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The 2015 DOJ IEEE Business
Review Letter:
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and Evidence

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I. INTRODUCTION

IEEE is a private standard-setting association (“SSO”) that develops, adopts, and revises standards in certain industries, including accepted and highly successful standards incorporating wireless technologies such as Wi-Fi. The membership of IEEE includes many employees of providers of consumer electronics products and their suppliers.

On February 2, 2015, the Antitrust Division of the U.S. Department of Justice (“DOJ”) issued a Business Review Letter (the “IEEE BRL”)² stating that it does not intend to take any enforcement action under U.S. antitrust law against an agreement among powerful companies under the auspices of IEEE on a controversial set of amendments to IEEE’s rules concerning the licensing of patents essential to IEEE standards (“the Revised Rules”). These rules are expressly aimed at driving down the compensation—i.e., price—that holders of “standard essential patents” (“SEPs”) will receive for licensing patents essential to any IEEE standard. In February 2015, the board of directors of IEEE approved the Revised Rules, which went into effect on March 15, 2015.

The IEEE BRL is deeply flawed and even disturbing. Tellingly, the IEEE BRL says little or nothing about the policies reflected in patent law, decades of settled antitrust law applicable to coordinated action on buyer prices, BRLs issued by DOJ during prior administrations regarding coordinated conduct within SSOs by buyers of intellectual property rights (“IPR”), and the evidence and arguments submitted to the Division by multiple patent-holder companies who are the targets of the Revised Rules. When ignoring relevant law, arguments and evidence is not enough to reach the conclusion desired by today’s Antitrust Division—its IEEE BRL misstates the provisions of the rules to make them more defensible.

For these reasons, the IEEE BRL thus should not be viewed as an interpretation of antitrust law or its relationship to patent law. Rather, the IEEE BRL is an expression of the industrial policy preference of today’s DOJ for potential short-term price reductions at the expense of providing long-term incentives to engage in R&D for technologies useful in standards, contrary to the key premise underlying patent law—a premise that historically has been accorded great respect by antitrust courts.

¹ Vice President, Legal Counsel, Qualcomm, Inc., J.D. University of Chicago 1982. This article reflects the views of the author and these views are not necessarily the same as those of his current or former clients or employers.

² Business Review Letter from Acting Assistant Attorney General Renata B. Hesse to Michael A. Lindsay (Feb. 2, 2015), available at <http://www.justice.gov/atr/public/busreview/311470.htm>, hereinafter “IEEE BRL.”

Nor can the IEEE BRL be defended as an exercise by the DOJ of “competition policy advocacy” as opposed to “antitrust law enforcement.” Most fundamentally, the IEEE BRL is a statement of the DOJ’s intention not to enforce decades of settled antitrust law prohibiting coordination among powerful buyers on the prices they are willing to pay for inputs needed by the buyers’ businesses. If that is not an issue of enforcement, then what else would be?

In addition, many foreign governments do not understand that U.S. agencies, unlike foreign agencies, have no authority to make antitrust law and that U.S. agency views on questions of antitrust law are given little—if any—more weight by U.S. courts than those of private parties. Accordingly, foreign agencies may view the IEEE BRL as an authoritative interpretation of U.S. antitrust law legalizing buyer cartel behavior towards licensors of SEPs. Because business review letters may not be appealed to U.S. courts, the harm inflicted by this misunderstanding cannot easily be undone. Even if the IEEE BRL were properly viewed as “policy advocacy,” it is difficult to understand how DOJ advocacy inconsistent with U.S. law and policy on issues that may also be subject to the jurisdiction of multiple foreign agencies can be reconciled with the duty of DOJ to “uphold the laws of the United States.”

To place this matter in context, Part II will review briefly patent law and its underlying policy, antitrust law against concerted action by buyers, prior DOJ BRLs on intellectual property rights (“IPR”) and standard-setting, and the changes to IEEE’s rules and policies concerning the licensing of patents essential to IEEE standards, including the process by which those changes were developed and adopted. Part III will then assess against this background the “analysis” in the IEEE BRL.

II. BACKGROUND

A. Patent Law and its Underlying Policy

Patent law grants inventors the right, for a limited time, to exclude others from using their inventions, or license the use of their inventions in return for cash or other compensation. Patent law reflects a deliberate determination by Congress that the public interest is best-served by providing inventors and their investors a state-sanctioned “monopoly” on their invention—and at least the potential for market power and monopoly profits, depending on the invention and available alternatives—as an incentive to invest labor and capital in costly and risky R&D through an opportunity to earn real market-based rewards for successful inventions. Thus, as the Supreme Court has stated, “[a] patent empowers the owner to exact royalties as high as he can negotiate.”³ U.S. antitrust law places no limits on that right, including in the standard-setting context.⁴

The IEEE BRL allows, if not encourages, patent users to use their collective power to deny licensors the opportunity provided them by patent law. It does so without discussing patent law, its underlying policy, and how these have been interpreted by the U.S. Supreme Court. The absence of such a discussion is one of the circumstances raising an inference that the IEEE BRL is the result of considerations other than current U.S. law or policy.

³ *Brulotte v. Thys. Co.*, 379 U.S. 29, 33 (1964) (emphasis added).

⁴ *Rambus, Inc. v. F.T.C.*, 522 F.3d 456, 469 (D.C. Cir. 2008), cert. denied, 129 S. Ct. 1318 (2009).

B. Antitrust Law and Concerted Action by Buyers

The IEEE Revised Rules are the product of an express collective effort by prospective licensees under the auspices of an SSO to depress prices they might otherwise be required to pay for a license to use patented technologies incorporated in IEEE standards. The proponents of the Revised Rules were buyers (licensees) of non-exclusive rights to use the patented technology of sellers (licensors) that depend on licensing revenues to recover their R&D costs and attract capital. Such buyer cartel-behavior, like seller cartel-behavior, is in most settings strongly condemned by U.S. antitrust law as *per se* illegal. Recently, for example, DOJ brought an enforcement action against six technology companies that had entered into agreements that they would not directly recruit each other's employees, describing these agreements as "facially anticompetitive" and as "naked" restraint[s] of trade that [were] *per se* unlawful under Section 1 of the Sherman Act, 15 U.S.C. 1."⁵

Importantly, coordination on price can be anticompetitive where the coordination concerns a methodology or principles for establishing prices rather than an agreement on the prices themselves. This includes coordination among buyers regarding the prices they will pay to their suppliers.⁶ And, as noted by the eminent economist Roger Noll, there is and should be no special exception in the case of intellectual property to the rule against coordinated action by powerful buyers on the prices they will pay their suppliers.⁷ Indeed, it would be surpassing strange to uniquely permit buyer cartel-behavior to curb the exercise of the one class of market power that has been expressly authorized by Congress for the purpose of creating incentives for investment and innovation.

The law concerning concerted action by buyers on the prices they will pay is, like patent law and its underlying policy, not mentioned in the IEEE BRL. This omission may reflect doubts on the part of today's DOJ that its policy preferences reflected in the IEEE BRL are reconcilable with patent and antitrust law as adopted by Congress and construed by courts.

C. Prior DOJ BRLs on Coordinated Action by Buyers of IPR Essential to Standards

While collective action within SSOs on technology choices is generally subject to a rule of reason analysis, the legal standard for collective action on the price of technology chosen by an SSO is not clear. Many SSOs have adopted FRAND policies pursuant to which SEPs are required or requested to commit to license those patents on terms that are reasonable and non-discriminatory. Those policies have not been scrutinized as potential antitrust violations, presumably because they reflected a consensus of both sellers and buyers and/or merely reflected existing patent law on damages for infringement. Neither explanation, however, applies to the IEEE's Revised Rules imposed through collective action of IPR buyers. Here the sellers opposed vigorously the Revised Rules, which depart markedly from patent law.

⁵ DOJ Competitive Impact Statement at 3, *U.S. v. Adobe Systems, Inc.*, No. 10-cv-01629 (D. Col. Sept. 24, 2010).

