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The Evolution of U.S. Antitrust
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Standards and Standard
Essential Patents:
From Enforcement to Advocacy

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I. INTRODUCTION

The focus of this article is on what has become a powerful, if somewhat controversial, exercise of advocacy by the U.S. antitrust enforcement agencies: the employment of pressure and advocacy to encourage a result that some claim is redolent of non-antitrust goals in the interface between standard development organization (“SDO”) policies and standard essential patents (“essential patents”). In short, where have we come from, where are we, and how did we get here?

II. THE EARLY RECOGNITION OF THE VALUE OF INTELLECTUAL PROPERTY AND THE IMPORTANCE OF DYNAMIC COMPETITION

In the early part of the last decade, the antitrust agencies acknowledged the competitive and consumer welfare benefits of intellectual property (“IP”) protection and standards development, but also focused on the possibility of abuse in limited circumstances—particularly in cases of deception. Thus, then-AAG Tom Barnett, in remarks delivered at a George Mason University Law School Symposium in 2006, cautioned against overvaluing short-term price effects at the expense of long-term dynamic competition in research and development. He observed:

[i]n particular, regulatory second-guessing of private firms' solutions to technological problems, which I perceive to be on the increase, threatens to harm the very consumers it claims to help,²

and also noted:

[i]f a firm knows it will have to share its intellectual property or be managed by a committee of government regulators, it will not innovate in the first instance.³

Concerned with abuse of the standards process, the Federal Trade Commission (“FTC”) took action against single-firm manipulation and deception in the standards setting context, e.g.

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² Thomas O. Barnett, Asst. At'y. Gen., Antitrust Div., U.S. Dep't. of Justice, Interoperability between Antitrust and Intellectual Property, Presentation to the George Mason School of Law Symposium Managing Antitrust Issues in a Global Marketplace, 1 (Sept. 13, 2006), *available at* <http://www.justice.gov/atr/public/speeches/218316.htm>.

³ *Id.* at 12- 13.

Unocal, Rambus.⁴ In those matters, the FTC focused on allegations of deception by the respondents' failure to disclose standard essential IP in violation of SSO policies and the post-adoption assertion of those patent rights against downstream rivals.

The 2007 U.S. Department of Justice ("DOJ") business review letter to the Institute for Electrical and Electronic Engineers ("IEEE") tried to strike a balance between deceptive exploitation and reward to innovation, indicating no action on a policy encouraging owners of standard essential patents to disclose them *ex ante* and state the maximum royalty rate. At the same time, joint negotiation by prospective licensees was neither proposed nor cleared; however, DOJ indicated that the rule of reason would govern any such conduct.⁵ Plainly, the rule of reason was not considered a template for *per se* legality where the objective of any such joint action was to counter bargaining power by essential patent owners.

Focusing on this threat of buyer collusion, Hill Wellford, then a senior official at the Antitrust Division, stated that while an SSO could use techniques such as FRAND to address possible standards-related market power, it "may not be reasonable to use a collaborative standard setting process to attempt to destroy market power that a patent holder achieved independently through procompetitive means."⁶

Similarly then-DOJ Deputy AAG Gerald F. Masoudi stated:

[h]arm to short term efficiency does not necessarily equate to harm to competition. If a patentee and an SDO cannot agree about disclosure policies or royalty rates, and end up with competing standards backed by each camp, this may be costly to efficiency in the short run; however, if the credible threat to set up competing standards causes parties to bargain, innovate, or otherwise compete harder, long-term efficiency may benefit. *There is always a temptation to focus on short-term, party-specific harm, since that is the easiest to measure, but the proper focus is on the competitive process and the long-term efficiency of standard setting. Measuring long-term efficiency is difficult but we need to remind ourselves constantly that this is the goal.*⁷

Around the beginning of the current decade, the agencies' balanced approach started to shift. It began with expressions of a theoretical (but not empirically grounded) concern with hold-up and royalty stacking, divorced from any reliance on *ex ante* deception by the patent owner.

For example, a 2011 FTC report commented that:

⁴ Union Oil Co. of Cal., 138 FTC 1 (2004) (consent decree); Rambus Inc., 2004 FTC LEXIS 17 (2004) (initial decision); Rambus Inc., 2006 FTC LEXIS 60 (2006) (order), *rev'd*, 522 F.3d 456 (D.C. Cir. 2008).

