need to make sure that those contracts have clear FRAND terms so that they can be enforced if necessary under contract law.

The FTC and the DOJ are at a crossroads. The DOJ has started the debate related to patent hold-up, hold-out, injunctions, and the per se right to exclude others from practicing one's invention.²⁵⁰ It is time for the two agencies to meet and come to an agreement. The New Madison Approach is a necessary step. Users of both antitrust law and patent law need clarity. They need guidelines, clear policy statements, and regulations that instill the ideas of the New Madison Approach.

If the FTC and DOJ persist in different views, there can be unintended consequences. For example, while still under appeal, the FTC has prevailed in an antitrust action against Qualcomm because of its "no license-no chips" policy.²⁵¹ On the other hand, Apple and Qualcomm have come to a settlement to drop all litigation worldwide.²⁵² These issues have important ramifications. If a company cannot rely on the patent system to protect innovation, then innovation and the American public will be harmed. Inventors may resort to trade secrets, which does not benefit the progress of science that results from the continual push and pull of innovators improving upon known technology.

The FTC has recently conducted extensive hearings to determine whether the "economy, evolving business practices, new technologies, or international developments might require adjustments to competition and consumer protection law, enforcement priorities, and policy."²⁵³ The FTC and DOJ do not act in a vacuum, but are influenced by their interactions, their choice of cooperation in which enforcement to pursue or not to pursue, and consistency with administration goals.²⁵⁴ As an independent agency, the FTC's views are important to ensure a balanced approach to antitrust law and intellectual property

nuisance in government.' ").

²⁵⁰ *Id.*

²⁵¹ Complaint of Federal Trade Commission for Equitable Relief at 3, Fed. Trade Comm'n v. Qualcomm Inc., No. 5:17-cv-00220, 2017 WL 242848 (N.D. Cal. Jan. 17, 2017).

²⁵² Molly Schuetz, *Qualcomm and Apple Agree to Drop All Litigation Worldwide*, BLOOMBERG L. NEWS (Apr. 16, 2019), <https://news.bloomberglaw.com/tech-and-telecom-law/qualcomm-and-apple-agree-to-drop-all-litigation-worldwide>.

²⁵³ Hearings on Competition and Consumer Protection in the 21st Century, FED. TRADE COMMISSION, <https://www.ftc.gov/policy/hearings-competition-consumer-protection> (last visited Jan. 19, 2019).

²⁵⁴ JERRY L. MASHAW, REASONED ADMINISTRATION AND DEMOCRATIC LEGITIMACY: HOW ADMINISTRATIVE LAW SUPPORTS DEMOCRATIC GOVERNMENT 160 (2018) (arguing that where Congress does not require action, the agency has discretion to decide policy initiatives, but also there is a need for consistency with the administration's general program and their proper role within government).

law and to help moderate views held by the DOJ.²⁵⁵

The debate centered around the New Madison Approach deserves further consideration. The availability of contract law as a remedy should be tested. Are the contracts at issue in standard-setting organizations clear and enforceable? One commentator has noted that, as of May 2018, no state or federal court has found a RAND contract unenforceable.²⁵⁶ However, in an investigation at the ITC a contract was found to not be reasonably certain, and therefore unenforceable under New York law.²⁵⁷ The availability of promissory estoppel and equitable estoppel in the patent context can be considered.²⁵⁸

Past use of contract law can be studied more in depth, including empirical studies. The judicial system is overburdened, juries are unpredictable, and cases often settle. For those reasons, parties may be reluctant to put all the particulars of a contract on the public record when they seek to enforce an agreement.

The intersection of common law and public enforcement can be more deeply tested. If contract law is available, the circumstances under which antitrust law is available, precluded, needed, or the better solution can be delineated.

A comparison of the New Madison Approach for standard-essential patents compared to patents generally can be used to further test the approach and gain a deeper understanding of the issues involved. While patents are territorial, technology is developed in the global marketplace and companies negotiate global royalty rates; this raises more issues for consideration.²⁵⁹

Thus far, the New Madison Approach has only been given through a series of speeches.²⁶⁰ When a consensus has been reached, rulemaking can be pursued so that the public is put on notice of what the law is in this area.

