

2016

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Recommended Citation

Alden F. Abbott, US Government Antitrust Intervention in Standard-Setting Activities and the Competitive Process, 18 *Vanderbilt Journal of Entertainment and Technology Law* 225 (2020)

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**US Government Antitrust
Intervention in Standard-Setting
Activities and the Competitive
Process**

*Alden F. Abbott**

ABSTRACT

The private sector historically has driven the setting of technical standards in the United States, with the federal government only intervening in response to perceived violations of specific statutes, such as antitrust laws. This concern is reflected in case law and in advice proffered by US antitrust enforcers. Recently, however, US enforcers have turned their attention primarily to the alleged misuse of monopoly power over patents that cover technologies embodied in standards. This new focus threatens to undermine innovation and departs from sound antitrust enforcement policy. American antitrust enforcers should redirect their priorities away from alleged single-firm, patent-related abuses associated with standard setting and toward the

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traditional emphasis on reductions in rivalrous competition. They should also reject their recently adopted skeptical attitude toward patents and return to the former consensus, understanding that the exercise of patent rights generally promotes innovation and strengthens the competitive process.

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I. INTRODUCTION

This Article discusses the recent undermining of patent rights by the Obama administration, which has manifested in various ways, particularly in the context of standard-setting policy and antitrust policy. Continuation of this policy, which unfortunately is mirrored in Europe and East Asia,¹ would prove harmful over time to the US innovation-based economy.

Patent laws enjoy a venerable place in US jurisprudence. Specifically, the Patent and Copyright Clause of the Constitution empowers Congress “[t]o 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.”² In *The Federalist* No. 43, James Madison justified the protection of “Writings” and “Discoveries” as contributing both to the public interest and to the

1. See generally Paul Lugard, Simina Suciuc & Elena Cortés, *European Union: Assessment of IP Licensing Agreements under EU Competition Law*, in GETTING THE DEAL THROUGH 5, 5 (2014), http://www.law.georgetown.edu/cle/materials/Antitrust15/IP/5/Getting_the_deal_through_Licensing_2014.pdf [<http://perma.cc/CJ4M-QDZQ>] (“In recent years there has been . . . an increasing willingness of the European Commission . . . and other antitrust enforcement agencies to challenge IP-related transactions, often on the basis of novel theories of competitive harm.”).

2. U.S. CONST. art. I, § 8, cl. 8.

private interest of creators—“[t]he public good fully coincides in both cases with the claims of individuals.”³

Patent law does not exist in a vacuum. In particular, federal courts often are asked to construe patent doctrines in tandem with antitrust law principles in high profile disputes regarding the application of valuable technologies. Though not mentioned in the Constitution, antitrust laws have long been seen as holding a special status in the federal statutory hierarchy. The US Supreme Court, for example, famously stated that “[a]ntitrust laws in general, and the Sherman Act in particular, are the Magna Carta of free enterprise.”⁴

Today, US antitrust law is often broadly viewed as aimed at promoting “consumer welfare” and “economic efficiency.”⁵ It typically does this by forbidding business behavior that harms the competitive process or lacks countervailing efficiency justifications.⁶ Concern typically focuses on “bad” actions—business behavior that is not “competition on the merits.”⁷ Certain conduct—“naked” cartel activity lacking any efficiency justification, such as secret price fixing or bid rigging—is deemed categorically illegal, or unlawful *per se*, without regard to possible efficiency justifications. Conduct that is not *per se* illegal is assessed under a “rule of reason,” which requires a more detailed analysis of particular practices.⁸ US antitrust law does not,

3. THE HERITAGE GUIDE TO THE CONSTITUTION 153 (David F. Forte & Matthew Spalding eds., 2d ed. 2014).

4. *United States v. Topco Assocs., Inc.*, 405 U.S. 596, 610 (1972).

5. The precise goals of antitrust are a rather complicated topic beyond the scope of this Article, but the merits of “economic efficiency” and “consumer welfare” clearly are a central feature of modern US antitrust policy debates (even though other factors are also discussed and there are disagreements as to definitions of terms). For an excellent overview of these debates and US antitrust philosophy in general, see HERBERT HOVENKAMP, *FEDERAL ANTITRUST POLICY* 57–86 (4th ed. 2011). For an excellent description of relevant scholarly literature in this area, see Jonathan M. Jacobson, Partner, Wilson Sonsini Goodrich & Rosati, Another Take on the Relevant Welfare Standard for Antitrust, Remarks at The Chair’s Showcase: Rethinking Antitrust Economics for the 21st Century, Am. Bar Ass’n Antitrust Section Spring Meeting (Apr. 16, 2015), <https://www.wsgr.com/attorneys/BIOS/PDFs/jacobson-0415.pdf> [<https://perma.cc/V6RB-Q396>].

6. Jacobson, *supra* note 4, presents a good discussion of competing standards for evaluating potential antitrust violations, including the treatment of efficiencies and the meaning of harm to the competitive process.

7. This is a slight overstatement. Antitrust law prohibits mergers that, while otherwise involving perfectly legitimate business objectives, “may . . . substantially lessen competition or . . . tend to create a monopoly.” Clayton Act, 15 U.S.C. § 7 (2012). Mergers, which play a prominent role in corporate conduct, are only “bad acts” in an antitrust sense if their effects raise these statutory concerns. See also *United States v. Von’s Grocery Co.*, 233 F. Supp. 976, 979 (S.D. Cal. 1964) (“The act was intended to prevent a merger or acquisition of assets when the effect may be to substantially lessen competition or tend to create a monopoly.”).

8. For a more nuanced overview of the distinction between the *per se* rule and the rule of reason (with an emphasis on the characterization of business practices that informs this distinction), see HOVENKAMP, *supra* note 5, at 272–89.

however, prohibit the mere exercise of legitimately obtained market power—that is, the mere charging of “high” prices by firms that succeed through merits-based competition.⁹ As the Supreme Court emphasized in *Verizon v. Trinko*:

The mere possession of monopoly power, and the concomitant charging of monopoly prices, is not only not unlawful; it is an important element of the free-market system. The opportunity to charge monopoly prices—at least for a short period—is what attracts ‘business acumen’ in the first place; it induces risk taking that produces innovation and economic growth. To safeguard the incentive to innovate, the possession of monopoly power will not be found unlawful unless it is accompanied by an element of anticompetitive conduct.¹⁰

II. THE HISTORY OF THE PATENT-ANTITRUST INTERFACE

Patent law and antitrust law have had an uneasy relationship over the years largely based on the discredited notion that patent law inherently promotes monopoly, while antitrust is designed to combat monopoly.