⁵ Letter from Thomas O. Barnett, Ass't Att'y Gen., U.S. Dep't of Justice, to Michael A. Lindsay 11 (April 30, 2007), *available at* <http://www.usdoj.gov/atr/public/busreview/222978.pdf>.

⁶ Hill B. Wellford, Counsel to the Ass't Att'y Gen., Antitrust Div., U.S. Dep't of Justice, Antitrust Issues in Standard Setting, 2d Annual Seminar on IT Standardization and Intellectual Property, China Electronics Standardization Institute Beijing, China 15 (Mar. 29, 2007), *available at* <http://www.justice.gov/atr/public/speeches/222236.pdf>.

⁷ Gerald F. Masoudi, Deputy Ass't Att'y Gen., Antitrust Div., U.S. Dep't of Justice, Antitrust Enforcement and Standard Setting: The VITA and IEEE Letter and the 'IP2' Report, Spring Meeting of the American Intellectual Property Law Ass'n, Boston, Mass. 10 (May 10, 2007) (emphasis added), *available at* <http://www.justice.gov/atr/public/speeches/223363.pdf>.

Over-compensation (*sic*) and injunctions that cause patent “hold up” . . . can lead to higher prices and encourage speculation in patent rights, which deters innovation. The report recommends that courts adopt an economically grounded approach to calculating patent damages that recognizes competition from non-infringing alternatives, and that courts take into account the ability of injunctions to cause patent hold up based on an infringer’s sunk costs.⁸

In a statement to the International Trade Commission (“ITC”) in 2012, the FTC wrote:

ITC issuance of an exclusion or cease and desist order in matters involving RAND-encumbered SEPs, where infringement is based on implementation of standardized technology, has the potential to cause substantial harm to U.S. competition, consumers and innovation. Simply put, we are concerned that a patentee can make a RAND commitment as part of the standard setting process, and then seek an exclusion order for infringement of the RAND-encumbered SEP as a way of securing royalties that may be inconsistent with that RAND commitment.⁹

In the same vein, then-Commissioner Ramirez in 2012 Congressional testimony referred with approval to Judge Richard Posner’s opinion in *Apple v. Motorola*¹⁰ to the effect that a patentee who has given a FRAND commitment implicitly accepts damages as sufficient relief for infringement.¹¹ In a later address to the 2014 Global Antitrust Enforcement Symposium, however, Chairwoman Ramirez noted that issues involving the level of royalty rates do not ordinarily raise antitrust concerns.¹²

More emphasis on the spectre of hold-up came from Antitrust Division chief economist Fiona Scott-Morton, who stated in a late 2012 speech:

We believe declared SEPs can be a powerful weapon, perhaps enhanced by over declaration, and can be used to harm competition through holdup. . . . the holdup power of the non-SEP owner does not stem from a collective decision by competitors. Rather, it springs only from a single innovation deployed unilaterally

⁸ Fed. Trade Comm’n 2011 Annual Report at 11 (discussing its report entitled “The Evolving IP Marketplace: Aligning Patent Notice and Remedies with Competition” (Mar. 2011)), *available at* <https://www.ftc.gov/policy/reports/policy-reports/ftc-annual-reports>.

⁹ Fed. Trade Comm’n, Third Party U.S. Fed. Trade Comm’n’s Statement on the Public Interest, In re Certain Wireless Comm’n’s Devices, Portable Music and Data Processing Devices, Computers and Components Thereof, Inv. No. 337-TA-745 (Int’l Trade Comm’n June 6, 2012), *available at* <http://www.ftc.gov/os/2012/06/1206ftcwirelesscom.pdf>.

¹⁰ *Apple, Inc. v. Motorola, Inc.*, 2012 WL 2376664 (N.D. Ill. June 22, 2012).

¹¹ Edith Ramirez, Commissioner, Fed. Trade Comm’n, Oversight of the Impact on Competition of Exclusion Orders to Enforce Standard-Essential Patents, Testimony Before the United States Senate Committee on the Judiciary (July 11, 2012) at 12-13, *available at* https://www.ftc.gov/sites/default/files/documents/public_statements/prepared-statement-federal-trade-commission-concerning-oversight-impact-competition-exclusion-orders/120711standardpatents.pdf.

