Antitrust Chronicle

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New Madison Revisited

CPI COMPETITION POLICY INTERNATIONAL

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LETTER FROM THE EDITOR

Dear Readers,

James Madison, the fourth U.S. president and a principal drafter of the U.S. Constitution, is credited with including Article I, Section 8, Clause 8 – the Patent and Copyright Clause. This provides the basis for Congress to enact rules protecting intellectual property ("IP") rights in the U.S. constitutional order, a unique development at its time.

The evolution of antitrust law has, over time, come into conflict with the intellectual property rights created on the basis of this article, and has caused some actors, most recently former AAG Makan Delrahim of the U.S. Department of Justice, to call for a rebalancing of the interaction between IP and antitrust rules, in favor of rights holders, notably in the case of disputes over matters such as so-called fair, reasonable and non-discriminatory ("FRAND") licensing terms.

Broadly speaking, this "New Madison" approach has called for a cautious application of antitrust provisions as a tool to restrict IP rights and some commentators are now asking for a rejection of that principle. Such disputes are of key importance in various important sectors, not least tech and pharmaceutical markets, where the possession of an intellectual property portfolio is a key parameter of competition.

The articles in this Chronicle, written by experienced practitioners, academics, and commentators, critically assess the so-called new Madison approach, both from first principles and in terms of how it fits within existing case law and practice at this critical juncture in the development of antitrust theory and practice.

As always, thank you to our great panel of authors.

Sincerely,
CPI Team[1]

1 CPI thanks Qualcomm Inc. for their sponsorship of this issue of the Antitrust Chronicle. Sponsoring an issue of the Chronicle entails the suggestion of a specific topic or theme for discussion in a given publication. CPI determines whether the suggestion merits a dedicated conversation, as is the case with the current issue of the Chronicle, and takes steps to ensure that the viewpoints relevant to a balanced debate are invited to participate.

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The New Madison Approach to Antitrust and Patent Licensing: A Property Rights and Innovation Perspective

By Alden F. Abbott & Andrew Mercado

In 2018, Assistant Attorney General for Antitrust Makan Delrahim proposed a legal framework that rejects antitrust as a tool to resolve patent licensing disputes between holders of patents that cover standardized technologies ("standard essential patents" or SEPs) and producers that seek to use those technologies. Critics of this "New Madison Approach" assert that SEP holders' violations of licensing commitments made to standard setting bodies allow them to harm competition by "holding up" and "overcharging" licensees. We reject that critique, which would preclude SEP holders from bargaining for a reasonable share of the future commercialization value their patents will generate. We also demonstrate that the practical unavailability of injunctions for patent infringement inappropriately limits patent holders' bargaining leverage and undermines welfare-creating innovation. We therefore: (1) recommend fully endorse the New Madison Approach; and (2) call for legislation codifying the presumption that patentees are entitled to an injunction for patent infringement.

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Growing Convergence: The Limited Role of Antitrust in Standard Essential Patent Disputes

By Douglas H. Ginsburg, Joshua D. Wright & Camila Ringeling

In the last couple of years, the United States Department of Justice ("DOJ") and several European countries have reversed previous interventionist decisions and limited the role of antitrust in the resolution of disputes concerning Standard Essential Patent ("SEPs"). These jurisdictions recognize the need to protect intellectual property rights ("IPRs") by making available injunctions against infringers. Courts have realized that *hold-up* by a patent holder demanding excessive royalties is not a widespread problem and that patent implementers may *hold-out* against paying any royalties whilst they continue to practice a patent. They have accordingly adopted new standards for granting injunctions in disputes involving SEPs with the goal of increasing efficiency and legal certainty. We discuss this shift and its implications for competition policy and innovation.

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Why the New Administration Should Bury the New Madison Approach

By Michael A. Carrier

The "New Madison" approach sounds so promising. Old but new. Updating the classics for the modern era. What could be bad? In a word: everything. The intersection of patent and antitrust law has a long pedigree. For decades, antitrust's role in patent-based activity has been acknowledged. Patent licenses are subject to antitrust scrutiny. "Pay for delay" settlements are not entitled to antitrust immunity. And activity in the context of standard setting organizations ("SSOs") could conceivably violate antitrust law. That history has recently come under attack. Between 2017 and 2020, the head of the Department of Justice's Antitrust Division, Makan Delrahim, introduced a radical framework — the "New Madison" approach — that extricated patent-based conduct from antitrust scrutiny. Such a gambit diverged from the longstanding bipartisan approach that had recognized antitrust's role in policing standards-based conduct. This essay introduces standards and then addresses five tenets of Delrahim's approach. For each, it presents the argument and then discusses its flaws.

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By Richard A. Epstein

The modern progressive view of antitrust, which has its origins in Louis Brandeis's famous attack on "The Curse of Bigness," regards large firm size as a source of improper political influence, regardless of the concentration of market power within the industry. That Brandeisian view, championed today by Tim Wu and Lina Khan, now in the Biden administration, calls for a vast expansion of antitrust enforcement. Unfortunately, all too often that approach has given a free rein to monopolistic activities in agriculture and labor, while at the same exposing productive firms to political attacks that all too-often work to prop up weaker market competitors. The New Madison approach of Makan Delrahim rightly exposes the overreaching of that approach in dealing with patent pools. And his cautionary attitude also warns against the counterproductive effects of the antitrust laws in other sectors outside the IP sector.