Since the enactment of the Sherman Antitrust Act in 1890, the legal treatment of licensing practices based on patent rights has oscillated between absolute freedom in licensing and significant limitations. In the early 1900s, patent laws were considered to give “absolute freedom in the use or sale of rights.”¹¹ However, in the ensuing decades, the courts recognized limitations on the extent of a patent owner’s rights in licensing. In *United States v. Line Material Co.*, the Supreme Court emphasized that inventors must stay within their “statutory exclusive rights,” which include the “rights of an inventor to make, use, and sell products of his invention for a limited time.”¹² The Court pointed out that “[a]s long as the inventors kept within their statutory exclusive rights, they were not engaging in unreasonable restraints of trade violating the Sherman Act,” but added that “[t]he Sherman Act unquestionably applied to any abuse of a patentee’s exclusive rights which exceeded the limit of those rights.”¹³ The Court adopted a narrow interpretation of patent law rights in favor of the antitrust laws, noting in *Sears, Roebuck & Co. v. Stiffel Co.*, that “[o]nce the patent issues, it is strictly construed, it cannot be used to secure any monopoly beyond that contained in the

9. See, e.g., *Berkey Photo, Inc. v. Eastman Kodak Co.*, 603 F.2d 263, 294 (2d Cir. 1979) (“Setting a high price may be a use of monopoly power, but it is not in itself anticompetitive.”).

10. *Verizon Commc’ns Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398, 407 (2004).

11. See *E. Bement & Sons v. Nat’l Harrow Co.*, 186 U.S. 70, 91 (1902) (“[T]he general rule is absolute freedom in the use or sale of rights under the patent laws of the United States.”).

12. *United States v. Line Materials Co.*, 333 U.S. 287, 341 (1948).

13. *Id.*

patent, the patentee's control over the product when it leaves his hands is sharply limited, and the patent monopoly may not be used in disregard of the antitrust laws."¹⁴ In other words, a patentee cannot legally engage in conduct that violates antitrust norms if such conduct goes beyond the core time-limited right to make, use, and sell his patented product—as the Supreme Court put it, “The patent laws which give a temporary monopoly on ‘making, using, or selling the invention’ are *in pari materia* with the antitrust laws, and modify them *pro tanto*.”¹⁵

The Court's jurisprudence defined certain types of conduct involving patents to be *per se* violations of the antitrust laws. In *Mercoid Corp. v. Mid-Continent Investment Co.*, the Court held that tying arrangements involving patents always constituted antitrust violations.¹⁶ The Court stated:

When the patentee ties something else to his invention, he acts only by virtue of his right as the owner of property to make contracts concerning it and not otherwise. He then is subject to all the limitations upon that right which the general law imposes upon such contracts. The contract is not saved by anything in the patent laws because it relates to the invention.¹⁷

In the 1970s, the Antitrust Division of the US Department of Justice (DOJ) went beyond existing case law and delineated nine types of patent licensing restrictions that it would challenge, without regard to their potential efficiencies: the “Nine No-Nos” of licensing.¹⁸ The “No-Nos” sought to render invalid virtually all of a patent holder's contractual limitations on the use of its technology by “downstream” licensees. The “No-Nos” ignored the licensing restraints' role in developing potential gains in technology specialization, adoption, and further technological improvement investment incentives.

In practice, only a few of the IP cases filed by the Antitrust Division addressed any of these nine restrictions, and most of those cases were litigated under a rule of reason rather than *per se* illegality.¹⁹ Nevertheless, the existence of such a highly publicized list undoubtedly discouraged potentially efficient, welfare-increasing patent licensing transactions.

14. *Sears, Roebuck & Co. v. Stiffel Co.*, 376 U.S. 225, 230 (1964) (citations omitted).

15. *Simpson v. Union Oil Co. of Cal.*, 377 U.S. 13, 24 (1964).

16. *Mercoid Corp. v. Mid-Continent Inv. Co.*, 320 U.S. 661 (1944).

17. *Id.* at 666.

18. See Abbott B. Lipsky, Jr., *Current Antitrust Division Views on Patent Licensing Practices*, 50 ANTITRUST L.J. 515, 517–24 (1982).

19. Richard Gilbert & Carl Shapiro, *Antitrust Issues in the Licensing of Intellectual Property: The Nine No-No's Meet the Nineties*, in BROOKINGS PAPERS ON ECON. ACTIVITY, MICROECON. 283, 286 (1997), http://www.brookings.edu/~media/projects/bpea/1997-micro/1997_bpeamicro_gilbert.pdf [<http://perma.cc/C8KN-ATXY>].

Beginning in 1981, US antitrust authorities under the Reagan Administration changed course and rejected the “Nine No-Nos” broad presumptions of illegality concerning patent licensing. This was not the temporary partisan position of a conservative administration. By the mid-1990s, an antitrust enforcement consensus had developed in the United States that patent licensing transactions were often efficiency enhancing and should not lightly be subjected to antitrust prosecution. This consensus was embodied in the 1995 issuance of joint DOJ—Federal Trade Commission (FTC) Antitrust Guidelines for the Licensing of Intellectual Property (“1995 Guidelines”).²⁰ Although the 1995 Guidelines, as their title suggests, facially encompass all forms of intellectual property, their application has primarily centered on patent transactions.

The 1995 Guidelines recognize that intellectual property laws and antitrust laws share the common purpose of promoting innovation and enhancing consumer welfare. Under the 1995 Guidelines, licensing restrictions do not run afoul of antitrust law unless they create market power greater than the power the IP holder could have exercised without licensing (e.g., by refusing to license and directly producing and selling products covered by its patents). In short, a firm that possesses monopoly power *ex ante* may use licensing to extract monopoly rents. The 1995 Guidelines embody three important general principles: (1) For the purpose of antitrust analysis, the DOJ and FTC (“Agencies”) regard intellectual property as being essentially comparable to any other form of property, (2) the Agencies do not presume that IP creates market power in the antitrust context, and (3) the Agencies recognize that IP licensing allows firms to combine complementary factors of production and is generally pro-competitive.²¹ Within a relatively short period of time, the 1995 Guidelines came to be accepted as consensus mainstream US antitrust thinking. In the *Independent Ink*²² case, the Supreme Court adopted the reasoning of those Guidelines in holding that a patent is not presumed to convey market power for the purpose of antitrust tying analysis.

Following FTC and DOJ hearings in the early 2000s on the intersection of antitrust and IP, the two agencies jointly issued a

20. US DEP'T OF JUSTICE & FED. TRADE COMM'N, ANTITRUST GUIDELINES FOR THE LICENSING OF INTELLECTUAL PROPERTY 6 (Apr. 1995), <https://www.ftc.gov/sites/default/files/attachments/competition-policy-guidance/0558.pdf> [<https://perma.cc/KRD8-S58M>].

21. *Id.* at 2.

22. *Illinois Tool Works Inc. v. Indep. Ink, Inc.*, 547 U.S. 28, 46 (2006).

report on antitrust enforcement and IP rights (“2007 Report”).²³ The 2007 Report in essence reaffirmed and expanded upon the 1995 Guidelines’ general approach to the antitrust analysis of patent licensing.²⁴ The 2007 Report delved in significant detail on issues such as: unilateral refusals to license; standard setting; portfolio cross-licenses and patent pooling; variations on IP licensing practices (including grantbacks, non-assertion clauses, and reach-through licensing); tying and bundling of IP rights; and contractual practices that extend beyond the patent term (long-term exclusivity and royalty contracts, along with bundling patents with trade secrets).²⁵

In particular, the 2007 Report stated that antitrust liability for mere unilateral, unconditional refusals to license a patent would “not play a meaningful part in the interface between patent rights and antitrust protections.”²⁶ This formulation was in harmony with the Supreme Court’s *Trinko* decision, discussed previously, which held that antitrust law strongly disfavors requiring firms to deal with third parties. It also reinforced the general understanding that antitrust should not be applied to interfere with the core right of patent holders to deny third parties access to their patents.