¹² Edith Ramirez, Chairwoman, Fed. Trade Comm’n, Standard-Essential Patents and Licensing: An Antitrust Enforcement Perspective, Address at 8th Annual Global Antitrust Enforcement Symposium 11 (Sept. 10, 2014), *available at* http://www.ftc.gov/system/files/documents/public_statements/582451/140915georgetownlaw.pdf.

by its owner. This is the difference that causes F/RAND encumbered SEPs to be of concern to competition authorities including the Department of Justice.”¹³

DAAG Morton did, however, acknowledge in a footnote to her prepared remarks that exclusionary relief might be justified in the case of an unwilling licensee.¹⁴

In a frequently quoted October 2012 address, Deputy Assistant Attorney General Renata Hesse offered “Six Small Proposals for SSOs before Lunch.”¹⁵

One proposal urges:

It would seem appropriate [for SSO’s] to limit a patent holder’s right to seek an injunction to situations where the standards implementer is unwilling to have a neutral third-party determine the appropriate F/RAND terms or is unwilling to accept the F/RAND terms approved by such a third-party.¹⁶

Another of her proposals offers: “Standards bodies may want to explore setting guidelines for what constitutes a FRAND rate”¹⁷ In a speech three months later, DAAG Hesse expressed some agnosticism over application of Section 2 of the Sherman Act to allegations of patent “hold-up,” and urged further work by bar and academia.¹⁸

III. THE AGENCIES’ PRIMARY FOCUS

The agencies’ evolving position focuses on two substantive areas: injunctive relief and the calculation of a reasonable royalty. Regarding injunctive relief, in 2013 the FTC issued two consent orders limiting the use of injunctions with respect to patents subject to a RAND licensing commitment.

In *Robert Bosch*, the FTC used the leverage of merger approval to extract concession from a respondent, which had acquired patent assets subject to a RAND commitment, that it would not seek an injunction except where a licensee refuses to accept a FRAND rate as determined by a third party.¹⁹ According to the FTC majority, the conduct of a patentee in seeking an injunction for infringement of an essential patent subject to a FRAND commitment against a willing licensee constituted an unfair method of competition.

¹³ Fiona Scott-Morton, Deputy Ass’t Attn’y Gen., Antitrust Div., U.S. Dep’t of Justice, *The Role of Standards in the Current Patent Wars*, at the Charles River Associates Annual Brussels Conference 5-6 (Brussels, Dec. 5, 2012), available at <http://www.justice.gov/atr/public/speeches/289708.pdf>.

¹⁴ *Id.* at FN 7. (“(I)f a putative licensee refuses to pay what has been determined to be a F/RAND royalty (either by a court, a mediator or through some other process agreed upon by the participants in the standardization process) or refuses to engage in a negotiation over what is F/RAND, an exclusion order or injunction could be appropriate. An exclusion order also could be appropriate if a putative licensee is not subject to the jurisdiction of a court that could award damages and impose an on-going F/RAND royalty as relief.”).

¹⁵ Renata Hesse, Deputy Assistant Att’y Gen., Antitrust Div., U.S. Dep’t of Justice, *Six “Small” Proposals for SSOs before Lunch: Remarks as Prepared for the ITU-T Patent Roundtable* (Oct. 10, 2012), available at <http://www.justice.gov/atr/public/speeches/287855.pdf>.

¹⁶ *Id.* at 9.

¹⁷ *Id.* at 10.

¹⁸ Hesse, IP, Antitrust and Looking Back on the Last Four Years, Presented at Global Competition Review 2nd Annual Antitrust Law Leaders Forum, Miami, FL 21 (Feb. 8, 2013), available at <http://www.justice.gov/atr/public/speeches/292573.pdf>.

¹⁹ *Robert Bosch GmbH*, Docket No. C-4377 (F.T.C. Apr. 23, 2013).