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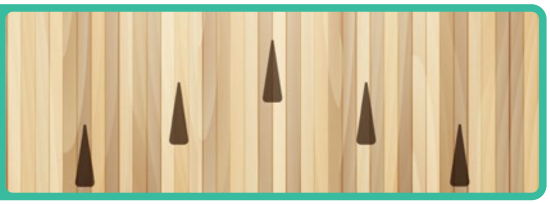

The New Madison Approach: Keeping Antitrust in Its Lane

By Gregory J. Werden

In 2018 Assistant Attorney General Makan Delrahim proclaimed the New Madison Approach ("NMA") to the interface between antitrust and intellectual property. He specifically addressed disputes involving standard essential patents subject to commitments to license on fair, reasonable, and non-discriminatory terms. After the Ninth Circuit's *Qualcomm* decision, which implicitly embraced the NMA, controversy continues to rage over the role of antitrust in these disputes. This paper argues that the NMA and *Qualcomm* decision are correct and that these disputes do not present a competition issue. Antitrust litigation has been a distraction from the root cause of the disputes: There is neither a consensus nor a controlling edict on the patent owners' fair share of the bounty from standards-based technology. Opponents of the NMA believe that the patent owners' fair share is tiny, and proponents of the NMA doubt that.

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Applying Section 2 to Frand Violations: "It's Elementary, My Dear Watson"

By John "Jay" Jurata, Jr. & Emily N. Luken

Many well-reasoned cases have concluded that a holder of standard-essential patents ("SEPs") subject to a commitment to license on fair, reasonable, and nondiscriminatory ("FRAND") terms may violate section 2 of the Sherman Act by breaching that FRAND commitment. However, a small but vocal minority has increasingly questioned that view, relying on *Rambus*, where the D.C. Circuit overturned an FTC order finding that *Rambus* engaged in unlawful monopolization due to its failure to disclose its patents to a standard-setting organization. For this point, *Rambus* relied almost entirely on the Supreme Court's 1998 *NYNEX* decision, which involved a legal monopoly, not standard-setting activities. This article will (1) explain why *Rambus* was incorrectly decided, including its misinterpretation of *NYNEX*, and (2) describe the circumstances under which a unilateral breach of FRAND is a cognizable Section 2 violation.

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Putting Together a Competitive Puzzle: How to Understand and Assemble the Pieces of the New Madison Approach

By Kristen Osenga

The New Madison Approach, championed by former Assistant Attorney General Makan Delrahim, sets forth a framework for understanding how antitrust law, patent law, and contract law intersect and interrelate in the field of technology standards. Commentators often conflate these divergent, but complementary, areas of law and seek to substitute one for the other, especially in disputes involving standard essential patents. In doing so, they often arrive at the conclusion that the puzzle is missing some pieces. By recognizing the work that each of these doctrines can and should do, the New Madison Approach solves the puzzle and presents an appealing picture of competition in the innovation age.

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"Not" Madison

By Jorge L. Contreras

This essay challenges the claim that President James Madison, the namesake of the Trump Administration's "New Madison" Approach to Antitrust and Intellectual Property Law, was an advocate for strong patent rights unrestrained by the limitations of antitrust law. While Madison supported the authority of Congress to grant patents to inventors, this view was widely shared by his contemporaries. Rather than advocating for strong patent rights, Madison's writings reveal that he was concerned about the "exorbitant gains" that patents and other monopolies could confer upon their holders, while at the same time preventing individuals from exercising their trades. Most importantly, Madison formulated his views a full century before the enactment of the antitrust laws, in an economic environment in which private firms could not acquire market power absent governmentally-issued monopolies. This suggests that Madison is an inapt namesake for the policies of a federal agency that is charged with enforcing the antitrust laws today. For all of these reasons, the "New Madison" approach is plainly "Not" Madison, and the continued misuse of this label distorts the views of a major figure in American Constitutional history.

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For August 2021, we will feature Chronicles focused on issues related to (1) **State AGs**; and (2) **EAB Antipasto**.

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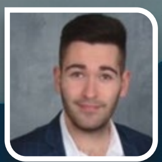
The CPI Editorial Team will evaluate all submissions and will publish the best papers. Authors can submit papers on any topic related to competition and regulation, however, priority will be given to articles addressing the abovementioned topics. Co-authors are always welcome.

THE NEW MADISON APPROACH TO ANTITRUST AND PATENT LICENSING: A PROPERTY RIGHTS AND INNOVATION PERSPECTIVE

BY ALDEN F. ABBOTT & ANDREW MERCADO[1]



1 Alden F. Abbott is a senior research fellow with the Mercatus Center at George Mason University and formerly served as the Federal Trade Commission's General Counsel. Andrew Mercado is a research assistant with the Mercatus Center, focusing on competition policy.