⁶ *See, e.g., Mandeville Island Farms, Inc. v. Am. Crystal Sugar Co.*, 334 U.S. 219, 223-37 (1948).

⁷ Roger G. Noll, *Buyer Power and Economic Policy*, 72 ANTITRUST L. REV. 589, 591 (2005).

When legitimate explanations for other SSO IPR rules and policies are unavailable, DOJ officials in prior administrations had expressed concern that joint purchaser action within SSOs may have anticompetitive effects. For example, Hill Wellford, while Counsel to the Assistant Attorney General, Antitrust Division, stated publicly “SDO buyer-cartel behavior has the real potential to damage innovation incentives, and therefore is properly the subject of antitrust scrutiny.”⁸ Gerald Masoudi, while Deputy Assistant Attorney General, Antitrust Division, warned of a “serious” concern that SDO patent policies . . . could drive down the rewards to patent holders, thereby reducing innovation incentives⁹ Accordingly, he cautioned that antitrust law should not be used to “limit” patent rights or to “reflexively rein[] in the power of whatever player has developed pricing power at a particular time.”¹⁰

In light of these important and complex considerations, DOJ on at least three occasions has declined to provide a blanket endorsement of joint efforts by IPR buyers to negotiate or set license fees.

In November 2002 DOJ issued a BRL regarding a proposal by the 3G Patent Platform Partnership—comprised of multiple companies interested in 3G wireless standards—to establish organizations (“Platforms”) to, among other things, develop interim license agreements for the use of SEPs pending completion of bilateral license negotiations between individual licensors and licensees. DOJ premised its statement that it had no present intent to take enforcement actions against the Partnership or the Platforms on, among other things, its understanding that prices in interim agreements would largely be determined by SEP licensors, and prices in final agreements would be established through the aforementioned bilateral negotiations. DOJ therefore concluded that the Platform would “operate[] in a procompetitive manner, not unduly allowing the interests of those patent holders whose primary interest is as licensors to be adversely affected by a collective action through a [Platform] of those patent holders who also have significant interests as licensees.”¹¹

In its October 2006 business review letter concerning a proposal by VITA—an international trade association—to require standard-setting participants to declare their “most restrictive licensing terms,” DOJ predicated its “no present intent” decision on a representation that the proposal would not permit joint action to drive down royalty rates.¹² It noted:

The proposed policy should not permit licensees to depress the price of licenses for patented technologies through joint action because it prohibits any joint negotiation or discussion of licensing terms among the working group members

⁸ Hill B. Wellford, *Antitrust Issues in Standard Setting*, China Electronics Standardization Institute 2d Annual Seminar on IT Standardization and Intellectual Property, at 15 (Mar. 29, 2007), available at <http://www.justice.gov/atr/public/speeches/222236.pdf>.

⁹ Gerald F. Masoudi, *Objective Standards and the Antitrust Analysis of SDO and Patent Pool Conduct*, Annual Comprehensive Conference on Standards Bodies and Patent Pools, at 14- 15 (Oct. 11, 2007), available at <http://www.justice.gov/atr/public/speeches/227137.pdf>.

¹⁰ *Id.*

¹¹ Business Review Letter from Assistant Attorney General Charles A. James to Ky P. Ewing (Nov. 12, 2002), at 11, available at <http://www.justice.gov/atr/public/busreview/200455htm> (“VITA BRL”).

¹² Business Review Letter from Assistant Attorney General Thomas O. Barnett to Robert J. Skitol (Oct. 30, 2006), available at <http://www.justice.gov/atr/public/busreview/219380htm> (“2007 IEEE BRL”).

or with third parties at all [standards-development committee] and working group meetings. Moreover, working group members will not set actual licensing terms. The patent holder and each prospective licensee will negotiate separately, subject only to the restrictions imposed by the patent holder's unilateral declaration of its most restrictive terms.¹³

In its April 2007 business review letter regarding IEEE's proposed policy to permit patentees to publicly disclose licensing terms, DOJ again expressly refused to issue a "no present intent" statement with respect to any joint discussion or negotiation of licensing terms by standards-development working groups:

The Department observes in this regard that IEEE's current policies permit limited discussions of costs related to proposed standards. Such discussion, could, in certain circumstances, rise to the level of joint negotiation of licensing terms. You have not requested, and we are not providing, the Department's views on joint negotiations that might take place inside or outside such standards development meetings or IEEE sponsored meetings.¹⁴

DOJ concluded in these prior BRLs that it would review coordinated action by SEP users on the license fees they would pay on a case-by-case basis under the rule of reason. This conclusion properly reflects the fact that such coordination may, in some circumstances and on balance, harm competition.

The new IEEE BRL does not mention (i) the risks identified by Messrs. Wellford and Masoudi, (ii) DOJ's warnings in the prior BRLs about coordinated action of IPR buyers that might depress prices payable for SEP licenses, or (iii) DOJ's prior statements that it would consider such conduct under a fact-intensive rule of reason inquiry, requiring the balancing of anticompetitive and pro-competitive effects. Needless to say, the IEEE BRL does not and could not find that the joint buyer conduct within IEEE would not "depress" prices for SEPs, as this is the avowed purpose of the conduct. Conspicuously, however, the IEEE BRL indicates no consideration by today's DOJ of its predecessors' concerns that depressing the price of SEPs through the exercise of monopsony power may harm consumer welfare and competition. This raises questions about relying on the IEEE BRL to justify conduct that may attract the attention of future administrations at DOJ.

D. Changes to IEEE's IPR Policy: Process and Substance

From the outset, the development and adoption of the proposed changes to IEEE's IPR Policy was dominated and controlled by individuals seeking to advance the commercial interest of a discrete subset of companies—that is, by IEEE members which are major users (not producers) of technology incorporated in standards. These interests engaged in a coordinated effort to use IEEE structures to depress the royalties for such IPR. Their agenda was implemented through changes to IEEE policy and the Letters of Assurance ("LOA") that owners of patents essential to IEEE standards are asked to provide about their willingness to license SEPs in

¹³ *Id.* at 9-10.

¹⁴ Business Review Letter from Assistant Attorney General Thomas O. Barnett to Michael A. Lindsey (Apr. 30, 2007), at 11, available at <http://www.justice.gov/atr/public/busreview/222978htm>.

accordance with certain principles, the receipt of which almost always is a condition to incorporation of a patented technology in a standard.

The development of the proposed changes began at a March 2013 meeting of the IEEE Standard Association's Standard Board's Patent Committee ("PatCom"). At that meeting, without advance notice, PatCom created the Ad Hoc Committee, purportedly to consider whether modifications to the IEEE patent policy should be recommended. At that time, PatCom was almost exclusively composed of individuals affiliated with manufacturers and sellers of standard-compliant products that have systematically advocated in multiple fora for policies that would compel lower royalties for SEPs, including precisely the substantive provisions included in the Proposal. PatCom appointed its members to the Ad-Hoc, and added to the Ad-Hoc another IEEE member whose views were known to be consistent with those of the PatCom members.

As one would expect from the teaching of antitrust law that firms and individuals act in accordance with their economic interests rather than altruism, the outcome of the process designed and implemented by PatCom and the Ad Hoc was thoroughly in line with the public and litigation positions of the major licensees with which the majority of their members was affiliated. Following approval by PatCom and the Ad Hoc, the proposed changes were approved in closed sessions by successively higher levels of the IEEE hierarchy, two of which included four individuals who were also members of PatCom and the Ad Hoc.

The changes adopted by IEEE at the behest of the IPR licensees center on two mandatory licensing terms and one evidentiary rule, each of which is well calculated to depress the price patentees will receive for licenses to SEPs, as explained in part III below:

"Prohibitive Order." Under the terms of the proposed changes, a SEP-holder that undertakes a reasonable and non-discriminatory ("RAND") licensing commitment would be prohibited from seeking an injunction or exclusion order (a "Prohibitive Order," under the Proposal)

unless the implementer fails to participate in, or to comply with the outcome of, an adjudication, including an affirming first-level appellate review . . . by one or more courts that have the authority to: determine Reasonable Rates and other reasonable terms and conditions, adjudicate patent validity, enforceability, essentiality, and infringement; award monetary damages; and resolve any defenses and counterclaims.