Commissioner Ohlhausen dissented, in part on the basis that the impairment of injunctive relief may exceed the Commission's authority under Section 5 of the FTC Act, urging that the Commission should first articulate a Section 5 policy regarding conduct not previously covered by the antitrust laws before invoking it as authority. Another of the Commissioner's concerns was that the enforcement policy on the seeking of injunctive relief on essential patents subject to a RAND licensing requirement effectively ousted other institutions from regulating the area including the federal courts and the ITC. Allied to this concern was that Commissioner Ohlhausen considered the policy to lack "regulatory humility" as it implied that the FTC's judgment on injunctive relief on FRAND-encumbered essential patents was superior. Commissioner Ohlhausen also raised the question whether seeking injunctive relief was in fact protected petitioning following *Noerr-Pennington*.²⁰

The agency's subsequent *Google-Motorola* action was to the same effect as the *Bosch* consent. The Commission asserted it could reach opportunistic conduct under Section 5 by a RAND-encumbered patentee that breaches its commitment so as to harm consumers.²¹ The majority Commission order establishes elaborate procedures for the essential patent holder's right to seek injunctive relief. Again, Commissioner Ohlhausen dissented.²²

One might question the use of merger approval to leverage a respondent into accepting an unrelated conduct order and then holding out the consent as an expression of established legal principle. Complaints in the consent order context should not affect established legal precedents.

Still some balance was shown in the DOJ/PTO filing with the ITC (January 8, 2013),²³ acknowledging justification for exclusionary relief in the case of an unwilling licensee. The filing appears to accept the concept of a constructive refusal to deal.

The current state-of-play centers on a revised patent policy statement issued by the IEEE, which expands on the conditions that a holder of essential patents must meet in providing a Letter of Agreement or LOA.

The DOJ provided a no-action business review letter to the IEEE on February 2, 2015.²⁴

The shift in agency approach to the review policy is apparent in the following three areas:

²⁰ Dissenting Statement of Commissioner Maureen K. Ohlhausen, In the Matter of Robert Bosch GMBH, FTC File No. 121-0081 (Nov. 26, 2012), *available at* <https://www.ftc.gov/public-statements/2012/11/dissenting-statement-commissioner-maureen-ohlhausen-matter-robert-bosch>; *See* Eastern R.R. Presidents Conference v. Noerr Motor Freight, 365 U.S. 127 (1961); United Mine Workers of Am. v. Pennington, 381 U.S. 657 (1965).

²¹ In the Matter of Motorola Mobility LLC, and Google Inc., Docket No. C-4410 (F.T.C. July 24, 2013), *available at* <https://www.ftc.gov/enforcement/cases-proceedings/1210120/motorola-mobility-llc-google-inc-matter>.

²² Dissenting Statement of Commissioner Maureen Ohlhausen - In the Matter of Motorola Mobility LLC and Google Inc., FTC File No. 121-0120 (Jan. 3, 2013), *available at* https://www.ftc.gov/sites/default/files/documents/public_statements/statement-commissioner-maureen-ohlhausen/130103googlemotorolaohlhausenstmt.pdf

²³ U.S. Dep't of Justice and U.S. Patent & Trademark Office, Policy Statement on Remedies for Standards-Essential Patents Subject to Voluntary F/RAND Commitments (2013), *available at* <http://www.justice.gov/atr/public/guidelines/290994.pdf> ("DOJ/PTO").

²⁴ Letter from Renata B. Hesse, Acting Assistant Att'y Gen., U.S. Dep't of Justice, to Michael A. Lindsay (Feb. 2, 2015) ("2015 IEEE BRL").

1. A virtual ban on injunctive relief.
2. Prescription of the appropriate base for calculation of a reasonable RAND royalty.
3. Lack of concern with collective action to prescribe the royalty base.

A. On Injunctive Relief

The IEEE “updated” patent policy (anything but an update) forecloses injunctive relief in the absence of an unwilling purchaser being so adjudicated by an independent authority at the first appellate level. The DOJ business review letter thus addresses a policy limiting—virtually excluding—injunctive relief for a patentee holding essential patents subject to a RAND commitment:

Limiting this [injunction] threat reduces the possibility that the patent holder will take advantage of the inclusion of its patent in a standard to engage in patent hold up and provides comfort to implementers in developing their products.”²⁵

The DOJ business review letter acknowledges that provision but goes further than the DOJ/PTO filing with ITC. The DOJ sees no antitrust concern with an SSO imposing a collective ban on injunctive relief.