I. INTRODUCTION AND OVERVIEW

The New Madison Approach ("NMA") advanced by former Assistant Attorney General for Antitrust Makan Delrahim is a simple analytical framework for understanding the interplay between patents and antitrust law arising out of standard setting. A key aspect of the NMA is its rejection of the application of antitrust law to the "hold-up" problem, whereby patent holders demand supposedly supra-competitive licensing fees to grant access to their patents that "read on" a standard – standard essential patents ("SEPs"). This scenario is associated with an SEP holder's prior commitment to a standard setting organization ("SSO"), that is: if its patented technology is included in a proposed new standard, it will license its patents on fair, reasonable, and non-discriminatory ("FRAND") terms. "Hold-up" is said to arise subsequently, when the SEP holder reneges on its FRAND commitment and demands that a technology implementer pay higher-than-FRAND licensing fees to access its SEPs.

The NMA has four basic premises[2] that are aimed at ensuring that patent holders have adequate incentives to innovate and create welfare-enhancing new technologies, and that licensees have appropriate incentives to implement those technologies:

1. Hold-up is not an antitrust problem. Accordingly, an antitrust remedy is not the correct tool to resolve patent licensing disputes between SEP-holders and implementers of a standard.

2. SSOs should not allow collective actions by standard-implementers to disfavor patent holders in setting the terms of access to patents that cover a new standard.

3. A fundamental element of patent rights is the right to exclude. As such, SSOs and courts should be hesitant to restrict SEP holders' right to exclude implementers from access to their patents, by, for example, seeking injunctions.

4. Unilateral and unconditional decisions not to license a patent should be *per se* legal.

Delrahim emphasizes that the threat of antitrust liability, specifically treble damages, distorts the incentives associated with good faith negotiations with SSOs over patent inclusion.[3] Contract law, he goes on to note, is perfectly capable of providing an *ex post* solution to licensing disputes between SEP holders and implementers of a standard. Unlike antitrust law, a contract law framework allows all parties equal leverage in licensing negotiations.[4]

Critics of the NMA maintain, however, that antitrust is needed to prevent the exercise of excessive market power by SEP holders. Those critics tend to ignore basic principles of American antitrust law that undermine their legal case. More fundamentally, however, their policy prescription is fatally flawed, because it fails to take into account the dynamic forward-looking nature of SEPs (and patents in general), which serve as a catalyst for the wealth-creating diffusion of innovation. Put differently, NMA critics view the process of integrating a patent into a standard as the equivalent of winning a lottery so that the extra value is not a reward for anything.[5] In marked contrast, NMA supporters view standard setting as a discovery process, which reveals the relative value of alternative technologies and tends to result in the best patents being integrated into a standard. The latter perspective lends support to SEP valuations that allow SEP holders to obtain an appropriate return for the new economic surplus that results from the commercialization of standard-engendered innovations. It recognizes that dynamic economic growth is fostered through the incentivization of innovative activities backed by patents.

Having rejected the application of antitrust to SEP holder – innovator licensing disputes, a property rights approach to contractual negotiations over SEP licenses is put forth and compared to a liability rule approach. Economic analysis demonstrates that a property rights approach, which is in harmony with the premises of the NMA, advances wealth-creating dynamic innovation. What's more, a property rights perspective yields a welfare-superior outcome to reliance on a liability rule in dealing with disputes arising out of licensing negotiations. As such, a focus on property rights inspired by the NMA is revealed to be the best legal approach for the promotion of innovation and dynamic growth arising out of

2 Former Assistant Att'y Gen. Makan Delrahim, Address Before the U. of Pennsylvania Law Sch., *The "New Madison" Approach to Antitrust and Intellectual Property Law,* Antitrust Div. of U.S. Dep't of Just. (2018) (available at https://www.justice.gov/opa/speech/file/1044316/download).

3 Former Assistant Att'y Gen. Makan Delrahim, Remarks at the LeadershIP Virtual Series, *Broke...but Not No More: Opening Remarks--Innovation Policy and the Role of Standards, IP, and Antitrust*, Antitrust Div. of U.S. Dep't of Just. (2020) (According to Delrahim, negotiating in the shadow of dubious antitrust liability is not only unnecessary, but it also dramatically shifts bargaining power between patent holders and implementers in a way that distorts the incentives for real competition on the merits through innovation. Giving implementers the threat of treble damages in antitrust increases the perverse likelihood of "hold-out," which is the other side of the "hold-up" coin.").

4 *Id.*

5 The authors are indebted to Tracy Miller of the Mercatus Center at George Mason University for suggesting this alternative formulation of the underlying thinking that informs the debate between NMA supporters and NMA detractors.

the diffusion of standards-based innovations. Strong judicial solicitude for the property rights perspective in reviewing SEP holder – implementer disputes is entirely appropriate, as a matter of law and policy. Legislative change would be required, however, to ensure judicial application of property rights analysis to patent licensing disputes in the United States.