"Reasonable Rate." The Proposal seeks to impose a mandatory definition as to the meaning of a "Reasonable Rate" under RAND. Specifically, a "Reasonable Rate:"

- must be limited to "appropriate compensation to the patent holder for the practice of an Essential Patent Claim excluding the value, if any, resulting from the inclusion of that Essential Patent Claim's technology in the IEEE Standard;"
- must be set with reference to the "smallest saleable Compliant Implementation that practices [an] Essential Patent Claim;"
- must be set "in light of the value contributed by all Essential Patent Claims for the same IEEE Standard practiced in that Compliant Implementation; "and

- may be calculated with reference to royalties received under other licenses only “where such licenses were not obtained under the explicit or implicit threat” of an injunction or exclusion order—thereby allowing exclusion of essentially all historical and market-based evidence of what an industry considers to be “reasonable.”

“Reciprocal Licensing.” The Proposal prohibits a SEP-holder from “condition[ing]” a license on a licensee’s agreement “to grant a license to any of the Applicant’s Patent Claims that are not Essential Patent Claims for the referenced IEEE standard.”

This one-sided cookbook of patent devaluation recipes was not the product of any process intended to—or capable of—arriving at an outcome that reflected a consensus among all interested stakeholders, including SEP licensors dependent on license revenue. Indeed, in response to literally hundreds of stakeholder complaints about the process, absence of consensus, and the substance of the proposed changes, IEEE responded that adoption of its proposals “does not require consensus of all material affected parties.”¹⁵ Among other things:

- **Vote-stacking.** The IPR-buyer interests that controlled PatCom and the Ad Hoc excluded or ignored other interests and voices during the process that produced the new Rules. In contrast to prior practices in PatCom, there was no general invitation to the IEEE membership to participate in the Ad Hoc Committee. Indeed, throughout 2013, the Ad Hoc rejected requests from interested stakeholders to open its membership. Only in 2014 did PatCom add to the Ad Hoc two individuals affiliated with companies critical of the Proposal, but PatCom made sure the dissenters lacked the voting power to achieve any meaningful changes in the Proposal’s terms.
- **No transparency.** The Ad Hoc conducted its meetings privately and published no minutes, allowing its members to avoid the scrutiny that their deliberations would have otherwise received under more formalized procedures. The absence of transparency continued through the end of the process, with deliberations at each successive level of the IEEE hierarchy undertaken in private, closed sessions with no indication of whether—and if so how—the objections of SEP licensors and others not adequately represented during the process were considered. IEEE even refused to share with its members a copy of the BRL request to DOJ
- **No meaningful responses to or explanations for rejecting concerns of other stakeholders.** DOJ notes in the IEEE BRL that the Ad Hoc sought and received from other IEEE members comments on its Proposal. The IEEE BRL fails to note the absence of any meaningful responses, in the form of either substantive modifications or non-cryptic, responsive explanations, to those comments. It is very difficult to conclude that the comment process had any purpose other than to give an illusory appearance of openness. For example, the Ad Hoc and PatCom:

¹⁵ PatCom Ad Hoc Committee Comment Disposition Report for IEEE-SA Standards Board Bylaws Draft 05-Aug-15 (Nov. 13, 2013), Proposed Responses to Comments 5, 7, 9, 23, 82, 88, 98, 100, and 101, *available at* http://grouper.ieee.org/groups/pp-dialog/drafts_comments/PatCom_sort_by_commentID_141113.pdf

- Refused uniformly to respond to comments requesting identification of any evidence of any need for changes to the existing and long-standing IEEE IPR policy, stating, “It is not necessary to cite a specific IEEE instance of a problem in order to make policy clarifications or even changes.”¹⁶
- Never identified any problem, distortion, or defect in the content or real-world operation of the existing IEEE policy that would justify the proposed changes, or gave any indication whether or how stakeholders other than IPR buyers would be impacted, including the impact on incentives to engage in R&D for technologies beneficial to its standards.
- Rejected the overwhelming majority of comments that disagreed with the substantive provisions of the Proposal. Indeed, despite hundreds of objections to various aspects of the Proposal, every policy change initially included in the Proposal remained substantively unaltered between the first draft in August 2013 and the final draft in June 2014.
- **No independent review by upper levels of IEEE hierarchy.** The private, closed sessions of the upper levels of the IEEE hierarchy included, among others, the same four individuals affiliated with IPR buyers comprising the majorities of PatCom and the Ad Hoc. The hierarchy was advised by the same in-house and outside counsel selected by PatCom and the Ad-Hoc, notwithstanding requests that the hierarchy obtain independent advice and counsel. No information was given members about the documents and information provided to the hierarchy, or the content of any discussion at the closed sessions.

None of these facts are mentioned in the IEEE BRL.

III. ANALYSIS

Contrary to DOJ’s prior statements that it would review “joint negotiation or discussions of licensing terms among [SSO] working group members,”¹⁷ and joint negotiations that might take place insider or outside standards development meetings¹⁸ on an individualized rule-of-reason basis,¹⁹ IEEE invited—and DOJ gave a blanket endorsement for (effectively deeming legal *per se*) new mandatory license terms and principles that are clearly intended to depress pricing for all patents essential to any IEEE standard.

The IEEE action approved by DOJ is not even a joint negotiation: It is an agreement by users of SEPs on new license terms and principles that will depress royalties, made possible by the exclusion of SEP owners from meaningful participation in their development or approval. IEEE did not provide—and DOJ did not consider—important categories of evidence that would

¹⁶ PatCom Ad Hoc Committee Comment Disposition Report for IEEE-SA Standards Board Bylaws Draft 05-Aug-15 (Nov. 13, 2013), Proposed Responses to Comments 3 and 4, *available at* http://grouper.ieee.org/groups/pp-dialog/drafts_comments/PatCom_sort_by_commentID_141113.pdf.

¹⁷ VITA BRL, *supra* note 11, at 9.

¹⁸ 2007 IEEE BRL, *supra* note 12, at 11.

¹⁹ *See* VITA BRL, *supra* note 11, at 9 & n. 27.

have been absolutely essential for a meaningful “rule of reason” inquiry. For example, IIEEE did not provide—and DOJ did not consider—any evidence with regard to the existence of any problem arising under any particular IIEEE standard, or any particular SEP. IIEEE did not provide evidence concerning—and DOJ did not consider—potential alternatives to buyer cartel conduct (e.g., *ex ante* bilateral negotiations), or the feasibility of alternatives other than IIEEE available to licensors desiring to commercialize their technologies, but unwilling to capitulate to the cartel’s demands. IIEEE did not provide—and DOJ did not consider—any evidence on the impact of the new rules on incentives to invest in R&D for disruptive technologies.

The potential anticompetitive effects of the changes to the IIEEE IPR policy, which DOJ should have but failed to weigh against their alleged pro-competitive effects, are described in more detail below.

A. The Revisions to IIEEE’s Rules are Manifestly Anticompetitive

Many of the new IIEEE rules are uncertain in meaning and application.²⁰ But no one has disputed that their underlying intent is consistent with the view of the Chinese People’s Supreme Court that royalties for SEPs “should be lower than normal.”²¹

1. Prohibition Orders

One of the primary goals of the Ad Hoc members in a variety of fora has been to limit the remedies available for infringement of SEPs. Continuing this theme, the new rules add a prohibition that an SEP owner “shall neither seek nor seek to enforce [an injunction or exclusion order] . . . unless the implementer fails to participate in, or to comply with the outcome of, an adjudication, including an affirming first-level appellate review . . . by one or more courts”²² The bar on injunctive relief is flat and unconditional, lacking any feature designed to protect the legitimate interests of SEP owners or licensees in good standing. The ban applies even if the infringer has not denied infringement or validity of the patent but nevertheless refuses outright to negotiate a license.