In what seems a sharp departure from earlier concerns for long-run dynamic competition to bring forward the best technology, discussed above, the DOJ seems to have endorsed an IEEE policy that will work to drive down royalty rates below market value by forcing, patent-by-patent, prolonged litigation with the best result for a patentee being recovery of what would have been determined to be fair and reasonable rate *ex ante*. It prevents an essential patent holder from using an injunction as a defensive matter, eliminates any downside risk to engaging in a constructive refusal to deal, and discourages portfolio licensing. Even some supporters of antitrust action against claimed RAND “violations” are concerned that limitation on injunctive relief would raise *Noerr* issues.²⁶

B. Turning to the Issue of a Reasonable Rate

Some implementers have addressed the theory that breach of a FRAND undertaking by an essential patent holder charging excessive rates could constitute an antitrust violation and that reasonable rates could be established *ex ante* by joint bargaining.²⁷ The FTC’s *N-Data* (2008) 3-2 consent order tacitly endorses the theory over dissents by Chairman Majoras and Commissioner Kovacic.²⁸ According to the FTC’s complaint, the transferee of an essential patent subject to a RAND commitment reneged on its royalty-ceiling *ex ante* undertaking. The Commission majority observed that it could be an unfair method of competition for a holder of Essential

²⁵ *Id.* at 9.

²⁶ Joseph Kattan & Chris Wood, *Standard-Essential Patents and the Problem of Hold-Up*, available at <http://www.gibsondunn.com/publications/Documents/Kattan-Standard-Essential-Patents-and-the-Problem-of-Hold-Up-12.19.2013.pdf>; George S. Cary, et al, *The Case for Antitrust Law to Police the Patent Holdup Problem in Standard Setting*, 77 ALJ 3, 913 (2011).

²⁷ Joseph Kattan, *Disclosures and Commitments to Standard-Setting Organizations*, Antitrust 22, (Summer 2002); Kattan, *Frاند Wars and Section 2*, Antitrust 30 (Summer 2013); Kattan, *The Next FRAND Battle: Why the Royalty Base Matters*, CPI Antitrust Chronicle (Mar. 2015); Michael A. Lindsay & Robert A. Skitol, *New Dimensions to the Patent Holdup Saga*, 27 Antitrust 2, 34 (Spring 2013).

²⁸ In re Negotiated Data Solutions, LLC, Docket No. C-4234 (FTC Sept. 22, 2008).

Patents to breach a FRAND agreement where there is coercion and an adverse impact on competition. The FTC's statement takes a pass on the applicability of the Sherman Act. Chairman Majoras's dissent, however, challenges the legal basis and policy of making law by consent order.

Interesting in this context is the later observation by Chairwoman Ramirez explaining that it was her belief that "royalty rates should not be negotiated under the threat of antitrust liability," and "it is important to recognize that a contractual dispute over royalty terms, whether the rate or the base used, does not in itself raise antitrust concerns."²⁹

The recent policy change by IEEE requires that a reasonable royalty calculation "should" use smallest saleable component ("SSC") as the base for royalty calculations—other royalty bases might also be considered but parties should use the SSC as a base. The policy statement also provides that a reasonable royalty can only rely on an existing license agreement as evidence of a reasonable rate, but only when there was no "implicit" threat of injunction at the time of that license. Finally, the policy holds that the rate must take into account the value of all Essential Patents covering standard.

The DOJ business review letter bases its "no action" conclusion on the grounds that the policy:

- Promotes desirable clarity.
- Is purely voluntary, with the focus on "should," rather than "must."
- SSC royalty base reflects existing law.
- Does not inhibit portfolio licensing.

The business review letter endorsed the "reasonable rate" required by the updated IEEE policy establishing SSC and rejected the relevance of existing license agreements entered into under "implicit threat of injunction." It wrongly concludes that the policy reflects existing law.³⁰

The District Court's decision in *Ericsson v. D-Link* notes that "a patent holder does not violate its RAND obligations by seeking a royalty greater than its potential licensee believes is reasonable. . . both sides' initial offers should be viewed as the starting point in negotiations."³¹ The court also explained that there was "nothing inherently wrong or unfair with Ericsson's

²⁹ Ramirez, *supra* note 11, at 9-11.

³⁰ This approach, while not contradictory, appears at odds with what AAG Bill Baer explained in a speech to foreign enforcers. AAG Baer said that "Using antitrust enforcement to reduce the price firms pay to license technology owned and developed by others is short-sighted. Any short-term gains derived from imposing what are effectively price controls will diminish incentives of existing and potential licensors to compete and innovate over the long term, depriving jurisdictions of the benefits of an innovation-based economy." See Bill Baer, Asst. Att'y. Gen., Antitrust Div. U.S. Dep't. of Justice, International Antitrust Enforcement: Progress Made; Work to be Done, Remarks as Prepared for Delivery at the 41st Annual Conference on International Antitrust Law and Policy (Sept. 12, 2014), available at <http://www.justice.gov/atr/public/speeches/308592.pdf>.