II. CRITICISM OF THE NEW MADISON APPROACH MISSES THE MARK

The NMA is not without its detractors. For example, former Federal Trade Commissioner Terrell McSweeny asserts that the hold-up problem is an antitrust issue due to the additional market power that a standard confers upon SEP holders.[6] This incremental market power, she claims, is a byproduct of the artificial increase in value of the patent that results from adoption of a standard , and thus does not reflect the "fair value" of the underlying intellectual property.[7] The SEP holder is incentivized to attempt to extract monopoly rents through hold-up threats made to implementer-licensees. This scenario, it is asserted, has the potential to lead to an economically inefficient outcome.

Additionally, former Federal Trade Commission Chairman Timothy J. Muris argues that so-called "weak" patents exacerbate the hold-up problem.[8] When a "weak" patent is included in a standard the market power and value of that patent is increased without merit. These patents with "limited inventive value"[9] proliferate among commercial products only because they are claimed to be essential to the standard, not because they are better on the margin. Weak patents are also blamed for stifling innovation and causing "economic damage."[10] Some companies are claimed to use bundles of weak patents in order to gain supra-competitive royalties or substantial settlements to avoid litigation.[11] Furthermore,, some companies allegedly violate antitrust law by using FRAND commitments to induce SSOs to incorporate technologies covered by their patents into a standard, and then demanding increased licensing fees once the technology has been integrated.[12]

These arguments are problematic as a matter of U.S. antitrust law. Patent hold-up involves an attempt to obtain maximum royalties from a patent license, considering its inclusion in a standard. Such an attempt, however, does not harm competition (it only reflects an attempted exercise of existing market power), and therefore it does not support an antitrust claim.[13] Relatedly, because it is not possible to show how hold-up harms competition, antitrust injury cannot be demonstrated.[14] Furthermore, until they are held invalid, patents retain the status of protected property rights under U.S. law.[15] Their mere assertion in the context of a licensing transaction cannot raise an antitrust claim; their purported "weakness" (which reflects a subjective value judgment, not a legal determination) should be of no legal consequence.

6 Former Commissioner Terrell McSweeny, *Holding the Line on Patent Holdup: Why Antitrust Enforcement Matters,* Federal Trade Commission (2018), at 3 (available at https://www.ftc.gov/system/files/documents/public_statements/1350033/mcsweeny_-_the_reality_of_patent_hold-up_3-21-18.pdf).

7 *Id.*

8 Timothy J. Muris, *Bipartisan Patent Reform and Competition Policy,* Am. Enterprise Inst. (2017), at 3
(available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3292476).

9 *Id.*

10 *Id.* at 1.

11 *Id.* at 3.

12 Professors Timothy J. Muris & Michael A. Carrier, among others, have claimed that "FRAND breaches could satisfy the [Sherman Antitrust Act] section 2 elements of exclusionary conduct by demonstrating an exclusion of competitors (the exclusion of rival competitive technologies not chosen by the SSO) that results in competitive injury (price increases and innovation harms from the breach) and acquisition or maintenance of monopoly power (obtained through the breach). Letter from Michael A. Carrier, Timothy J. Muris, et al. to Makan Delrahim (May 17, 2018), at 3 (available at https://patentlyo.com/media/2018/07/Letter-to-Delrahim-May-17-annotated.pdf).

13 See Gregory J. Werden & Luke M. Froeb, *Why Patent Hold-Up Does Not Violate Antitrust Law*, 27 Tex. Intell. Prop. L. J. 1 (2019). See also *FTC v. Qualcomm, Inc.*, 963 F.3d 974 (9th Cir. 2020) (holding that Qualcomm's alleged breach of its SSO commitments to license its SEPs to rivals on FRAND terms did not in itself violate the antitrust laws by impairing the opportunities of rivals, and noting the "persuasive policy arguments" against applying antitrust to essentially contractual disputes between private parties pursuing technological innovation). The Ninth Circuit also held that Qualcomm had no antitrust duty to license its rival chip suppliers.

14 Werden & Froeb, *id.*, at 5, 24-27.

15 See 35 U.S.C. § 261 (1952) ("patents shall have the attributes of personal property"). Patent law does not, however, prevent application of the antitrust law to attempted enforcement of patents obtained through fraud. *Walker Process Equip., Inc. v. Food Mach. & Chem. Corp.*, 382 U.S. 172 (1965). And an objectively baseless patent infringement claim brought in bad faith could constitute an antitrust violation. *Handguards, Inc. v. Ethicon, Inc.*, 601 F.2d 986 (9th Cir. 1979).

The critiques of the NMA framework are also badly misguided as a matter of economic policy. They manifest a narrow short-term static view of markets, focused on the assertion that standard setting artificially raises the market power of patents included in a standard and that a failure to curtail the exercise of such power reduces welfare. This blinkered perspective ignores the fact that the value of patents is forward looking. The implication that patent holders, due to their newfound monopoly power, have an incentive to hold-up to extract additional licensing fees after the innovation is declared an SEP[16] is wrong.

- First, it neglects to consider that a standardized technology may compete with other technologies, constraining the standard's ability to confer market power.

- Second, it does not take into account the fact that standard setting is often a repeat game,[17] creating disincentives for an SEP holder to be seen as engaging in exploitative licensing behavior.