Guidelines or policy statements of either the FTC or DOJ do not have the

²⁵⁵ MARSHALL J. BREGER & GARY J. EDLES, *INDEPENDENT AGENCIES IN THE UNITED STATES: LAW, STRUCTURE, AND POLITICS* 38 (2015) (quoting remarks by Senator Francis Newlands at the creation of the FTC as supporting a strong independent agency: “Such work must be done by a board or commission of dignity, permanence, and ability, independent of executive authority...”; and quoting Robert Cushman that commission independence helped counter “the partisan and pressure-controlled administration of the antitrust laws by the Department of Justice”).

²⁵⁶ Sidak, *supra* note 244, at 4.

²⁵⁷ *See id.* at 3–4 (describing the reasoning of the unenforceability of a RAND contract in Inv. No. 337-TA-1023).

²⁵⁸ *Id.* at 5 (citing Jorge L. Contreras, *A Market Reliance Theory for FRAND Commitments and Other Patent Pledges*, 2015 UTAH L. REV. 479) (stating at note 22 that proving an equitable estoppel defense by an SEP infringer would be unlikely).

²⁵⁹ Susan Decker & Ellen Milligan, *Huawei Patent Battles Could Be Played Out in U.K. Courts*, BLOOMBERG L. NEWS (Oct. 20, 2019), <https://news.bloomberglaw.com/ip-law/huawei-patent-battles-could-be-played-out-in-u-k-courts> (describing the U.K. Supreme Court’s upcoming consideration of using British tribunals to set global royalty rates).

²⁶⁰ Tierney & Luken, *supra* note 85 (noting that while the approach has thus far only been advocated through speeches, the Antitrust Division may look to present its views in court or attempt to participate in FRAND cases).

force of law when they have not undergone rule-making procedures.²⁶¹ However, it is not always clear that guidance documents are not substantive rules.²⁶² The Administrative Procedure Act (“APA”) also provides for the precedential effect of opinions, statements of policy, or interpretation.²⁶³ In addition, agencies must be mindful of the *Accardi* doctrine, which provides that agencies are obligated to follow their own procedures or regulations.²⁶⁴

The DOJ-FTC have already issued joint “Antitrust Guidelines for the Licensing of Intellectual Property” in 2017 to guide the public about when anticompetitive conduct can be found in the licensing of intellectual property.²⁶⁵ The guidelines state that intellectual property is considered the same as any other form of property for the antitrust analysis.²⁶⁶ While patents can confer market power, market power does not violate antitrust law if that power derives from “a superior product, business acumen, or historic accident.”²⁶⁷ The guidelines describe the markets affected by licensing, and general principles and their application in evaluating license agreements using the rule of reason.²⁶⁸ With respect to the fourth element of the New Madison Approach, the guidelines state, “Nor does such market power impose on the intellectual property owner an obligation to license the use of that property to others.”²⁶⁹ However, as discussed above, this is not a necessary result and exceptions may be possible.²⁷⁰ Furthermore, the guidelines do not directly address standard-essential patents within the context of standard-setting organizations. As technology progresses and SSOs become more prevalent, clear policy is needed.

In response to the debate and withdrawal from the 2013 Joint Policy Statement, the USPTO, the National Institute of Standards and Technology

²⁶¹ See generally Administrative Procedure Act, 5 U.S.C. §§ 551–559 (2012) (outlining the rule-making procedures); Administrative Procedure Act, 5 U.S.C. § 553(b)(A) (stating that general statements of policy, or rules of agency organization, procedure, or practice are not subject to APA requirements).

²⁶² *Ctr. for Auto Safety v. Nat’l Highway Traffic Safety Admin.*, 452 F.3d 798, 807 (D.C. Cir. 2006) (holding guidance documents are not reviewable nor “final agency action” unless a “consummation of the agency’s decision-making process” that determine rights or obligations or result in legal consequence (citing *Bennett v. Spear*, 520 U.S. 154, 178 (1997))).