III. ENFORCERS’ RECENT ABANDONMENT OF SOUND PATENT–ANTITRUST ANALYSIS WITH A FOCUS ON STANDARD SETTING

Unfortunately, however, federal antitrust enforcers now seem to be departing from the policy of not undermining a patentee’s unilateral efforts to maximize returns on its patents. Enforcers have recently sought to use antitrust and unfair competition law to constrain patent holders’ individual rights when their patents have been incorporated into technological standards.²⁷ This approach represents a marked change in emphasis from a focus on joint conduct that restricts competition among rival technologies to a primary concern with unilateral conduct by individual patent holders.

23. US DEP’T OF JUSTICE & FED. TRADE COMM’N, ANTITRUST ENFORCEMENT AND INTELLECTUAL PROPERTY RIGHTS: PROMOTING INNOVATION AND COMPETITION (Apr. 2007), <http://www.justice.gov/sites/default/files/atr/legacy/2007/07/11/222655.pdf> [<http://perma.cc/7T6Z-MMWV>] [hereinafter 2007 Report].

24. *Id.*

25. *Id.*

26. *Id.* at 32.

27. See discussion of three FTC consent decrees imposing limitations on the exploitation of such standards, *infra* text accompanying notes 34–39.

A. *Standard-Setting Overview*

Before turning to recent US antitrust agency enforcement initiatives regarding standard setting, a brief overview of US standard setting generally is in order. The US government summarized key benefits and attributes of standard setting in general—emphasizing the US experience—in its 2014 submission on standard setting to the Organization for Economic Cooperation and Development (OECD):

Industry standards are widely acknowledged to be one of the engines driving the modern economy. Standards can make products less costly for firms produce and more valuable to consumers. They can increase innovation, efficiency, and consumer choice; foster public health and safety; and serve as a fundamental building block for international trade. Standards enable virtually all the products we rely upon in modern society, including mechanical, electrical, information, telecommunications, and other systems, to interoperate. The most successful standards are often those that provide timely, widely adopted, and effective solutions to technical problems. . . . Standards development in the United States may be characterized as sector based and market led. U.S. businesses often collaborate to establish standards by working through standard-setting organizations (SSOs) to develop a standard that all firms, regardless of whether they participate in the process, can use in making products. [S]tandards may also be set in the marketplace where firms vigorously compete, [sometimes] in a winner-take-all standards war to establish their own technology as the de facto standard. . . . Most standards developed and used in the United States are voluntary consensus standards created through private sector leadership.²⁸

In sum, US standards, which are developed by the private sector and cover a multitude of products, are socially beneficial. They reduce production costs, solve technical problems, enhance health and safety, spur international trade, and promote vigorous competition among products.

B. *Traditional Antitrust Concerns with Standard Setting*

Despite their significant benefits, however, standards set through SSOs may also pose competitive harm. Specifically, as the DOJ and FTC explained in their 2007 IP Report:

Firms that choose to work through an SSO to develop and adopt standards may be competitors within their particular industry. Thus, agreement among competitors about which standard is best suited for them replace consumer choice and the competition that otherwise would have occurred in the market to make their product the consumer-chosen standard. . . . Recognizing that collaboratively set standards can reduce competition and consumer choice and have the potential to prescribe the direction in which a market will develop, U.S. courts have been sensitive to antitrust

28. Submission to Working Party No. 2 on Competition and Regulation, *United States—Intellectual Property & Standard Setting*, Organization for Economic Co-operation & Development [OECD] Doc. DAF/COMP/WD (2014) 116 (Dec. 8, 2014), https://www.ftc.gov/system/files/attachments/us-submissions-oecd-other-international-competition-fora/standard_setting_us_oecd.pdf [<https://perma.cc/6QB2-KAWL>] (internal quotation marks and footnote citations omitted).

issues that may arise in the context of collaboratively set standards. They have found antitrust liability in circumstances involving the manipulation of the standard-setting process or the improper use of the resulting standard to gain competitive advantage over rivals.²⁹

In short, the fact that competitors work closely together in standard setting makes the risk of collusion among rivals—who have a common interest in favoring themselves and excluding technologies offered by potential competitors—a central focus of antitrust concern.

C. The Recent Antitrust Enforcement Focus on Hold-Up by Patent Holders

In recent years, antitrust agencies have turned their focus away from collusion and toward wrongful exploitation of patent-based monopoly power (so-called “hold-up”) allegedly generated in connection with standard-setting activity. As agencies have noted, “Commonly, businesses collaborate to establish [technology] standards by working through standard setting organizations . . . to develop a standard that all firms, regardless of whether they participate in the process, then can use in making products.”³⁰ While standards may promote efficiencies in production, they also eliminate preexisting competition among similar technologies that were candidates to be adopted by the SSOs. Holders of standard essential patents (SEPs) that cover “winning” technologies selected for inclusion in a widely adopted standard³¹ suddenly acquire additional market power. This market power increment is reflected in higher royalty licensing rates (and other more beneficial licensing terms) received by SEP holders.

29. 2007 Report, *supra* note 23, at 34–35 (citation omitted).

30. *Id.* at 33. The following brief discussion of the threat of hold-up and licensing SSO licensing commitments directed at hold-up draws upon the 2007 Report. *Id.* at 33–48. For a more recent FTC perspective on SSOs and hold-up, see, e.g., *Oversight of the Enft of the Antitrust Laws: Hearing Before the Subcomm. on Regulatory Reform, Commercial and Antitrust Law of the H. Comm. on the Judiciary*, 113th Cong. 9–14 (2013) (statement of the Fed. Trade Comm’n), https://www.ftc.gov/sites/default/files/documents/public_statements/prepared-statement-federal-trade-commission-oversight-enforcement-antitrust-laws-presented/131115antitrustlawtestimony.pdf [<https://perma.cc/L3EH-A9FF>]; *Standard Essential Patent Disputes and Antitrust Law: Hearing Before the Subcomm. on Antitrust, Competition Policy & Consumer Rights of the S. Comm. on the Judiciary*, 113th Cong. (2013) (statement of the Fed. Trade Comm’n), https://www.ftc.gov/sites/default/files/documents/public_statements/prepared-statement-federal-trade-commission-concerning-standard-essential-patent-disputes-and/130730standarlessentialpatents.pdf [<https://perma.cc/3ZNL-NRFV>].

31. I refer here to a standard that is utilized by a large proportion of firms that compete downstream in a particular product or service market (or markets). The downstream firms offer key standardized features that consumers demand (features without which they cannot be viable competitors) and compete by differentiating their offering on non-standardized attributes (for instance, the individualized “look” or “feel” of a particular smartphone that differs among manufacturers).

This surge in market power arises because producers that manufacture according to the standard may no longer turn to substitute technologies if they are dissatisfied with the terms offered to them by the SEP holders. In effect, the SEP holders enjoy a special “hold-up premium” above and beyond that attributable to the inherent superiority of their technology due solely to the fact that licensing negotiations take place after a standard has been adopted, rather than before (when competition among technologies constrained market power).³²

In order to forestall opportunistic hold-up of technology implementers, many SSOs have required SSO members to agree to license their SEPs on “reasonable and non-discriminatory” (RAND) or “fair, reasonable, and non-discriminatory” (FRAND) terms.³³ In three litigation settlements, the FTC has imposed conditions on SEP holders that allegedly failed to adhere to previously made FRAND commitments.