To be clear, the scenario at issue is an extreme one: an infringer has refused to negotiate license terms; an independent court has found the terms offered by the licensor to be consistent with the IIEEE IPR Policy after a full trial; yet the infringer continues to refuse to accept a license and pay royalties on the court-approved terms. Even then, the revised rules say, the patentee may not seek to enjoin the ongoing and uncompensated infringement.

If, as DOJ asserts in the IIEEE BRL,²³ the automatic ban on injunctions through an appeal “will not be significantly more restrictive than current case law,” then one might ask why the IPR buyers even bothered crafting and imposing a new rule to begin with. But that question need not be answered because, in fact, the new rule differs from current law, and radically so, in two critical respects.

²⁰ See, e.g., pp. 12, 13, 16, 20-21, *infra*.

²¹ Chinese People’s Supreme Court, *Interpretation on Implementation of Patents Adopted in Industrial Standard* (July 2008 Ming San Ta Zi No 4).

²² See *supra* at 7.

²³ IIEEE BRL, *supra* note 2 at 10.

1. While current law precludes injunctions against infringement of SEPs by prospective licensees that had been engaged in efforts to obtain a license, few if any courts have rejected requests for injunctions against infringers that had, for example, refused to negotiate or respond to a request to negotiate a license—a remedy that is critical to encourage voluntary, bilateral license negotiations.
2. The ban on injunctions through completion of an appeal is equivalent in operation and effect to an automatic stay pending appeal of a district court decision. Such stays, however, are very rare, as DOJ’s lawyers surely know.

The effect intended by the IPR buyers is clear: Prolong the already lengthy period during which IPR buyers may infringe SEPs without making any payments to SEP holders, putting them to the choice between capitulating to the license terms demanded by the infringer or waiting for four or more years for an infusion of cash or other compensation thus reducing the revenues available for a return on prior investment or to fund new R&D.

The risk of this sort of licensee “hold-out” was recently discussed by a U.S. International Trade Commission Administrative Law Judge (“ALJ”). As the ALJ found, even the status quo FRAND rules and legal environment permit IPR buyers to sell infringing products and, without seeking a license, wait to see whether they are sued and then the outcome of the lawsuit. IPR buyers are thereby

able to exert a pressure on the negotiations with the IPR holder to try to make the agreement in the lower range of FRAND, or perhaps even lower than a reasonable FRAND rate.” They also are able to shift the risk involved in patent negotiation to the patent holder. *By not paying for a FRAND license and negotiating in advance of the use of the IPR, they force the patent holder to take legal action. In this action, the patent owner can lose the IPR they believe they have, but if the patent holder wins it gets no more than a FRAND solution, that is, what [it] should have gotten under the agreement in the first place.*

There is no risk to the exploiter of the technology in not taking a license before they exhaust their litigation options if the only risk to them for violating the agreement is to pay a FRAND based royalty or fee. *This puts the risks of loss entirely on the side of the patent holder, and encourages patent hold-out . . .*²⁴

The ALJ found²⁵ that this “hold-out” problem “is as unsettling to a fair solution as any patent hold up might be.” The elimination of any incentive of an infringer to negotiate a license, and the automatic stay mandated by IEEA and approved by DOJ, will only exacerbate the “hold-out” problem. Indeed, the only way an automatic stay could “help parties reach agreement more quickly,” as DOJ asserts, is if SEP owners offer license terms that a licensee would find more favorable than the terms it could obtain in a FRAND adjudication by an amount that offsets the value of a deferral of license payments that the prospective licensee could otherwise obtain.

²⁴ *Certain Wireless Devices With 3G and/or 4G Capabilities and Components Thereof*, USITC Inv. No. 337-TA-868, 2014 WL 2965327, at *78 (U.S. Intern. Trade Com’n June 13, 2014) (“*Certain Wireless Devices*”)(*emphasis added*)..

²⁵ *Id.*

Nowhere does the IEEE BRL explain how magnifying incentives for hold-out, and increasing materially the pressure on SEP owners to accept less than what their technology is worth, could preserve “the pricing freedom in bilateral licensing negotiations” AAG Baer “termed critical for intellectual property owners.”²⁶ Nowhere does the BRL explain why barring injunctions until completion of an appeal of a court’s FRAND decision—the most radical feature of the changes regarding the availability of injunctions—is necessary to prevent theoretical or other patent “hold-up,” or otherwise promote competition.

And what the BRL does say about the protracted ban on injunctions is factually inconsistent with the actual language of the IEEE Revised Rules that IP buyers have now imposed on licensors. Specifically, the BRL states, “tools are available to ensure that patent holders are appropriately compensated and that potential licensees do not act unreasonably,” such as by “requiring an alleged infringer to post a bond or make escrow payments.”²⁷

This unsupported statement is foreclosed by the unequivocal language of the new rule, which says nothing about bonds or escrow payments. Notably, IEEE did not provide—and DOJ apparently did not seek—any assurance that the Revised Rules allow SEP owners to seek or enforce a court order requiring an infringer to post a bond or make payments into escrow. It would be legal malpractice for counsel for an infringer not to oppose on this ground any such request.

In sum, notwithstanding DOJ’s attempt to rewrite the IEEE Revised Rules to make them appear more defensible, the rule imposed by the IPR buyers makes unavailable to SEP owners the usual “tools” for protecting the interests of a seller in cases of prolonged litigation.

2. Shrinking the Royalty Base

The Proposal provides that a “Reasonable Rate” must be measured against “the smallest saleable Compliant Implementation that practices the Essential Patent Claim.” This is neither economically appropriate nor practically possible. The part of a product in which an invention is implemented is a technical matter that, in most cases, tells little or nothing about the invention’s value. In many cases, moreover, the full value even of an innovation that physically resides within a component (e.g., a chip) may only be fully exploited, and measureable, in the context of a complete and operational device. As one court has explained:

Basing a royalty solely on chip price is like valuing a copyrighted book based only on the costs of the binding, paper, and ink needed to actually produce the physical product. While such a calculation captures the cost of the physical product, it provides no indication of its actual value.²⁸

Further, the long-standing practice in many industries is to license SEPs on a portfolio basis, using the value of the finished product as the royalty base. By contrast, the changes to the IEEE policy require that SEP-owners calculate royalties on a patent-by-patent basis against the value of a bewildering range of differing royalty bases to be identified on a per-patent basis. In

²⁶ William J. Baer, Assistant Attorney General, U.S. Department of Justice Antitrust Division, *International Antitrust Enforcement: Progress Made; Work to be Done* (Sep. 12, 2014).

²⁷ IEEE BRL, *supra* note 2 at 11.

²⁸ *CSIRO v. Cisco Systems, Inc.* 2014 WL 3805817, at *11 (E.D. TX. 2014).

the common case of a diverse portfolio and a complex product, the transaction costs of attempting a per-patent royalty base analysis and royalty rate negotiation would be overwhelming, destroying the widely recognized efficiencies of portfolio licensing. Indeed, DOJ never even considers the possibility that the increased transaction costs would overwhelm the *de minimis* royalties that the Revised Rules allow, prevent innovators from capturing appropriate returns on the full value they create, and discourage investment in standardized technologies.

DOJ's only response to concerns expressed about this provision of the Revised Rules is that it does not "mandate the use of the smallest saleable Compliant Implementation["SSCI"] as the correct [royalty] base," but states only that it "should" be "considered."²⁹ This linguistic hair-splitting is unconvincing given, *inter alia*, the absence of any language in the changes (i) requiring or allowing consideration of other factors, (ii) suggesting what those other factors would be, or (iii) indicating the circumstances under which they could or should be considered. In any event, if words like "should" and "considered" created legitimate doubts about the requirement's mandatory nature and the admissibility of other evidence, then this would only undermine DOJ's conclusion³⁰ that the changes are pro-competitive because they create "reduce uncertainty" for licensors and licensees.