²⁶³ Administrative Procedure Act, 5 U.S.C. § 552(a)(2) (“A final order, opinion, statement of policy, interpretation, or staff manual or instruction that affects a member of the public may be relied on, used, or cited as precedent by an agency against a party....”).

²⁶⁴ *U.S. ex rel. Accardi v. Shaughnessy*, 347 U.S. 260, 268 (1954).

²⁶⁵ ANTITRUST GUIDELINES FOR THE LICENSING OF INTELLECTUAL PROPERTY, *supra* note 35, at 1.

²⁶⁶ *Id.* at 3.

²⁶⁷ *Id.* at 4 (quoting *United States v. Grinnell Corp.*, 384 U.S. 563, 570–71 (1996)).

²⁶⁸ *Id.* at 16.

²⁶⁹ *Id.* at 4.

²⁷⁰ See *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585 (1985).

(“NIST”), and the DOJ Antitrust Division issued a new 2019 Policy Statement.²⁷¹ Good-faith negotiations between patent owners and licensees are expected, but injunctions should be available for patent infringement as the facts warrant, with no special rules for standard essential patents.²⁷² The 2019 Policy Statement reiterates that a balanced approach, accounting for all remedies, will preserve competition and provide incentives to innovate.²⁷³ A USPTO press release quotes Under Secretary of Commerce for Intellectual Property and Director of the USPTO Andrei Iancu stating, “The new joint statement effectively takes the government’s thumb off the scale” and is meant to “incentivize technological development and growth of standards-based industries.”²⁷⁴

This is a fair debate, but the enforcement agencies are in a unique position to drive the discussion towards the best solution. A faithful effort now to gather public input will help ensure that any guidelines and policy statements are likely to be accepted.²⁷⁵ That way, policy and guidelines can remain valuable and withstand the test of time.²⁷⁶

By coming together with the DOJ, stakeholders can send a strong statement to the world that the patent system is strong and open to all inventors in the world. The role of antitrust law in the patent system must be clear. It is not one to be shuttered away but approached on a case-by-case basis, as the facts and circumstances demand.

America’s inventors and those who invest in patented technology in America deserve clarity, a strong intellectual property system, and a strong antitrust system. Antitrust enforcers, innovators, and implementers can and must all work together to better our society.

IV. CONCLUSION

Intellectual property law and antitrust law can work together to promote innovation that increases consumer welfare. However, antitrust law should not

²⁷¹ POLICY STATEMENT ON REMEDIES FOR STANDARDS-ESSENTIAL PATENTS SUBJECT TO VOLUNTARY F/RAND COMMITMENTS, *supra* note 149.

²⁷² *Id.* at 9.

²⁷³ *Id.* at 8.

²⁷⁴ Press Release, U.S. Patent & Trademark Office, U.S. Patent and Trademark Office Releases Policy Statement on Standards-Essential Patents Subject to Voluntary F/RAND Commitments (Dec. 19, 2019), <https://www.uspto.gov/about-us/news-updates/us-patent-and-trademark-office-releases-policy-statement-standards-essential>.

²⁷⁵ MASHAW, *supra* note 254, at 162 (describing political reason-giving for legitimate administrative action).

²⁷⁶ See generally Richard A. Posner, *Legal Formalism, Legal Realism, and the Interpretation of Statutes and the Constitution*, 37 CASE W. RES. L. REV. 179, 217 (1986) (describing the test of time to validate interpretations of statutes).

be short-sighted and look for short term rewards. Having a variety of remedies available, including injunctions, ensures that parties will negotiate in good faith and abide by their commitments over time. The New Madison Approach is a necessary debate; further discussion and analysis will ensure that policy and guidelines that stand the test of time can be developed. Innovation is necessary at the cutting edge, creating new products in an unpredictable time frame. This demands flexibility to ensure that the society can reap the greatest benefit possible. Antitrust law should also address patent hold-up and hold-out, injunctions, and unilateral refusal to license with clear policy. Ultimately, society will reap the benefits of an appropriate approach to these bodies of law.