In *N-Data*,³⁴ a firm made a price-specific licensing commitment (a \$1,000 one-time paid-up license) within an SSO, the Institute of Electrical and Electronic Engineers (IEEE), and then subsequently transferred its patent interests with a subsequent transferee (N-Data) demanding far higher royalties. An FTC majority found that the transferee had engaged in patent hold-up by exploiting the incorporation of patented technology into a standard and reneging on a known commitment made by its predecessor in interest.³⁵ This opportunistic activity harmed competition by raising prices for an entire industry and threatening to subvert the IEEE’s standard-setting process in a way that endangered the viability of standard setting in general. In settling these charges, N-Data agreed

32. Prior to the adoption of a standard, patentees will compete among themselves for the benefit of having their technology incorporated in a standard and thus will offer lower royalties to prospective licensees than will be available after a winning technology is selected.

33. “RAND” (the term typically used in the United States) and “FRAND” (the term typically employed outside the United States) are widely treated as equivalent and interchangeable terms. SSOs’ RAND/FRAND requirements do not spell out precisely the meanings of those terms, which must be determined on a case-by-case basis among private parties through negotiations, alternative dispute resolution, or litigation. As of now, there is no universally agreed-to definition of the terms.

34. Negotiated Data Sols., LLC, F.T.C. File No. 051-0094 (Jan. 23, 2008), <http://www.ftc.gov/os/caselist/0510094/index.shtm> [<http://perma.cc/8B99-VH6V>]; Dissenting Statement of C. Majoras, Negotiated Data Sols., LLC, F.T.C. File No. 051-0094 (Jan. 23, 2008), <http://www.ftc.gov/os/caselist/0510094/index.shtm> [<http://perma.cc/BE5T-NCDZ>]; Dissenting Statement of Comm’r Kovacic, Negotiated Data Sols., LLC, F.T.C. File No. 051-0094 (Jan. 23, 2008), <http://www.ftc.gov/os/caselist/0510094/index.shtm> [<http://perma.cc/5MAJ-WRYH>].

35. See Negotiated Data Sols., LLC, F.T.C. File No. 051-0094 (Jan. 23, 2008), <http://www.ftc.gov/os/caselist/0510094/index.shtm> [<http://perma.cc/8B99-VH6V>].

not to enforce the patents in question unless it first offered a \$1,000 one-time paid-up license.

In *Robert Bosch GmbH*,³⁶ an FTC majority found that SPX Service Solutions U.S. LLC harmed competition by reneging on a commitment to license SEPs on FRAND terms by seeking injunctions against willing licensees of those patents. As part of a settlement with the FTC, Bosch, which acquired SPX, agreed not to pursue claims for injunctive relief with respect to those patents.

In *Motorola Mobility LLC and Google Inc.*,³⁷ the FTC alleged that Google, which had acquired Motorola Mobility, harmed competition by reneging on Motorola Mobility's commitment to license its SEPs on FRAND terms—specifically by seeking or threatening injunctions against firms that were willing to accept FRAND licenses. In its settlement with the FTC, Google agreed not to seek injunctive relief before (1) providing a potential licensee with written offer containing all material terms required for an SEP license and (2) providing the potential licensee with an offer of binding arbitration to determine specific licensing terms.³⁸ The consent decree also provided potential licensees with a voluntary negotiation framework that they could opt into and identified several narrow circumstances when Google would be allowed to seek an injunction (such as if the potential licensee refused to accept terms set by a court or an arbitrator).³⁹

Unlike the FTC, the DOJ has not yet brought enforcement actions arising out of broken standard-setting pledges, but it has investigated acquisitions of patents (joint conduct, not unilateral

36. See Analysis of Agreement Containing Consent Orders to Aid Public Comment, Robert Bosch GmbH, F.T.C. File No. 121-0081 (Apr. 24, 2013), <https://www.ftc.gov/sites/default/files/documents/cases/2013/04/121126boschanalysis.pdf> [<http://perma.cc/5QKL-CUW4>]; Dissenting Statement of Comm'r Maureen K. Ohlhausen, Robert Bosch GmbH, F.T.C. File No. 121-0081 (Apr. 24, 2013) (discussing those portions of the consent relating to alleged conduct by the respondent involving SEPs), <https://www.ftc.gov/sites/default/files/documents/cases/2012/11/121126boschohlhausenstatement.pdf> [<http://perma.cc/BNZ5-D9EE>].

37. See Analysis of Proposed Consent Order to Aid Public Comment, Motorola Mobility LLC & Google Inc., F.T.C. File No. 121-0120 (Jan. 3, 2013), <https://www.ftc.gov/sites/default/files/documents/cases/2013/01/130103googlemotorolaanalysis.pdf> [<http://perma.cc/8YVX-85D6>]; Dissenting Statement of Comm'r Maureen K. Ohlhausen, Motorola Mobility LLC & Google Inc., F.T.C. File No. 121-0120 (Jan. 3, 2013), https://www.ftc.gov/sites/default/files/documents/public_statements/statement-commissioner-maureen-ohlhausen/130103googlemotorolaohlhausenstmt.pdf [<http://perma.cc/DK5M-AZ54>].

38. See Decision and Order, Motorola Mobility LLC & Google Inc., F.T.C. File No. 121-0120 at *7–8 (July 23, 2013), <https://www.ftc.gov/sites/default/files/documents/cases/2013/07/130724googlemotorolado.pdf> [<https://perma.cc/QNU8-PQ3M>].

39. See *id.* at *8–9.

conduct) subject to licensing commitments related to standard-setting processes.⁴⁰ Moreover, there are indications that the DOJ shares the philosophy underlying the three FTC consents. A senior DOJ official has stated that the DOJ will “continue to look at” whether an antitrust violation may occur when a FRAND-encumbered SEP owner exercises the monopoly power that it acquired through participation in a standard-setting process in breach of the SEP owner’s FRAND commitment.⁴¹

These enforcement agency initiatives are highly problematic. The FTC settlements have been criticized by a former FTC Chairman as failing to meet the standard for antitrust liability;⁴² by a former FTC Commissioner as fundamentally undermining core patent rights;⁴³ and by a sitting FTC Commissioner as lacking in regulatory humility and raising institutional conflicts with the US International Trade Commission,⁴⁴ as offering ambiguous guidance to businesses, creating doctrinal confusion, and for failing to meet the standard for Federal Trade Commission Act violations.⁴⁵ Furthermore, there is good reason to question the real-world validity and incidence of the hold-up, which is the key underlying justification for the FTC consents

40. See Press Release, Antitrust Div., US Dep’t of Justice, CPTN Holding LLC and Novell Inc. Change Deal In Order to Address Department of Justice’s Open Source Concerns (Apr. 20, 2011), <http://www.justice.gov/opa/pr/cptn-holdings-llc-and-novell-inc-change-deal-order-address-department-justices-open-source> [<http://perma.cc/GZ8V-V2CT>]; Press Release, US Dep’t of Justice, Statement of the Department of Justice’s Antitrust Division on its Decision to Close its Investigations of Google Inc.’s Acquisition of Motorola Mobility Holdings Inc. and the Acquisitions of Certain Patents By Apple Inc., Microsoft Corp. and Research In Motion Ltd. of Certain Nortell Networks Corp. Patents (Feb. 13, 2012), <http://www.justice.gov/opa/pr/statement-department-justice-s-antitrust-division-its-decision-close-its-investigations> [<http://perma.cc/H9CG-TEDW>].