3. Proportionality

Preliminarily, the idea of mandatory rate-setting on the basis of the "value contributed by all essential patent claims" (proportionality) is no less arbitrary than requiring a division of rents by all providers of hardware inputs—or inputs beginning with the letter "P." Neither IEEE nor DOJ offers any legal or economic basis for capping and then dividing rents among owners of different technologies.

Proportionality rests on the false premise that there is some fixed total IPR value contribution that should be divided among the various patentees according to some principle such as an arithmetic allocation proportional to numbers of essential patents ("proportionality"). As a standard grows technically richer, the standardized product provides more value to the user. Adding an additional invention to a capability-rich product does not inherently reduce the value provided to the user by other inventions embodied in that product. Adding hand-upholstered leather to a car does not reduce the value contribution of the engine; there is no fixed "value" to the car to be carved up according to some principle of "proportionality."

Further, the value of each individual component of a product (both hardware and IP) is by no means a fixed quantity that can be pinned down and measured. On the contrary, that value can vary widely and complexly depending on the presence of other inputs. For example, a beautiful "HD" screen may have great value in consumers' eyes when supported by high data-rate LTE technology, while it would have little value in an older "feature phone" that is unable to download video or take high-definition photographs, and only intermediate value in a 3G device with intermediate data transmission rates. In short, and as courts have noted:

²⁹ IEEE BRL, *supra* note 2, at 12.

³⁰ E.g., IEEE BRL, *supra* note 2, at 10.

It is no[t] . . . realistic to think that [a] court could arrive at a fair valuation of . . . patents simply by applying the percentage of intellectual property rights approach³¹.

Also,

If a patent holder owns ten out of a hundred patents essential to a given standard, it does not automatically mean that it contributes 10% of the value of the standard.³²

The theoretical difficulty with determining a technology's value in comparison to all other essential patents is compounded by the practical reality that there is no way to determine the total number of patents actually essential to a given standard. Lists of patents declared as potentially essential are of little use, because "The Declaration is never confirmed, and often patents that are declared as perhaps reading on a standard will, at a later date, be shown not to be Standard Essential Patents."³³ Indeed, "[t]his has happened with a certain degree of frequency in such matters."³⁴

DOJ's sole statement in defense of the proportionality requirement is that it "addresses royalty stacking."³⁵ However, the proponents of the proportionality requirement at IEEE—who know what royalties they pay and are in possession of the true facts—have never identified any factual royalty-stacking issue with any IEEE standard. "Experts" testifying at trial on behalf of one of the IPR buyers with whom a member of the Ad Hoc and PatCom is affiliated were unable to identify an actual instance of royalty stacking.

Likewise, DOJ has not in its IEEE BRL, or elsewhere, demonstrated the existence of a royalty-stacking problem for any standard. It is indeed notable that, while alarms about "royalty stacking" have been featured in academic and policy debate for at least a decade, no manufacturer-licensee affected by any major standard has yet stepped forward with factual information disclosing a real-world royalty burden that shocks (or even disturbs) the conscience. The Federal Circuit recently held that a jury evaluating a "reasonable royalty" could not properly be instructed about "royalty stacking" concerns absent actual evidence of royalty stacking.³⁶ If evidence-based analysis is important to a reasoned evaluation of "reasonableness" in one particular litigation, it should be all the more mandatory in the case of approval of an IPR policy that will affect every patent essential to any IEEE standard.

4. Prohibition on Consideration of Existence Licenses in Determining Reasonable Royalties

Among the most probative evidence of reasonableness of fees payable under a proposed license are the fees negotiated and set forth in "comparable" licenses (i.e., licenses for the same or similar patented technology). One of the IEEE Revised Rules imposed by IPR buyers is that

³¹ *Apple Inc. v. Motorola Mobility, Inc.*, No. 11-cv-178-bbc, 2012 WL 7989412, at *5 (W.D. Wis. Nov. 8, 2012).

³² *In re Innovation IP Ventures, LLC Patent Litig.*, MDL Docket No. 2303, 2013 WL 5593609, at *10 (N.D. Ill. Oct. 3, 2013).

³³ See *Certain Wireless Devices*, *supra* at ADD, 2014 WL 2965327, at *76.

³⁴ *Id.*

³⁵ *Id.* at 13.

³⁶ See *Ericsson, Inc. v. D-Link, Sys.*, 773 F.3d 1201, 1234 (Fed. Cir. 2014)]

courts may consider comparable licenses in determining “reasonableness” of an offer only “where such licenses were not obtained under the threat, “explicit or implicit,” of an injunction. This new rule is at best extraordinarily unclear and, at worst, a massive overreach.

In most jurisdictions, injunctive relief against patent infringement is a remedy authorized by law, though very rarely granted in the SEP absent egregious conduct by the infringer. Every license negotiation is conducted against this legal background, in which the possibility of injunction if no agreement is reached is arguably “implicit” albeit remote. What the group of IPR purchasers behind the new IEEE rule is seeking to accomplish is to erase history and all existing market-based evidence of the value of patents essential to IEEE standards, in order to clear the way for royalty-depressing expert theorizing detached from the real world.

The remarkable (and false) implication, of course, is that for decades the terms for licenses to patents essential to IEEE (and other) standards, negotiated by sophisticated parties fully aware of their rights to “reasonable” terms, in fact have been systematically unreasonable. Now, the implication continues, royalty rates for SEPs to be “reasonable” must be systematically lower than has been true up to the present, because up to the present most licenses have been negotiated with the patentee having a right to seek an injunction, no matter how remote the possibility the injunction request would be granted.

DOJ’s sole and baffling response to these concerns is that “[t]he [change] does not prevent consideration of agreements other than those specifically identified therein.”³⁷ By no stretch of the imagination, however, can it be concluded that the new rule “specifically” identifies any agreement. The revised rule is intentionally broad, raising the distinct possibility that it will sweep in essentially all existing, privately negotiated license agreements. Indeed, an “FAQ” document issued by IEEE states that the mere request to a court for an injunction is an “explicit threat” while a statement to an infringer about the possibility of such a request is an implicit threat.”³⁸ The IP buyer beneficiaries of the new rule will surely argue that merely the right to seek an injunction requires under the new IEEE rules the exclusion of evidence of prior market acceptance of particular rates for a license—no matter how widespread and long-standing the rates, no matter how successful the industry has been under existing licensing terms, and no matter how unlikely an injunction request would be granted—to demonstrate that those terms are “reasonable.”

If, as DOJ apparently contends, the new rule does not ban all consideration of comparable license agreements, it is at best question-begging, and yet another indication that something other than a desire for “certainty”³⁹ or “clarity”⁴⁰ is behind the IEEE BRL.

5. Prohibition on Demands for Cross-Licenses to Non-Essential Patents

The IEEE’s Revised Rules include a prohibition against SEP licensors requiring cross-licenses to non-SEPs as a condition to granting an SEP license. This *per se* prohibition on one

³⁷ IEEE BRL, *supra* note 2, at 13.

³⁸ IEEE-SA, *Understanding Patent Issues During IEEE Standards Development* (2015), at 13, available at <http://standards.ieee.org/faqs/patents.pdf>.

³⁹ IEEE BRL, *supra* note 2 at 4, 10.

⁴⁰ *Id.* at 6, 11, 14, 15.

particular form of “compensation in-kind” may appear reasonable at first glance. In fact, it is novel and clearly intended to strengthen the bargaining hand of parties that expend resources on non-essential patents to the detriment of those that are responsible for developing the core technologies needed to enable standards projects—and standardized products—to succeed.

As to novelty few, if any, SSO licensing policies have a *per se* rule against demands for a cross-license. And no court has ever held that it is inconsistent with patent or antitrust law for a licensor to demand a non-exclusive cross-license from a licensee, regardless of the existence or amount of any market power conferred by the licensor’s patents.