- Third, and most fundamentally, this view takes the SEP as having only the intrinsic value of the innovation standing alone and does not account for the technology commercialization value it acquires when practiced by producers as the result of standardization.[18]

When a patent is integrated into a standard, just as when the innovation is patented, value is added due to the supplemental lines of commercialization that are available to the innovator. The demand for the innovation increases, and therefore the cost of licensing should also increase, *ceteris paribus*. A flaw with an *ex ante* determination of FRAND based on a technology's marginal superiority over alternatives before a standard is finalized (the approach generally favored by NMA critics) is that it fails to account for the SEP's role in generating this enormous amount of *ex post* value.

If a patent is deemed essential, but legal rules require that the FRAND license fee be reached based on mere *ex ante* considerations, then the SEP-holder can capture almost none of the forward-looking surplus created by the patent.[19] This surplus is not due to any unearned "monopoly power" bestowed by the standard. It is a function of the increased value that was not incorporated into the original static pre-standard calculation that informed a purported FRAND valuation. Another way of stating this is that the law should allow FRAND determinations reached in license negotiations to be based on the SEP's forward-looking dynamic contribution to new standard-engendered wealth.

Such an alternative understanding of FRAND appropriately views the SEP-holder's royalty demands in negotiations for more than *ex ante* valued added as "fair and reasonable," not "excessive and anticompetitive." Employing a robust forward-looking approach to FRAND valuation creates appropriate incentives for innovative wealth-creating investments in patenting that are sorely lacking under a crabbed *ex ante* perspective. As such, the misguided application of antitrust to enforce a narrow *ex ante* interpretation of FRAND is harmful to innovation-induced wealth creation.

If one rejects antitrust as a means for resolving innovator-implementer FRAND disputes, what is the appropriate contract law approach for handling such controversies? Two alternative frameworks are considered below: one based on a property rule that features injunctions and one based on a liability rule that emphasizes damages. Although the analysis is applicable to patent licensing in general, it is particularly relevant to FRAND licensing, which is emphasized below. It will be shown that the injunctions-based property rule, which comports with the NMA's stress on the right to exclude, is preferable as a matter of innovation-induced economic welfare.[20]

16 Muris, *supra* note 8, at 8.

17 See Pierre Larouche & Florian Schuett, *Repeated Interaction in Standard Setting,* 28 J. Of Econ. & Mgmt. Strategy 488 (2019).

18 For a discussion of this topic see Daniel Spulber, The Case for Patents 4 (2021) ("The rewards view tends to be backward-looking; according to this view, patents complete most of their economic functions at the time they are granted.") (Internal quotation marks omitted).

19 For a more detailed discussion of the appropriate legal rule to govern FRAND negotiations, and the problems with an artificial valuation approach based on marginal *ex ante* considerations, see Richard A. Epstein & Kayvan B. Noroozi, *Why Incentives for "Patent Holdout" Threaten to Dismantle FRAND, and Why it Matters,* 32 Berkeley Tech. L. J. 1381 (2017), at 1384.

20 See, for example, Ben Depporter, *Property Rules, Liability Rules and Patent Market Failure,* 1 Erasmus L. Rev. 59 (2008), at 63 ("by emphasizing the *ex ante* incentive for the innovator and the reliance on private bargaining, law and economics scholarship operates on the presumption that property rules (injunctions) may be preferred in the field of patents") (This essay's analysis, which is somewhat stylized for purposes of general application, eschews a detailed discussion of current legal standards and case law.)

III. WELFARE EVALUATION OF PROPERTY AND LIABILITY RULES IN THE PATENT LICENSING CONTEXT

A. Patent Licensing with a Property Rule (the Right to Exclude)

The right to exclude is a well-established principle of property law. In fact, it is the fundamental underlying foundation upon which the institution of property exists.[21] In the patent law context, assigning the patentee right the right to enjoin use of its patent is the manifestation of the right to exclude. The right to enjoin informs a potential licensee-implementer that if it fails to agree to terms with the patentee, it can be totally excluded from legally accessing the patented innovation. This means, in the case of an SEP, that the implementer will be unable to employ valuable standardized technology in manufacturing its products, thereby harming its commercial prospects. When the patentee-innovator is given the right to enjoin the implementer, it may seek a return to innovation that reflects longer-term considerations.[22] Once a patent has been widely implemented, and further technologies spring up as part of an innovative cycle, the value of the patent rises. If not for this original patent, there would not have been a host of other innovations generated as a by-product of the adoption of a standard.[23] The patentee innovator, then, has a high incentive to look to the future and set a fee based on what the patent's value is estimated to be in the future. Also, not willing to be relegated to utilizing second-rate, non-standardized technology and calibrating its expected profits in light of the future value of standards-based sales, the implementer should be willing to negotiate mutually acceptable licensing terms based on a dynamic forward-looking valuation.[24]

In short, a property rule that authorizes patentee injunctions promotes mutually beneficial licensing transactions, creating economic surplus for both contracting parties and raising economic welfare. The innovator can negotiate a licensing rate that is higher than its reservation price, but lower than the implementer's reservation price.[25]