41. See Renata B. Hesse, Deputy Assistant Att’y Gen., Antitrust Div., US Dep’t of Justice, IP, Antitrust and Looking Back at the Last Four Years, Remarks at the Global Competition Review, 2nd Annual Antitrust Law Leaders Forum (Feb. 8, 2013), <http://www.justice.gov/atr/file/518361/download> [<http://perma.cc/E8YE-LD3V>].

42. See Dissenting Statement of Chairman Majoras, Negotiated Data Sols., LLC, *supra* note 34.

43. See Joshua D. Wright, Comm’r, Fed. Trade Comm’n, Does the FTC have a New IP Agenda?, Remarks at the 2014 Milton Handler Lecture: “Antitrust in the 21st Century” (Mar. 11, 2014), https://www.ftc.gov/system/files/documents/public_statements/288861/140311ipagenda.pdf [<https://perma.cc/P7LK-VTFX>] (“[*Bosch* and *Motorola*] depend upon the [incorrect] assumption that seeking injunctive relief, without more, is itself anticompetitive” and thus represent a “notorious rejection of . . . the basic economic proposition that the exercise and enforcement of presumptively valid property rights promotes economic exchange.”).

44. See Analysis of Agreement Containing Consent Orders to Aid Public Comment, Robert Bosch GmbH, *supra* note 36; Dissenting Statement of Comm’r Maureen K. Ohlhausen, Robert Bosch GmbH, *supra* note 36.

45. See Analysis of Proposed Consent Order to Aid Public Comment, Motorola Mobility LLC and Google Inc., *supra* note 37; Dissenting Statement of Comm’r Maureen K. Ohlhausen, Motorola Mobility LLC and Google Inc., *supra* note 37.

and the DOJ expression of enforcement interest in standard setting and SEPs.⁴⁶ For example, firms engaged in standard-setting activity may implicitly threaten to retaliate in future negotiations against firms that seek to engage in hold-up (for example, by bypassing their technologies in future standard-setting rounds)—a factor that would discourage unreasonable licensing demands in the first place. But even assuming SEP hold-up may exist and may cause harm, applying antitrust in such situations appears unnecessary.⁴⁷

Patent and contract law doctrines are fully adequate to preclude anticompetitive hold-up schemes. First, a court will not enter an anticompetitive injunction in favor of an SEP holder given the Supreme Court's holding that a traditional "public interest" standard must be satisfied before such relief is ordered.⁴⁸ Second, contract law doctrine allows legitimate, commercially motivated contract renegotiations, but it does not permit the sort of improper, opportunistic contract demands that are an inherent aspect of hold-ups.⁴⁹ Even assuming, however, that contract remedies are imperfect and enforceable contracts may not always be present, a variety of equitable doctrines—including estoppel, unclean hands, custom, and unjust enrichment—may be invoked to combat opportunistic behavior, including hold-up.⁵⁰ In short, because patent law, contract law, and equitable remedies are well tailored to effectively deal with hold-up, application of antitrust here is unnecessary.

Invocation of antitrust principles does, however, impose substantial costs due to possible welfare-inimical error.⁵¹ An SEP holder might very legitimately seek an injunction rather than

46. See generally J. Gregory Sidak, *The Antitrust Division's Devaluation of Standard-Essential Patents*, 104 GEO L. J. ONLINE 48 (2015), <http://georgetownlawjournal.org/files/2015/05/Sidak-AntitrustDivisionsDevaluationofStandard-EssentialPatents1.pdf> [<http://perma.cc/B5Z8-7JNN>].

47. The following summary analysis of the case against antitrust intervention to cure hold-ups draws upon Thomas A. Lambert, *Respecting the Limits of Antitrust: The Roberts Court Versus the Enforcement Agencies* (Heritage Found. Legal Memorandum No. 144, 2015), http://thf_media.s3.amazonaws.com/2015/pdf/LM144.pdf [<http://perma.cc/RC3V-FFUB>].

48. See *eBay v. MercExchange, L.L.C.*, 547 U.S. 388, 391 (2006).

49. See RESTATEMENT (SECOND) OF CONTRACTS §§ 89, 175–76 (AM. LAW INST. 1981); see also Uniform Commercial Code § 2-209 (AM. LAW INST. & UNIF. LAW COMM'N 2012).

50. See, e.g., Henry E. Smith, *Property as Platform: Coordinating Standards for Technological Innovation*, 9 J. COMPETITION L. & ECON. 1057 (2013).

51. The importance of error cost considerations in guiding antitrust enforcement is widely recognized. The seminal article is Frank H. Easterbrook, *The Limits of Antitrust*, 63 TEX. L. REV. 1 (1984) (noting that in light of the inevitable social losses from incorrect antitrust decisions ("error costs") and the costs of assessing liability under the antitrust laws ("decision costs"), courts and regulators should interpret and enforce antitrust's amorphous prohibitions so as to minimize the sum of error and decision costs).

monetary compensation against a judgment-proof infringer or against a “bad faith” infringer that had arbitrarily rejected fair and legitimate licensing orders to threaten litigation and illegitimately gain leverage. Alternatively, an SEP holder negotiating demands might reflect a legitimate response to unanticipated changes in relevant circumstances, including marketplace conditions. In sum, given these legitimate efficiency explanations, caution should be exercised to avoid over-detering SEP holders’ efforts to obtain injunctions or renegotiate contracts. Interjecting antitrust into RAND or FRAND controversies (which, as we have seen, can be handled appropriately through other legal means) ignores this sound counsel and may prove affirmatively harmful.

Indeed, precluding SEP holders from obtaining remedies to vindicate their property rights could subject them to “reverse hold-up” by licensees that desire to obtain SEP technology for an inappropriately low rate—a rate that provides suboptimal compensation for SEPs. In other words, if technology implementers know that they will be guaranteed access to SEPs at low rates with no threat of future exclusion if sued, they hold all of the negotiating cards. SEP holders may have little choice but to offer licenses at rates below those that would be set through normal bilateral bargaining. This tactic will reduce current SEP holders’ incentive to commit their technologies to future standard-setting negotiations. This behavior, in turn, will tend to degrade the quality of future standards and the new products and services they enable.

Until now, the government has led antitrust investigations of SEP activity. But what if private plaintiffs enter the litigation game? Successful private antitrust actions result in treble damages to account for the fact that most antitrust misconduct, such as price fixing, occurs in secret and is thus not successfully prosecuted; optimal deterrence requires a damages multiplier.⁵² For antitrust violations that do not occur in secret, however, the multiplier tends to create over-deterrence. That would be the outcome here: injunction actions and license renegotiations by SEP holders occur in the open, so applying a damages multiplier in private litigation to account for the (nonexistent) difficulty of detection will over-deter injunctive actions and renegotiations.⁵³

52. See Richard Craswell, *Deterrence and Damages: The Multiplier Principle and its Alternatives*, 97 MICH. L. REV. 2185 (1999), for an overview (and critique) of the law and economics of deterrence and damages multipliers.