And there are sound reasons why this is the right answer. Companies that have invested primarily in developing core technologies may be quite willing to contribute those technologies to standards and to commit to license them freely. Yet, at the same time, they may be worried that—unless they receive broad cross-licenses back—they will be “unilaterally disarming” with respect to companies that have invested in more peripheral (and thus non-standardized) yet important technologies. If major contributors to standards find themselves unable to obtain cross-licenses when they grant SEP licenses—and are thus defenseless against lawsuits from their own licensees asserting non-essential patents against them, then contributing to standards and making RAND commitments will become a risky proposition indeed.

This, of course, would undermine the efficiencies and benefits that standards are supposed to provide. It could easily become standard operating procedure for implementers to first negotiate and accept an SEP license, then promptly file suit asserting non-essential patents and demand cheaper terms for their inbound SEP license as a condition of granting a license to the implementer’s non-essential patents.

This is not to say that demanding a cross-license to non-SEPs may not indeed be unreasonable in some settings. The point here is merely that there is no legitimate basis for a *per se* prohibition of such requests without regard to the facts and circumstances of a particular case.

The response to these concerns in the IEEE BRL⁴¹—that the new rules do not *prohibit* licensees from granting cross-licenses to holders of SEPs—is no response. The issue here is not whether licensees may “voluntarily” grant cross-licenses, but whether SEP licensors can protect themselves from the assertion by licensees of powerful, although not technically essential, patents, the assertion of which may in some cases impact competition no less than a refusal to license an SEP. The IEEE BRL offers no explanation why it is appropriate to require licensors to license all of their SEPs, including SEPs that may confer no market power on their owners, but to prohibit them from demanding cross-licenses to non-essential patents that may confer substantial market power.

B. The New IEEE Rules Offer No Pro-competitive Benefits to Balance Against the Anticompetitive Effects

In order to justify sanctioning under a rule of reason analysis what amounts to coordination by IPR buyers on the prices they will pay, a court would have to determine, based on concrete empirical evidence, at least the following:

⁴¹ *Id.* at 15.

- a) that RAND policies in their current form do not negate market power, such that patent “holdup” as measured by real world prices is systematically inflating license prices of patents essential to all IEEE standards;
- b) that the supposed solutions to “hold-up” adopted by the IPR buyers will appropriately remedy the real-world anticompetitive costs that “holdup” purportedly imposes; and
- c) that the collateral damage of reduced incentives for innovation and SSO contribution will be consistently outweighed—across all of the standards and all of the industries affected by IEEE standards—by a greater good of eliminating these “holdup” costs.

In the absence of any justifying data, and in light of the extensive history of standards promulgated by IEEE that have enjoyed tremendous commercial success and consumer adoption, it is not possible to reach any of these conclusions.

The IEEE BRL does not even engage with these issues, much less attempt any serious rule of reason analysis. Instead, the BRL offers two purportedly “pro-competitive” justifications for the IEEE changes, and one explanation why the rule against coordinated conduct by buyers on the prices they will pay does not apply to them. None have merit.

1. “Mitigation of Holdup”

Much of the clamor that led to the IEEE changes has been about so-called patent “holdup,” which has been defined in various theoretical ways that are of little help in determining its existence, much less how to measure it. A fundamental premise of holdup theory is that once a patent is incorporated in a standard, the patentee obtains an increment of market power because it is no longer economically rational for a seller of standard-compliant products to switch to an alternative to the patent. “Holdup” as used in this context is the exercise of the alleged increase in market power.

In the IEEE BRL,⁴² DOJ cites mitigation of holdup as justification for its decision not to enforce the law against coordinated action by powerful buyers on the prices they will pay for a license to SEPs. However, even as a theoretical matter, there is no market power that SEP owners may use to holdup SEP users.

The textbook consensus definition of market power is “unilateral power over price.” Most SEPs, and virtually all SEPs for IEEE standards, are subject to enforceable contractual commitments to license them on reasonable and nondiscriminatory terms. SEP owners thereby relinquish whatever unilateral power over price they otherwise might have: license fees and other terms are determined either through bilateral negotiations between licensor and licensee or, in the event negotiations fail, by a court or other tribunal.⁴³ Principles of contract, equity, and patent law have almost entirely eliminated the possibility of an injunction prior to the completion of a FRAND adjudication, allowing negotiations to establish real market-based prices.

⁴² *Id.* at 5, 9, 12, 15, and 16.

⁴³ See Dennis W. Carlton & Allan L. Shampine, *Identifying Benchmarks for Applying Non-Discrimination in FRAND*, 8(1) CPI ANTITRUST CHRON. (August 2014), at 3-6.

Indeed, a thought experiment suggests that, under existing law, FRAND commitments interpose such serious obstacles to successful assertion of an SEP against an infringer that the fact of being made “essential” to a standard (if also made subject to a FRAND commitment) substantially decreases the value of “market power” otherwise conferred by the statutory patent grant.

Suppose a recalcitrant infringer refuses to enter into negotiations for a license to an innovator’s strong patent portfolio, which was developed by investing hundreds of millions of dollars in high risk R&D. The innovator wishes to bring an infringement action to motivate the infringer to begin license negotiations. A variety of patents in the innovator’s portfolio are clearly infringed. Does the innovator bring suit on its SEPs or on its non-essential patents?

The answer is obvious: The patentee who asserts SEPs hands the infringer additional defensive weapons, increases the cost and complexity of the trial (since there must be FRAND adjudication), limits the potential damages, almost certainly forecloses the possibility of injunction (the threat that would actually drive the infringer to the negotiating table), and even creates a risk of hostile action by regulatory agencies. In today’s legal environment, a lawyer who recommends to the innovator the assertion of its SEPs in lieu of its non-essential patents would almost certainly be committing malpractice.

It is thus hardly surprising that throughout the period the IPR buyers were developing and defending the patent devaluation measures they pushed through IEEE, they refused consistently to identify any instance of holdup. IEEE identified no such instances in its BRL request to DOJ. DOJ fails to identify in the IEEE BRL any instance of holdup in connection with any IEEE or other standard. The most that DOJ can do with holdup theory is refer to an example of “potential” holdup that was prevented by enforcement of the patentee’s FRAND commitment.⁴⁴

Indeed, passing the point that the exercise of market power by charging “high” prices does not violate U.S. antitrust law,⁴⁵ it is telling that during all the years of fretting about holdup, DOJ and other antitrust agencies have failed to identify a single instance in which the inclusion of a patent defeated or delayed the adoption or implementation of a standard, or otherwise harmed competition. The reason is clear: FRAND commitments obtained by SSOs—including FRAND commitments to IEEE pursuant to its IPR policy before the adoption of the revised rules—have successfully negated exercise of market power the SEP owner might otherwise have, exactly as intended. That the FRAND regime has resulted in so many agreements arrived at through bilateral negotiations, and so few arrived at by litigation, is a tribute to the balance of interests—now jettisoned by IEEE with the support of DOJ—it embodies.

No other proponent of changes to address purported holdup has filled this evidentiary void. In fact, the industry that has become the “poster child” for theories and assertions of holdup, the wireless industry, is thriving. Wireless standards have been hugely successful. Wireless devices and service have been steadily declining in price while their capabilities, quality,

⁴⁴ IEEE BRL, *supra* note 2, at 6-7 n.28.

⁴⁵ Rambus, *supra* note 4.

and reliability have increased radically, due in large part to dynamic innovation that the incentive scheme created by patent law was designed to promote.⁴⁶

Perhaps no circumstantial evidence that the IEEE BRL was driven by something other than antitrust law or principle is more compelling than DOJ's conspicuous and consistent failures to (i) explain how the owner of a patent subject to a FRAND commitment could have unilateral power over price, and (ii) identify any impact on competition from the inclusion of a patent in a standard. The inference that the IEEE BRL was driven by the current DOJ's industrial policy preferences, and not antitrust principle as applied to evidence, is warranted unless and until DOJ remedies these failures.

2. "Reducing Uncertainty"

The IEEE BRL⁴⁷ also justifies its acceptance of buyer cartel conduct with regard to SEP licenses on the ground that there is "broad problem of uncertainty" about the meaning of "reasonableness" as that term is used in FRAND policies and commitments. This rationale is no more persuasive than the one about mitigation of holdup.