³¹ *Ericsson Inc. v. D-Link Corp.* ("JMOL Order"), No. 6:10-cv-473, 2013 WL 4046225 at *25 (E.D. Tex. Aug. 6, 2013).

practice of licensing ‘fully compliant’ products.”³² This aspect of the court’s holding was not appealed.

Also relevant is the same court’s *CSIRO* decision that explained that requiring component licensing is like valuing a book based on the cost of printing and binding.³³

Innovatio is not persuasive contrary authority.³⁴ *Innovatio* did not assert the entire market value rule in that case. Accordingly, the court was not briefed on the possible use of the price of the end-product as a royalty base. The *Innovatio* court also never dismissed the entire market value rule. In fact, it noted that it could be appropriate, but not on the facts of the case before it. Even in China³⁵ and India,³⁶ use of an end-product base in calculating a reasonable royalty is not categorically barred. I am unaware of any litigated authority that holds that an offer of a rate ultimately determined to be higher than RAND constitutes an antitrust violation.

IV. WHEN ADVOCACY HAS THE FORCE OF LAW

This clear example of the exercise of advocacy by the DOJ and involvement in of private contracting has been criticized cogently by former Commissioner Wright.³⁷ With the business review letter, DOJ has minimized the threat of licensee “hold-out” as well as implementer royalty-pricing coordination and their resulting long-run effects on innovation.

There was, to be sure, early skepticism with the threat of hold-out expressed by then-Chairman Majoras’s speech in September 2005.

While theoretically possible, this risk is unlikely to be a frequent practical concern. If the SSO members jointly lack buying power, they would not be able to impose a lower-than competitive rate.³⁸

My above-reference to remarks of then-Division officials Wellford and Masoudi, however, clearly recognize the reality of the threat and its relevance to antitrust concerns.

The IEEE updated policy constitutes joint action undertaken by dominant implementers who may possess market power to set the base for calculation of royalty rates as the smallest saleable component. Pursuant to the policy, the defined reasonable rate “should” include a

³² *Id.* at 24.

³³ *Commonwealth Scientific and Industrial Research Org. v. Buffalo Tech. Inc.*, 492 F.Supp.2d 600 (E.D. Tex. 2007).

³⁴ *In re Innovatio IP Ventures*, 2013 WL 5593609 (N.D. Ill. Oct. 3, 2013).

³⁵ Patrick Moorhead, *Qualcomm Settlement With China’s NDRC Removes Major Speedbump*, FORBES (Feb. 10, 2015), available at <http://www.forbes.com/sites/patrickmoorhead/2015/02/10/qualcomm-settlement-with-chinas-ndrc-removes-major-speedbump/>.

³⁶ Delhi High Court’s Decision in *Ericsson v. Intex*, ¶¶ 156-59 (Mar. 13, 2015), available at [http://op.bna.com/der.nsf/id/tbay-9uwngw/\\$File/Ericsson%20vs%20Intex.pdf](http://op.bna.com/der.nsf/id/tbay-9uwngw/$File/Ericsson%20vs%20Intex.pdf).

³⁷ Daniel P. Weick, *FTC Commissioner Wright Criticizes DOJ IEEE Letter*, ABA Intellectual Property Committee tidBITS (Mar. 9-15, 2015), available at https://www.americanbar.org/content/dam/aba/publications/antitrust_law/at315000_tidbits_20150315.authcheckdam.pdf.

³⁸ Deborah Platt Majoras, Chairman, Fed. Trade Comm’n, *Recognizing the Procompetitive Potential of Royalty Discussions in Standard Setting, Prepared for Standardization and the Law: Developing the Golden Mean for Global Trade*, Stanford, Calif. 9 (Sept. 23, 2005).

calculation of the technology's contribution to the smallest saleable component, take into account the value of all essential patents' contribution to the SSC, and rely on existing licenses only where there is no "implied" threat of injunction.