B. Patent Licensing with a Liability Rule

Under a liability rule, the patentee has no right to enjoin unauthorized use of its patent and must seek damages in court if another party is utilizing its patented technology without permission. SEP holders that do seek infringement damages in court are stymied by the fact that U.S. courts have treated reasonable royalties for patent infringement as tantamount to FRAND license rates.[26] This means, in effect, that an implementer does not face serious consequences if it fails to negotiate with the SEP holder for a license. As a group of leading patent scholars have explained:

> Thus, an opportunistic manufacturer of standardized products could decide that the most efficient course of action is not to seek a FRAND license from a SEP holder at all, but instead to delay until it is sued for infringement, at which point its maximum liability (assuming that both patent validity and infringement are established) would only be the FRAND royalty it otherwise would have paid *ex ante*. As discussed elsewhere, this form of conduct by standards implementers has been termed "hold out."[27]

It follows that a liability rule seriously disincentivizes investment in innovation directed toward potential standardized technologies. By eliminating an innovator SEP-holder's leverage, it creates a *de facto* licensing scheme that inures to the benefit of the implementer. The implementer may effectively use standardized technology "for free" until it is hauled into court. What's more, if and when that happens, it must pay no more than a FRAND license rate it might have bargained for in the first place. Indeed, that license rate, which is determined by a court

21 Thomas W. Merrill, *Property and the Right to Exclude*, 77 Neb. L. Rev. 730 (1998), at 730.

22 Malcolm T. Meeks & Charles A. Eldering, *Patent Valuation: Aren't We Forgetting Something? Making the Case for Claims Analysis in Patent Valuation by Proposing a Patent Valuation Method and a Patent-Specific Discount Rate Using the CAPM*, 9 Nw. J. Tech. & Intell.Prop. 194 (2010), at 208 and 222.

23 Clearly, of course, many patents may support the implementation and wide-scale adoption of a standard, and the relative contribution of any individual SEP must be calibrated in that light. The salient point of this discussion is not the valuation of specific SEPs, but rather the observation that SEP valuation in general should take into account long-term dynamic considerations (with calculations reflecting appropriate discounting for risk and present values of future rents).

24 The implementer should be willing to accept a royalty rate that yields it expected returns from future sales, discounted by risk, that are greater than the expected returns from future sales, also discounted by risk, that it would have obtained through reliance on an inferior non-standardized technology. The SEP-holder should be mindful of the implementer's incentives and financial constraints, of course, in undertaking negotiations.

25 The exact relative distribution of rents between innovator and implementer will depend on a variety of case-specific factors, such as the information and other sources of potential leverage available to each negotiating party.

26 Curtis Dodd, *Damages for Patent Infringement versus FRAND Licensing Rates*, IPWatchdog (Dec. 8, 2020) (available at https://www.ipwatchdog.com/2020/12/08/damages-patent-infringement-versus-frand-licensing-rates/id=128050/).

27 Jorge L. Contreras et al., *The Effect of FRAND Commitments on Patent Remedies,* Utah L. Fac. Scholarship 160, at 295 (2018).

rather than through *ex ante* negotiations, may well be deflated to take into account such factors as potential "royalty stacking."[28] Moreover, the likelihood that a court would even consider the dynamic value of an SEP in prompting the beneficial future diffusion of new technologies (a key potential element of negotiations under a property rule) is close to nil. In short, the combination of a liability rule with existing judicial approaches to damages seriously undervalues the contribution of SEPs to innovation-induced economic welfare. As such, a liability rule is economically inferior to a property rule.

IV. IMPLICATIONS OF IMPLEMENTING THE NEW MADISON APPROACH

Hypothesized property rule and liability rule alternatives for FRAND licensing, and the NMA itself, should be viewed in context of the existing United States legal standards applicable to FRAND litigation. In essence, a *de facto* liability rule framework, rather than a property law framework, currently governs the treatment of SEPs in the United States.[29]

In 2006, in the *eBay* case,[30] the U.S. Supreme Court overturned Federal Circuit precedent in rejecting the historical property rule presumption that a patentee is entitled to an injunction when it has successfully defended patent validity and shown infringement. *eBay* held that a court must weigh four equitable factors in deciding on a case-by-case basis whether an injunction is warranted. This, of course, created welfare-inimical litigation uncertainty as to whether a property or liability rule would apply in any particular patent licensing dispute. With respect to SEPs, a combination of judicial decisions and government policy pronouncements have created a situation in which SEPs "now effectively operate under a liability-rule regime in which no injunction threat can be credibly asserted."[31] Accordingly, the following comparative evaluation is advanced in support of overruling *eBay* and reinstituting a property rule framework to govern American patent licensing disputes.

The advantages of a property rule over a liability rule have already been described. Those advantages are assessed in greater detail below. Specifically, a property rule approach to contract law disputes over SEP licensing (with the patentee enjoying an automatic right to enjoin infringement) compares favorably to a liability rule approach with respect to information in the market, litigation-related costs, innovation, and social surplus. Adoption of a property rule for SEP licensing (and, more generally, for all patent licensing), combined with a rejection of antitrust as a vehicle for handling SEP licensing disputes, would implement the NMA approach.