53. Over-deterrence is a concern even if the antitrust action is brought under Section 5 of the FTC Act, which cannot be privately enforced by plaintiffs seeking treble damages. A successful Section 5 action may give rise to copycat private actions under Sections 1 or 2 of the Sherman Act or under privately enforceable state antitrust laws (including so-called little FTC

The conclusion that government antitrust intervention is inappropriate here is underscored by the fact that private disputes regarding FRAND are now going through the courts and have reached the appellate level. In December 2014, the Federal Circuit set forth an extensive contract and patent law analysis of FRAND.⁵⁴ In particular, it held that a “patent holder should only be compensated for the approximate incremental benefit derived from his invention.”⁵⁵ In the context of a FRAND obligation, the court further held that “the royalty for SEPs should reflect the approximate value of that technological contribution, not the value of its widespread adoption due to standardization.”⁵⁶ Given the Federal Circuit’s influence as the sole appellate court for patent-based causes of action, the court’s analysis—perhaps supplemented in future appellate holdings—may be expected to clarify the meaning of FRAND without the need for costly and inappropriate antitrust intervention.

Using antitrust to police hold-up stemming from injunctive actions or renegotiation efforts by SEP holders provides little marginal benefit (given that other legal doctrines are better tailored to police bad behavior here) while imposing significant marginal cost given the likely over-deterrence resulting from potential antitrust liability. Respect for the limits of antitrust⁵⁷ would call for the enforcement agencies to stay their hand in this context.⁵⁸

Regrettably, however, the antitrust enforcers seem to be interjecting themselves even more broadly into standard-setting controversies. On February 2, 2015, the DOJ issued to the world’s largest high tech trade association, the IEEE, a “business review

Acts, many of which may be enforced in private actions). See Bruce H. Kobayashi & Joshua D. Wright, *The Limits of Antitrust and Patent Holdup: A Reply to Cary et al.*, 78 ANTITRUST L. J. 505, 509 n.15 (2012).

54. *Ericsson, Inc. v. D-Link Sys., Inc.*, 773 F.3d 1201 (Fed. Cir. 2014).

55. *Id.* at 1233.

56. *Id.*

57. See Easterbrook, *supra* note 51.

58. The European Court of Justice (ECJ) seems to have adopted an “intermediate position” on the ability of a dominant firm to seek an injunction on its SEP without incurring liability under European Union competition law—specifically, Article 102 of the Treaty on the Formation of the European Union, which forbids the “abuse” of a “dominant position.” On July 16, 2015, the ECJ issued a judgment in response to the request of a German court as to the conditions under which Huawei’s SEP-based suit for an injunction and damages against ZTE Corporation would constitute such an abuse. The ECJ held that a dominant firm does not “abuse its dominant position” by bringing an SEP-based injunctive action provided that the firm: (1) alerted the alleged infringer and, after the infringer expressed its willingness to conclude a FRAND licensing agreement, (2) gave the infringer a specific, written offer for such a license (including royalty terms), but (3) the infringer nevertheless continued to use the patent and failed to “diligently” respond to the offer in good faith. See Case C-170/13, *Huawei Techs. Co. v. ZTE Corp.*, 2015 <http://curia.europa.eu/juris/document/document.jsf?docid=165911&doclang=en> at *¶ 71 [<http://perma.cc/HJW3-YU9J>].

letter”⁵⁹ (“2014 IEEE Letter”) stating that it would not bring an antitrust enforcement action against a proposed new IEEE patent policy (subsequently adopted on February 8). The new IEEE policy intervenes in bilateral licensing negotiations in a most unfortunate manner.⁶⁰ It requires a patentee to provide the IEEE with a letter of assurance waiving its right to seek an injunction against an infringer in order to have its patents included in an IEEE standard. It also specifies that an analysis of comparable licenses for purposes of determining a FRAND royalty can only consider licenses for which the SEP holder has relinquished the right to seek and enforce an injunction against an unlicensed implementer. Moreover, under the change, an SEP holder may seek an injunction only after having fully litigated its claims against an unlicensed implementer through the appeals stage—a process that would essentially render injunctive relief highly impractical, if not futile.

In addition, the new policy precludes an SEP holder from conditioning a license on reasonable reciprocal access to non-SEP patents held by the counterparty licensee. Finally, the new policy straitjackets licensing negotiations by specifying that royalty negotiations must be based on the value of the “relevant functionality of the smallest saleable Compliant Implementation that practices the Essential Patent Claim.”⁶¹ This requirement ignores the fact that the benefit that a claimed invention provides to an end product—which is often key to determining reasonable licensing terms—depends on the specific patent and product to be licensed, not necessarily the “smallest saleable compliant implementation” (for example, a small microchip).

All told, the new IEEE policy not only creates an imbalance between the rights of innovators (whose SEPs lose value) and implementers of technologies, but also interferes in market processes by inappropriately circumscribing the terms of licensing negotiations. The policy’s provisions encourage potential licensees to insist on anticompetitive terms that monopsonistically reduce returns to SEP holders below the competitive level—terms that, if agreed to jointly by

59. Letter from Renata B. Hesse, Acting Assistant Att’y Gen., US Dep’t of Justice, to Michael A. Lindsey (Feb. 2, 2015), <http://www.justice.gov/atr/response-institute-electrical-and-electronics-engineers-incorporated> [<http://perma.cc/FJ86-JKEH>].

60. See Press Release, Inst. of Elec. & Elec. Eng’rs [IEEE], Statement Regarding Updating of its Standards-Related Patent Policy (Feb. 8, 2015), https://www.ieee.org/about/news/2015/8_february_2015.html [<https://perma.cc/XMU2-93N7>].

61. IEEE, IEEE-SA STANDARDS BOARD BYLAWS ¶ 6.1 (2015) <http://standards.ieee.org/develop/policies/bylaws/sect6-7.html> [<http://perma.cc/A9RY-25R2>].

the licensees, could well be deemed a per se illegal monopsony buyers' cartel (with the potential licensees buying license rights).⁶²

Astonishingly, the senior DOJ official who signed the 2014 IEEE Letter stated in a press release that "IEEE's decision to update its policy . . . has the potential to help patent holders and standards implementers to reach mutually beneficial licensing agreements and to facilitate the adoption of pro-competitive standards."⁶³ This statement ignores the fact that the devaluation of SEPs may be expected to lessen investment in standard setting and thereby degrade standards—an anticompetitive, not a procompetitive, result. The statement also is at odds with a joint DOJ-US Patent and Trademark Office (USPTO) policy statement issued in January 2013, which provides:

[The] DOJ and [USPTO] strongly support the protection of intellectual property rights and believe that a patent holder who makes such a F/RAND commitment should receive appropriate compensation that reflects the value of the technology contributed to the standard. It is important for innovators to continue to have incentives to participate in standards-setting activities and for technological breakthroughs in standardized technologies to be fairly rewarded.⁶⁴

Furthermore, the 2014 IEEE Letter fails to address even the issue of "monopsony" that the new policy inherently creates. This shortcoming would earn a poor grade on an antitrust examination.