First, the vagueness argument is impossible to reconcile with the numerous legal, regulatory, and contractual regimes that have employed successfully concepts of "reasonableness" with no further elaboration. Most obviously, the contention that "reasonable" is too vague ignores the widespread and long-standing reliance on a standard of "reasonableness" to define the value of patents in the most closely analogous context as possible: calculating infringement damages. Parties to bilateral negotiations and courts may turn to that extensive body of law to inform their positions and decisions. And it is especially ironic that DOJ has now embraced the "vagueness" rationale, given that when concerned about the possibility of supra-competitive prices for IPR due to horizontal arrangements, DOJ has settled investigations and cases through consent decrees establishing a general obligation for each licensor to offer a "fee which it deems reasonable," with no further elaboration.⁴⁸

Second, the argument that the term "reasonable" in RAND commitments cannot restrain unilateral pricing power is a non-sequitur. Uncertainty of definition may increase the likelihood that parties will be unable to agree on what is "reasonable" and will thus require recourse to a court, but it remains true that a court or other third party ultimately determines RAND license terms (or indeed has the power to do so if invoked by the infringer), meaning that the patentee is no more able to unilaterally determine price than is the prospective licensee.

⁴⁶ See K. Gupta, *Technology Standards and Competition in the Mobile Wireless Industry*, GEORGE MASON U. L. REV. (to be published, 2015) (demonstrating that "the empirical success story of the mobile wireless industry—the most patent—and standard-heavy of all industries—is entirely at odds with the bleak picture painted by some commentators"); also summarizing empirical data showing that the standards-intensive wireless industry "features high levels of SSO participation and R&D, stable profit margins, falling consumer prices, constant entry and exit, equal and fluctuating market shares, and sustained growth and innovation in products and features").

⁴⁷ IEEE BRL, *supra* note 2, at 4, 10.

⁴⁸ See Final Judgment ¶ XIV(A), *United States v. Broadcast Music, Inc.*, No. 64-Civ-3787 (S.D.N.Y. Nov. 18, 1994); *United States v. Am. Soc'y of Composers, Authors and Publishers*, 309 F. Supp. 2d 566, 575 (S.D.N.Y. Jun. 11, 2001). (emphasis added).

Third, DOJ's unsupported assertion that uncertainty is a "broad problem" in SEP licensing is refuted by the facts. Literally thousands of license agreements for SEPs have been negotiated without the aid of any clarification or supplementation of FRAND policies and commitments, or intervention by courts or agencies. Legal cases resolving disputes over SEP license terms remain few and far between.

Fourth, the revisions to IEEE rules will not reduce uncertainty. Virtually all the revisions introduce new elements of uncertainty and create new issues of interpretation and application to argue about in negotiations and litigation.⁴⁹ Yet another source of uncertainty is the provision in the new IEEE policy that "excludes" from the royalty rate "the value, if any, resulting from the inclusion of" the patented technology in an IEEE standard.

The meaning of this provision is as unclear as it is critical. Some parties have argued outside of IEEE that the "value of patented technology isolated from the value derived from incorporation in the standard would ideally be determined by calculating the incremental value of the technology compared to the alternatives that could have been written into the standard instead."⁵⁰ Under this interpretation, if the patented technology selected for inclusion in the standard has a value of ten, and the next best alternative available prior to adoption of the standard has a value of eight, then the incremental value of the selected technology is two. No real world market operates this way. Subjecting SEP licensing to an incremental value cap could not be more antithetical to the fundamental logic underlying the patent system.⁵¹

Licensor members of IEEE, alarmed by the possibility and potential consequences of an interpretation mandating an incremental value cap, formally requested the Ad-Hoc to clarify or at least explain the provision and state whether it supported such a cap. The Ad-Hoc's most cogent response to this inquiry is that the proposed (since adopted) new rule "neither proposes nor rejects the 'incremental value test.'"⁵² Unsurprisingly, neither the IP buyers nor DOJ have sought to explain how this new rule *reduces* uncertainty.

And if increased certainty about "reasonable" license terms was, in fact, the DOJ's goal, it would not have approved a rule that excludes from consideration all—or most—prior comparable licenses—historically the gold standard for establishing (or disproving) "reasonableness."

In sum, the only thing reasonably "certain" under the new IEEE policy is that fees for a license to patents essential to an IEEE standard will be lower than they would be under the prior policy due to a combination of the radical expansion of incentives for licensee "holdout" and the value-emasculating principles included in the policy governing determination by courts or other tribunals of a reasonable fee.

⁴⁹ See, e.g., *supra* at 12, 13, 16.

⁵⁰ Pl. Microsoft Corp.'s Post-Trial Proposed Findings of Fact and Conclusions of Law ("Microsoft Proposed Findings"), *Microsoft Corp. v. Motorola Inc.*, No. C10-1823-JLR, Doc. No. 625 (W.D. Wash. Dec. 17, 2012) at ¶ 66.

⁵¹ See *supra* at 3-4.

⁵² PatCom Ad Hoc Committee Comment Disposition Report for IEEE-SA Standards Board Bylaws Draft 19-Nov-15 (Mar. 4, 2014), Proposed Responses to Comments 29 and 30, *available at* http://grouper.ieee.org/groups/pp-dialog/drafts_comments/PatCom_sort_by_commentID_040314.pdf.

But the ultimate question for antitrust purposes, whether as a matter of enforcement or simply advocacy on competition policy, is not whether imposition of licensing terms by a cartel will result in short-run consumer savings. It is whether such a practice will expand output and increase dynamic efficiency over the long term:

Notwithstanding numerous statements to the effect that the primary or even exclusive concern of antitrust is ‘consumer’ welfare, upstream, or monopsony, injury to suppliers is treated in largely the same way as injury to consumers. . . . Clearly mistaken is the occasional court that thinks low buying prices are procompetitive regardless of the restraints on competition that lead to such prices⁵³

Dynamic efficiency and long-term effects on output are entitled to at least as much weight as short-term cost savings. And, in innovation-driven industries in particular, dynamic efficiency “accounts for the lion’s share of efficiency/welfare gains.”⁵⁴

3. Potential Safeguards Against Buyer Cartel Conduct

In addition to alleging (without empirical support or analysis) pro-competitive effects of coordinated action by IPR buyers on prices they will pay for SEP licenses, the IEEE BRL asserts that the potential for anticompetitive effects is eliminated or mitigated by the process followed by IEEE in devising and approving the new rules, which included affording all IEEE members an opportunity to provide comments on drafts of the rules, and allowing licensors to refuse to provide a conforming licensing commitment and/or depart the IEEE. None of this is consistent with governing legal principles.

a. The “Process” followed by IEEE

The one-sided “talk to the hand” process engaged in at IEEE intuitively cannot—and under controlling case law does not—afford a defense to what otherwise would be a paradigmatic violation of Section 1 of the Sherman Act. The Supreme Court has cautioned that private standard-setting by associations comprising firms with horizontal and vertical business relations “is permitted . . . under the antitrust laws only on the understanding that it will be conducted in a nonpartisan manner offering procompetitive benefits”⁵⁵ Participants in standard-setting “may not . . . (without exposing [themselves] to possible antitrust liability for direct injuries) . . . bias the process by . . . stacking the private standard-setting body with decisionmakers sharing their economic interest in restraining competition.” Thus, the most relevant consideration is the composition of the decision-making bodies, not merely the process they follow.

Here, IEEE did exactly what the Supreme Court has cautioned against. It stacked the decision-making bodies with representatives of interests of IP buyers, pre-ordaining the outcome. When PatCom created the Ad-Hoc, four of the six members of PatCom were affiliated with IP buyers that also happen to be among the largest users of SEPs in the world today and that

⁵³ PHILLIP E. AREEDA & HERBERT HOVENKAMP, *ANTITRUST LAW: AN ANALYSIS OF ANTITRUST PRINCIPLES AND THEIR APPLICATION* § 2011 (3rd & 4th Ed. 2010-2014).