A. Information and Litigation-related Costs

First, a property rule yields lower transaction costs through better information during negotiations as well as reduced litigation-related costs.

As compared to negotiations under a liability rule, information affecting the bargaining process is improved when the innovator holds enjoinment rights, because both counterparties have a clear understanding of relative negotiating power and the prospect for mutual harm if a deal is not struck. If the lowest offer that the innovator is willing to take is higher than the implementer is willing to pay, then there will be no deal. Under any other circumstance, however, the counterparties will come to an agreement that is favorable for both sides and they will have a high incentive to cooperate. This is because a failure to strike a deal will harm an SEP-holder by preventing it from earning substantial rents from broadscale implementation of a standard. It will also harm the implementer by preventing it from using the standardized technology (and thus relegating it to rely on an inferior, less-profitable alternative). The strong mutual incentives to reach a contract make litigation less likely.

Costs are fostered by the incentives to litigate that a liability rule engenders. Under a liability rule, the implementer can elect to infringe and merely pay reasonable court-determined licensing royalties, in effect forcing the innovator to sue to vindicate its rights. Under a property rule, by contrast, the infringing implementer will quickly be blocked from continued production, thereby causing it to waste the assets it employed to begin producing the standardized product without a license. Thus, a property rule strongly incentivizes the implementer to strike a licensing bargain and avoid infringing conduct that would generate these costs.

Furthermore, under a property rule, licensing litigation only needs to address the question of infringement. Litigation issues under a liability rule, including reasonable royalty determinations, are likely to be more complex and costly to resolve.

28 See Dodd, *supra* note 26.

29 This is in marked contrast to civil law countries, where the property rule presumption that patentees automatically will obtain a judicial injunction as a remedy for patent infringement remains strong. "[I]n the EU and other civil law jurisdictions injunctions typically issue automatically in patent cases, subject only to the violation of competition law." Contreras et al., *supra* note 27, at 340 (2018).

30 *eBay Inc. v. MercExchange, L.L.C.*, 547 U.S. 388 (2006).

31 Jonathan M. Barnett, Innovators, Firms, and Patents (2021), at 161.

B. Innovation and Social Surplus

Second, under a property rule, as contrasted to a liability rule, innovation will rise and drive an increase in social surplus, to the benefit of innovators, implementers, and consumers.

Innovators' welfare will rise, as previously noted. First, innovators already in the market will be able to receive higher licensing fees due to their improved negotiating position. Second, new innovators enticed into the market by the "demonstration effect" of incumbent innovators' success will in turn engage in profitable R&D (to them) that brings forth new cycles of innovation.

Implementers will experience welfare gains as the flood of new innovations enhances their commercial opportunities. New technologies will enable implementers to expand their product offerings and decrease their marginal cost of production. Additionally, new implementers will enter the market as innovation accelerates. Seeing the opportunity to earn high returns, new implementers will be willing to pay innovators a high licensing fee in order to produce novel and improved products.

Finally, consumers will benefit from expanded product offerings and lower quality-adjusted prices. Initial high prices for new goods and services entering the market will fall as companies compete for customers and scale economies are realized. As such, more consumers will have access to new and better products, raising consumers' surplus.

V. CONCLUSION

Innovation has the potential to better the lives of millions of individuals around the world, but the U.S. legal incentive structure around patents needs to be realigned to spur greater American innovation. The New Madison Approach puts forward four guiding principles to solve the welfare-inimical misalignment of incentives among SSOs, implementers, and innovators. The NMA rejects the application of antitrust law to patent licensing disputes between SEP holders and implementers of standards. The NMA also endorses the right of SEP holders to obtain injunctions as a matter of course against infringing conduct (a property rule) – a legal policy that is currently rejected in the United States but finds support in many foreign jurisdictions. U.S. legal reforms to adopt the NMA's proposals would accelerate American innovation and inure to the benefit of American innovators, implementers, and consumers. In particular, the statutory overruling of the Supreme Court's *eBay* holding, to restore the presumption that any patentee may obtain an injunction against proven infringement of its patent, is badly needed.[32]

32 Stronger Patents Act, S.2082, 116th Cong. (2019) (would among other things overrule *eBay*). See *Sens. Coons and Cotton, Reps. Stivers and Foster introduce bipartisan, bicameral bill to protect US patent holders, inventors* (July 10, 2019) (available at https://www.coons.senate.gov/news/press-releases/sens-coons-and-cotton-reps-stivers-and-foster-introduce-bipartisan-bicameral-bill-to-protect-us-patent-holders-inventors).

GROWING CONVERGENCE: THE LIMITED ROLE OF ANTITRUST IN STANDARD ESSENTIAL PATENT DISPUTES

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I. INTRODUCTION

In the last couple of years, the United States Department of Justice ("DoJ") and several European countries have reversed previous interventionist decisions and limited the role of antitrust in the resolution of disputes concerning Standard Essential Patent ("SEPs"). These jurisdictions recognize the need to protect intellectual property rights ("IPRs") by making available injunctions against infringers. Courts have realized that *hold-up* by a patent holder demanding excessive royalties is not a widespread problem and that patent implementers may *hold-out* against paying any royalties whilst they continue to practice a patent. They have accordingly adopted new standards for granting injunctions in disputes involving SEPs with the goal of increasing efficiency and legal certainty.