A more detailed examination of the 2014 IEEE Letter underscores its shortcomings. The letter eschews analyzing the risk that, by sharply constraining expected returns to SEPs, the IEEE's new policy may disincentivize technology contributions to standards, harming innovation. The letter focuses on how the IEEE's policy may reduce patentee "hold-up" by effectively banning injunctions and highlighting three factors that limit royalties—basing royalties on: (1) the value of the smallest saleable unit, (2) the value contributed to that unit in light of all the SEPs that practiced the unit, and (3) existing licenses covering the unit that were not obtained under threat of injunction. The letter essentially ignores, however, the very real problem of licensee "hold-out" by technology implementers who

62. See *Mandeville Island Farms, Inc. v. Am. Crystal Sugar Co.*, 334 U.S. 219 (1948) (price fixing by purchasers per se illegal); see also, e.g., *Todd v. Exxon Corp.*, 275 F.3d 191, 201 (2d Cir. 2001) ("[A] horizontal conspiracy among buyers to stifle competition is as unlawful as one among sellers.").

63. Press Release, Office of Pub. Affairs, US Dep't of Justice, Department of Justice Will Not Challenge Standards-Setting Organization's Proposal to Update Patent Policy (Feb. 2, 2015), <http://www.justice.gov/opa/pr/department-justice-will-not-challenge-standards-setting-organizations-proposal-update-patent> [<http://perma.cc/438N-2GY2>].

64. US DEP'T OF JUSTICE & US PATENT & TRADEMARK OFFICE, POLICY STATEMENT ON REMEDIES FOR STANDARDS-ESSENTIAL PATENTS SUBJECT TO VOLUNTARY F/RAND COMMITMENTS 8 (2013), <http://www.justice.gov/atr/public/guidelines/290994.pdf> [<http://perma.cc/Q67X-DRB6>].

may gain artificial bargaining leverage over patentees. Thus, there is no weighing of the new policy's anticompetitive risks against its purported procompetitive benefits. This is particularly unfortunate given the absence of hard evidence of hold-up.⁶⁵ Also, by forbidding injunctive actions prior to first-level appellate review, the new IEEE policy effectively precludes SEP holders from seeking exclusion orders against imports that infringe their patents under Section 337 of the Tariff Act. This move eliminates a core statutory protection that helps shield US patentees from foreign anticompetitive harm, further debasing SEPs—a reality the letter fails to address. Furthermore, the letter fails to assess the possible competitive harm firms may face if they fail to accede to the IEEE's new policy.

Finally, and most disturbingly, the 2014 IEEE Letter ignores the overall thrust of the new IEEE policy, which is to encourage potential licensees to insist on anticompetitive terms that reduce returns to SEP holders below the competitive level. Such terms, if jointly agreed to by potential licensees, could well be deemed a monopsony buyers' cartel (with the potential licensees buying license rights) subject to summary antitrust condemnation.⁶⁶

The 2014 IEEE Letter stands in marked contrast to two previous DOJ business review letters that also dealt with SSO policies designed to preclude SEP hold-up—a 2006 letter issued to the VMEbus (Versa Module Europa bus) International Trade Association (VITA) ("2006 VITA Letter") and a 2007 letter issued to IEEE ("2007 IEEE Letter").⁶⁷ Completely unlike the 2014 IEEE Letter, neither the 2006 VITA Letter nor the 2007 IEEE Letter micromanaged licensing negotiations or implicitly facilitated collusion. Thus, the earlier letters plainly avoided the serious potential anticompetitive problems associated with the 2014 IEEE Letter, as revealed by the specifics of the earlier letters and policies.

65. Indeed, the Federal Circuit in its *Ericsson v. D-Link* decision, discussed above (main text accompanying notes 54–56, *supra*), denied jury instructions citing the possibility of hold-up, given D-Link's failure to provide any evidence of hold-up.

66. See, e.g., *Mandeville Island Farms, Inc. v. Am. Crystal Sugar Co.*, 334 U.S. 219 (1948) (finding allegations that sugar beet refiners colluded to fix a uniform price to be paid to growers of sugar beets stated a cause of action for violation of the Sherman Act); *Todd v. Exxon Corp.*, 275 F.3d 191 (2d Cir. 2001) (finding systematic information exchanges plus evidence that defendants relied on information derived therefrom in setting salaries supported a claim for violation of the Sherman Act).

67. See Letter from Thomas O. Barnett, Assistant Att'y Gen., US Dep't of Justice, to Robert A. Skitol (Oct. 30, 2006), <http://www.justice.gov/sites/default/files/atr/legacy/2006/10/31/219380.pdf> [http://perma.cc/4FT8-JLZK] [hereinafter 2006 VITA Letter]; Letter from Thomas O. Barnett, Assistant Att'y Gen., US Dep't of Justice, to Michael A. Lindsay (Apr. 30, 2007), <http://www.justice.gov/sites/default/files/atr/legacy/2007/04/30/222978.pdf> [http://perma.cc/NA57-4YZ7] [hereinafter 2007 IEEE Letter].

The 2006 VITA policy required *ex ante* disclosures by SSO members of certain key SEP licensing terms (maximum price terms and most restrictive non-royalty terms) but, unlike the 2014 IEEE policy, it did not impose rules guaranteed to yield very low prices, nor did it interfere with VITA members' litigation rights. The DOJ made it very clear that the 2006 VITA Letter did not countenance anticompetitive behavior:

Working group members do not set actual licensing terms. . . . [T]he patent holder and each prospective licensee will negotiate separately, subject only to the maximum terms set forth in the patent holder's original, unilateral declaration. Any attempt to use this process as a sham to cover horizontal price fixing likely would result in antitrust liability, as an illegal agreement under Section 1 of the Sherman Act, but the restrictions put in place by VITA appear to promote efficiency if they are followed and enforced.⁶⁸

In short, the DOJ clearly warned VITA against collusion among competitors on negotiating terms and stressed that individual negotiations, based on broad-based negotiating freedom (limited only by individually and unilaterally set offer terms), would not pose competitive problems.

The 2007 IEEE policy differed from the 2006 VITA Policy in that it gave an SEP holder more options, specifically: (1) providing no SEP licensing term assurances, (2) stating that it held no SEPs, (3) committing not to assert its SEPs against implementers of the standard, (4) committing to license on RAND terms, and (5) committing to maximum price terms or most restrictive non-price terms.⁶⁹ The IEEE would then post the assurances, or lack thereof, on its website. If a patentee chose the fifth option, IEEE working groups could take this into account in assessing the relative costs of technologies that might be included in a standard. The 2007 IEEE Letter stressed that these provisions would encourage patent holders to compete to offer the most attractive combination of technology and licensing terms.⁷⁰ In short, far from straitjacketing negotiations and driving down prices (unlike the approach of the 2014 IEEE policy that was lauded in the 2014 IEEE Letter), the 2007 IEEE policy enhanced

68. Gerald F. Masoudi, Deputy Assistant Att'y Gen., Antitrust Div., US Dep't of Justice, Antitrust Enforcement and Standard Setting: The VITA and IEEE Letters and the "IP2" Report, Remarks at the Spring Meeting of the Am. Intellectual Prop. Law Ass'n 4 (May 10, 2007) (footnotes omitted), <http://www.justice.gov/atr/speech/antitrust-enforcement-and-standard-setting-vita-and-ieee-letters-and-ip2-report> [<http://perma.cc/GVP2-Z3VC>] [hereinafter Masoudi Remarks].