⁵⁴ Thomas O. Barnett, Assistant Attorney General, *Maximizing Welfare Through Technological Innovation*, Geo. Mason Univ. L. Rev. 11th Annual Symposium on Antitrust, at 7 (Oct. 31, 2007), available at <http://www.justice.gov/atr/public/speeches/227291.pdf>.

⁵⁵ *Allied Tube & Conduit Corp. v. Indian Head, Inc.*, 486 U.S. 492, 502 (1988).

have for years been actively advocating for measures to devalue SEPs. These four PatCom members appointed themselves, and another individual affiliated with another IP Buyer, to fill five of the seven slots on the Ad-Hoc.

Predictably, the comment process had no impact. The Ad-Hoc and PatCom provided no meaningful responses to comments, and every revised rule initially included in the Proposal remained substantively unaltered between the first and final drafts. Throughout the process, moreover, the IP buyers made clear their view that IEEE was not required to and did not seek a consensus of all economic interests. To the contrary, the Ad Hoc stated repeatedly, “adoption of the recommendations does not require consensus of all materially affected parties.”⁵⁶

In the IEEE BRL, DOJ cites none of the facts about the membership of the Ad-Hoc or PatCom or how those bodies responded to comments. DOJ states only that comments were allowed and their number. No one without an industrial policy agenda would contend that the mere number of comments is probative of the effectiveness of the process at IEEE to address the concerns about standard-setting expressed by the Supreme Court.

The lack of consensus at lower levels of the IEEE hierarchy was not addressed (let alone ameliorated) by “consideration” of the Proposal at higher levels of the IEEE. Each of the IP buyer-affiliated Ad Hoc Committee members held voting positions on at least one of the higher levels of the IEEE hierarchy, allowing them to advocate in closed sessions and vote for the policy they had previously written. The higher levels of the IEEE hierarchy were advised by the same outside counsel who were selected by, and advised, PatCom and the Ad-Hoc.

Because the deliberations by the IEEE hierarchy were secret, DOJ is unable in its BRL to say anything about them, including what the hierarchy was told and by whom. So the BRL relies again on circular reasoning: because “[a]ll those serving in a governance role at IEEE have a fiduciary duty to act in the best interests of IEEE when exercising their governance responsibilities,”⁵⁷ IEEE’s decisions must have been consistent with those duties.

Further undermining reliance on consideration by the upper levels of IEEE was the understanding that the new rules would not take effect unless IEEE received a favorable BRL from DOJ. It is far from inconceivable that this condition caused at least some members of the IEEE hierarchy to refrain from an in-depth consideration of objections to the proposed changes.

In any event, it is not enough to rely on a “fiduciary duty” to an organization where, as here, the organization is comprised of those with different interests, and the decision-making process is dominated by those with a shared economic interest. Modern antitrust enforcement rarely—if ever—relies on promises by others to act in a manner that is inconsistent with their economic self-interest. That DOJ would do so here again supports the inference that industry policy preferences, not antitrust law or policy, drove the IEEE BRL.

b. Refusal to submit LOAs to and departure from IEEE

⁵⁶ (PatCom Ad Hoc Committee Comment Disposition Report for IEEE-SA Standards Board Bylaws Draft 05-Aug-15 (Nov. 13, 2013), Proposed Responses to Comments 5, 7, 9, 23, 82, 88, 98, 100, and 101, *available at* http://grouper.ieee.org/groups/pp-dialog/drafts_comments/PatCom_sort_by_commentID_141113.pdf.

⁵⁷ IEEE BRL, *supra* note 2, at 8.

Finally, the fact that a patent owner is not legally required to provide a licensing commitment conforming to the IEEE revised rules and may “depart to other SSOs”⁵⁸ provides no basis for a *per se* legal treatment of coordinated action by buyers on the prices for a license to SEPs, for numerous reasons:

First, DOJ cites no case that excuses coordination by either a group of powerful sellers on the prices they will charge or a group of powerful buyers on the prices they will pay on the ground that the victims of the cartel behavior can take their business elsewhere.

Second, as several parties told DOJ during its consideration of the BRL request, refusing to submit a license commitment conforming to the revised IEEE rules, and leaving IEEE for another existing or new SSO, is not often a realistic possibility for a licensor desiring widespread commercialization of its technology. As a general principle, some SSOs and standards will have market power that will preclude competition, and some will not.

The IEEE is not a new startup SSO whose experimentation with royalty-free licensing or other terms could never be shown to have an imminent anticompetitive effect due to the SSO and its standards having no significant market presence. To the contrary, the IEEE is a well-established SSO with a very strong brand. It possesses significant market power for many standardization projects, including its 802.11 family of standards. The IEEE is distinct from consortia or other SSOs where IPR policies are adopted at the outset and there is a realistic opportunity for competitive organizations. In contrast, for many companies that develop and contribute technology for IEEE standards, there is significant sunk investment and market power of entrenched standards.

Third, DOJ’s advice to aggrieved licensors that they may depart IEEE for another existing or new SSO ignores the likelihood that the same major IP buyers responsible for the changes in the IEEE policy will likewise boycott the alternative standard and technology incorporated therein unless SEP owners capitulate to their collective demands on price. This will, among other things, make it difficult for a new standardization project to attract a critical mass of SEP owners needed to get the project off the ground. The point here is that DOJ’s focus on the theoretical possibility of aggrieved licensors leaving IEEE, as opposed to the powerful IPR buyers responsible for the new IEEE policy, is myopic and ignores reality.

Fourth, the IEEE BRL likewise conducts no analysis whether in any or all instances the possibility of competition from a standard developed and promulgated by another organization will ever, much less always, be sufficient to prevent a small but significant non-transitory decrease in price. This is a serious issue given the difficulty of establishing a new SSO, initiating a new standardization project, and developing and finalizing a standard.

Fifth, the route suggested by DOJ to aggrieved licensors is not, ironically, without antitrust risk. A licensor may very well be reluctant to launch and commit to a new organization or standardization project to compete with IEEE without assurance that other licensors will join it, and not undermine the endeavor by contributing their technology to an IEEE standard. Yet licensors who attempt to seek that assurance from other licensors may be met with antitrust

⁵⁸ *Id.*, at 6.

complaints alleging unlawful coordinated action including a group boycott. The absence of even a hint in the IEEE BRL of concern for the interests of SEP licensors suggests that such a complaint might even be prosecuted by DOJ, if not other antitrust agencies or private parties. In this regard, DOJ provides in the IEEE BRL no assurance that it will take no action against licensors who seek through coordination among themselves to frustrate the IPR buyers' goal of devaluing SEPs.

IV. CONCLUSION

In the United States, law is made and interpreted by Congress and the courts. Agencies do not make or give authoritative interpretations of law; they are supposed to enforce it. Due to resource limitations, etc., agencies necessarily have some enforcement discretion. An agency that does not support a particular law or its application to a given set of circumstances will naturally be inclined to exercise its discretion not to enforce it.

DOJ's statement in the IEEE BRL of its enforcement intentions with regard to coordination by IPR buyers on the license fees they are willing to pay does not and cannot change the law, however. Any "aggrieved party" generally may challenge before a court conduct it believes to violate antitrust law, even if the government agencies charged with enforcing it have refrained from challenging the very same conduct. So-called "private rights of action" are, among other things, a safeguard against an agency's decision not to enforce a law with which it disagrees.

A BRL will be given by courts only the weight warranted by its underlying analysis. Under that measure, the IEEE BRL should have little if any impact on private litigation. The BRL also does not bind new administrations of DOJ, which may hold views different than those held by the current administration. Companies that seek to use their joint power to dictate the license fees that patentees may charge enjoy no immunity from antitrust law based on the IEEE BRL, and should take from it little comfort.

On the other hand, SEP owners have every reason to be concerned that the industrial policy preferences reflected in the IEEE BRL will further encourage SEP devaluation by foreign governments and agencies hostile to protection of IP.