The DOJ letter excuses these requirements as voluntary action that provides for possible other options. One could question how this observation squares with established antitrust law.³⁹ Moreover, a full rule of reason analysis would consider specific facts and justifications, not available in a generalized request for business review, based on a theoretical justification not supported by empirical evidence. This DOJ endorsement reflects another change in policy by not acknowledging concerns of former officials and by the advocacy of "clarity" with the effect of interfering with bilateral contracting and promoting a policy favoring clarity to the benefit of implementers and specific business models.

There is the concern with proliferation of questionable patents. But is this concern an antitrust problem?

The 2011 FTC Report *The Evolving IP Marketplace: Aligning Patent Notice and Remedies with Competition* notes that:

Invalid or overbroad patents disrupt that balance by discouraging follow-on innovation, preventing competition, and raising prices through unnecessary licensing and litigation. For that reason, many of the recommendations in the 2003 FTC IP Report focused on improving patent quality as a means of balancing exclusivity and competition. . . . Good notice of patent rights encourages investment in new technologies. But poor quality patents can discourage innovation by creating uncertainty and raising costs.⁴⁰

There is also the often-expressed concern with hold up.⁴¹ But despite the decades-long assertion of this potential, there remains a lack of empirical evidence and the existence of RAND commitments in SSO policies is not itself proof of hold-up prevalence.

V. CLARITY THROUGH ADMONITION AND ADVOCACY

Finally, there is an expressed desire for clarity. But does extolling the virtues of clarity (i) through admonition, as in DAAG Hesse's 2015 interview with the *ABA Antitrust Source* asking that "people . . . bring us fact patterns [of FRAND violations in the absence of deception] that they think merit enforcement under Section 2,"⁴² and (ii) through advocating the use of antitrust to advance an economic policy that may be economically unwise for which antitrust is ill-suited, come at too high a price?

³⁹ See e.g., *Montgomery Cty. Assn. of Realtors v. Realty Photo*, 783 F. Supp. 952, 954 (D. Md. 1992).

⁴⁰ Fed. Trade Comm'n, *The Evolving IP Marketplace: Aligning Patent Notice and Remedies with Competition* (2011) at 1, available at <http://www.ftc.gov/sites/default/files/documents/reports/evolving-ip-marketplace-aligning-patent-notice-and-remedies-competition-report-federal-trade/110307patentreport.pdf>.

⁴¹ 2015 IEEE BRL at 9-11.

⁴² Interview with Renata Hesse, Deputy Ass't At'y Gen., Antitrust Div., U.S. Dep't of Justice, *Antitrust Source* 2 (Spring 2015), available at http://www.americanbar.org/content/dam/aba/publishing/antitrust_source/apr15_hesse_intrvw_4_22f.authcheckdam.pdf

There are, moreover, international ramifications in what the U.S. antitrust agencies advise. According to then-Commissioner Wright:

[r]ecent FTC enforcement actions, testimony, and speeches appear to suggest the beginning of what could be a wholesale departure from the symmetry principle. This development is troublesome, in my view, because it invites a drift toward ad hoc antitrust analysis of IPRs and promotes hostility toward the exercise of property rights and their exchange. It also sends a dangerous signal of approval to emerging antitrust regimes that special rules for IP are desirable from a competition perspective and that business arrangements involving IPRs may be safely presumed to be anticompetitive without rigorous economic analysis and proof of competitive harm.”⁴³

Furthermore he noted regarding international implications:

As China and other emerging jurisdictions craft their own approach to applying antitrust principles to IPRs it is critically important that the message coming from the actions and words of the global antitrust community, including the FTC and DOJ, is that promoting competition and consumer welfare as understood through the lens of rigorous economic analysis is the best and most intellectually coherent approach.”⁴⁴

The antitrust agencies have established an effective and praiseworthy record of competition advocacy over the years. Their role in the work of international organizations such as OECD and ICN reflects a positive contribution to sound global antitrust convergence. By like token, their advocacy before sectoral and state agencies on the domestic front has capably challenged excessive regulation and regulatory capture.

Advocacy, however, must be based on sound factual and economic analysis and correct legal principles. There is a serious question whether agency advocacy concerning SSOs and essential patents satisfies these criteria.

⁴³ Joshua D. Wright, Commissioner, Fed. Trade Comm'n, Does the FTC Have a New IP Agenda? Remarks at the 2014 Milton Handler Lecture: “Antitrust in the 21st Century,” New York, NY 15 (Mar. 11, 2014).

⁴⁴ *Id.* at 8.