69. *See id.*

70. "[T]he ability to make such commitments could generate . . . benefits as patent holders may compete to offer the most attractive combination of technology and licensing terms." 2007 IEEE Letter, *supra* note 67, at 10.

competition by improving the information in the marketplace available to both the framers of standards and licensing negotiators.

The new and extremely narrow FTC and DOJ fixation with alleged SEP-related monopoly single firm standard-setting-related abuses, in plain disregard of serious risks of collusion, is also at odds with modern US antitrust's primary concern with "horizontal" restrictions among direct competitors. The US Supreme Court singled out horizontal collusion as the "supreme evil of antitrust" in *Trinko*,⁷¹ while making it clear that monopolization cases typically raise greater difficulties. The three major Supreme Court antitrust cases featuring standard setting—*Radiant Burners*,⁷² *Hydrolevel*,⁷³ and *Allied Tube*⁷⁴—all involved collusion among SSO participants and agents to exclude disfavored competing technologies or products from receiving SSO imprimatur. These situations involved very little risk of error or disincentivizing efficient behavior, unlike the recent SEP monopolization scenarios that have preoccupied US enforcement agencies.

Supporters of the focus on alleged single-firm patent abuses in standard setting might nevertheless contend that reducing returns to individual patents will increase welfare by constraining the exercise of market power. Alternatively, they might argue that at the very worst, the new antitrust initiatives involve a targeted intervention in a corporate fight over rents between technology sellers and technology implementers that has no broad welfare implications.⁷⁵ Such justifications miss the mark. Although some academics have raised concerns about "poor" patent quality and "probabilistic" patents, recent comparative scholarship supports the proposition that, all else being equal, countries with stronger patent protection tend to have strong rates of economic growth and innovation.⁷⁶ In light of that scholarship and the lack of substantial empirical support for a cutback in existing levels of patent protection, this Article contends that recent actions by US antitrust enforcers that tend to weaken patents are

71. *Verizon Commc'ns Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398, 408 (2004).

72. *Radiant Burners, Inc. v. Peoples Gas Light & Coke Co.*, 364 U.S. 656 (1961).

73. *Am. Soc'y of Mech. Eng'rs v. Hydrolevel Corp.*, 456 U.S. 556 (1982).

74. *Allied Tube & Conduit Corp. v. Indian Head, Inc.*, 486 U.S. 492 (1988).

75. If the latter were the case, of course, the application of antitrust enforcement to private activity lacking substantial welfare implications would involve a waste of scarce government resources that could have been better deployed investigating clearly harmful behavior, such as collusion among competitors.

76. See generally Alden F. Abbott, *Abuse Of Dominance By Patentees: A Pro-Innovation Perspective*, 14 ANTITRUST SOURCE 1, 8–10 (2014) (summarizing recent scholarship), http://www.americanbar.org/content/dam/aba/publishing/antitrust_source/oct14_full_source.auth_checkdam.pdf [<http://perma.cc/3293-R5E7>].

ill-considered. Why are they ignoring this literature? One can only speculate, but it is possible that current patent-antitrust policy reflects a general administrative disdain for strong property rights and a belief in the superior ability of enlightened technocrats to micromanage the economy. The current administration's philosophical orientation may be reflected in other actions that may lead to further constraints on patent rights, such as investigations of patent assertion entities, which are beyond the scope of this Article.

Finally, US antitrust policy changes do not operate in a vacuum. Major foreign competition enforcers, such as China and Korea, are by nature more interventionist than US agencies, and recently they have undertaken a variety of intrusive investigations and enforcement measures directed at patents.⁷⁷ The continuing apparent denigration of patent rights by US antitrust authorities can only encourage them to continue along this path—a result that may further undermine innovation and welfare. Chinese officials' public references (albeit less than fully accurate) to FTC settlements restricting SEPs are but one example of this sad phenomenon.⁷⁸

IV. NEW DOJ-FTC IP-ANTITRUST POLICY STATEMENT

If the FTC and DOJ truly want to promote economic welfare more generally and consumer welfare in particular, they should issue a new IP-antitrust policy statement announcing a change in direction.

The statement should emphasize that the agencies will devote their limited IP-related enforcement resources primarily to the area where consumer harm is greatest—restrictions among competing technologies. Such restrictions are the principle focus of the 1995 Guidelines and the historic central concern of antitrust enforcers with standard setting. The statement could explain that alleged efforts by a single SSO participant to extract excessive monopoly returns on its SEPs following standards “lock-in” are far less likely to harm the competitive process and should not be an enforcement priority. The statement could note that SSOs, whose members include sophisticated

77. See, e.g., Bart Eppenauer, *Emerging Antitrust Regulation of Intellectual Property Licensing in Asia*, IP WATCHDOG (Aug. 16, 2015), <http://www.ipwatchdog.com/2015/08/16/emerging-antitrust-regulation-of-intellectual-property-licensing-in-asia/id=60693/> [<http://perma.cc/JLP3-VRX7>] (discussing Korea and China's recent IP regulations) (“[S]ignificant expansions in regulatory scrutiny of IP holders could have a chilling effect on incentives to innovate and collaboratively advance technology over the long term.”).

78. See *Hearing on “The Foreign Investment Climate in China: U.S. Administration Perspectives on the Foreign Investment Climate in China” Before the U.S.-China Econ. & Sec. Review Comm’n*, 114th Cong. (2015) (testimony of Maureen K. Ohlhausen, Comm’r, Fed. Trade Comm’n), https://www.ftc.gov/system/files/documents/public_statements/621411/150128_chinatestimony.pdf [<https://perma.cc/G6QV-7MWR>].

businesses, are perfectly capable of adopting procedures (such as *ex ante* disclosure of patents and FRAND licensing commitments) that are well suited to avoid exploitation of their processes. Also, the statement could stress that *ex post* private law remedies (contract, patent, and equity) are available to disgruntled licensees that believe they have been unfairly harmed through patentee deception or through a violation of licensing commitments. For these reasons, the statement could conclude that explicit adoption by US enforcers of an exclusive focus on collusion (including collusion to exclude rival technologies) in standard setting would reduce expected antitrust error costs and hopefully would have a salutary effect on foreign competition officials' development of enforcement norms in this area. In addition, the statement should disavow FTC and DOJ policy support for SSO policy changes, such as the February 2015 IEEE pronouncement—policies that threaten to undermine the value of patents by specifying the precise terms of licensor-licensee negotiations. In so doing, the statement should reaffirm the 2013 DOJ-USPTO Joint Statement's recognition of the importance of properly compensating SEP holders to reward and incentivize innovation.

V. CONCLUSION

Promulgation of a new DOJ-FTC IP-antitrust policy statement should reject the current emphasis on alleged single-firm SEP abuses and focus instead on restrictions among competing patentees and their technologies. Such a change would be beneficial by reducing antitrust error costs in standard-setting analyses; lessening uncertainty; and promoting innovative, welfare-enhancing patent arrangements. It also, of course, would require a significant change in current FTC and DOJ IP-antitrust philosophy.