The changes in the approach to SEP disputes may be summarized in the following principles: (i) SEP holders have the right to seek injunctive relief against infringers without automatically triggering antitrust concerns;[2] (ii) absent exclusionary effects, an alleged breach of a commitment to license a patent on Fair, Reasonable, and Non-Discriminatory ("FRAND") terms is not an actionable offence under antitrust law and is better addressed under contract or patent law;[3] (iii) agencies and courts should not presume that an IPR confers market power on its holder;[4] (iv) the analysis of comparable licenses provides the most reliable methodology for determining the FRAND rate for an SEP;[5] and (v) an SEP holder may choose at which level to license its SEP.[6]

The U.S. changed its policy on SEPs in 2019 when the DoJ and the United States Patent and Trademark Office ("PTO") withdrew and replaced their 2013 joint statement to reflect the changes made in the evaluation of remedies for SEP disputes. The DoJ and the PTO, now joined by the National Institute of Standards and Technology, issued a new policy statement that allows SEP holders to seek injunctive relief "[c]onsistent with the prevailing law."[7] The new statement applies existing intellectual property standards to SEP disputes, allowing the SEP holders to seek equitable relief without raising antitrust concerns.[8] Then-Assistant Attorney General Makan Delrahim labeled this policy the "New Madison Approach."[9] He reasoned that antitrust law should not be used to limit an SEP holder's access to an otherwise justified injunction and noted that such a limit would allow the implementer freely to infringe the SEP knowing that the most it will eventually have to pay is a FRAND royalty rate.[10] The DoJ also applied its new approach in updating its reply to the Business Review Letter sought by the Institute of Electrical and Electronics Engineers.[11]

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2 See generally Joshua D. Wright, *SSOs, FRAND, and Antitrust: Lessons from the Economics of Incomplete Contracts*, 21 Geo. Mason L. Rev. 791 (2014) (discussing the role of SDOs in the selection and enforcement of standards and whether antitrust law has, or should have, a role in regulating the SDO contracting processes); see also Douglas H. Ginsburg, Taylor M. Owings, and Joshua D. Wright, *Enjoining Injunctions: The Case Against Antitrust Liability for Standard Essential Patent Holders Who Seek Injunctions*, Antitrust Source at 6 (Oct. 30, 2014), available at https://www.americanbar.org/content/dam/aba/publishing/antitrust_source/oct14_ginsburg_10_21f.authcheckdam.pdf ("[O]verdeterrence of SEP holders seeking injunctions would be harmful to the public interest in competition and innovation."); U.S. Dep't of Just., PTO, & NIST, Statement on Remedies for Standard-Essential Patents Subject to Voluntary F/RAND Commitments (Dec. 19, 2019), https://www.justice.gov/atr/page/file/1228016/download.

3 See *FTC v. Qualcomm,* 969 F.3d 974 (9th Cir. 2020); *Cont'l Auto. Sys., Inc. v. Avanci, LLC*, 2019 WL 6735604, (N.D. Cal. 2019); Bruce H. Kobayashi & Joshua D. Wright, *Federalism, Substantive Preemption, and Limits on Antitrust: An Application to Patent Holdup*, 5 J. COMPETITION L. & ECON. 469, 471 (2009); Bruce H. Kobayashi & Joshua D. Wright, *The Limits of Antitrust and Patent Holdup: A Reply to Cary, et al.,* 78 ANTITRUST L.J. 505 (2012); Koren Wong-Ervin, Douglas H. Ginsburg, Bruce H. Kobayashi & Joshua D. Wright, *The Troubling Use of Antitrust to Regulate FRAND Licensing*, 15-46 Geo. Mason L.& Econ. Res. Paper (Oct. 15, 2015) https://ssrn.com/abstract=2674759.

4 See Ill*inois Tool Works Inc. v. Indep. Ink, Inc.*, 547 U.S. 28 (2006); U.S. Dep't of Just. & Fed. Trade Comm'n, Antitrust Guidelines for the Licensing of Intellectual Property (Jan. 2017); Koren Wong-Ervin, Douglas H. Ginsburg, Bruce H. Kobayashi & Joshua D. Wright, *Comment of the Global Antitrust Institute, Antonin Scalia Law School, George Mason University, on the U.S. Antitrust Agencies' Proposed Update of the Antitrust Guidelines for the Licensing of Intellectual Property*, 16-38, Geo. Mason L.& Econ. Res. Paper (Sept. 20, 2016), https://ssrn.com/abstract=2841207.

5 See *Ericsson v. D-Link*, 773 F.3d 1201 (Fed. Cir. 2014); *Sisvel v. Haier*, Federal Court of Justice (Bundesgerichtshof) 5 May 2020 - Case No. KZR 36/17; *Unwired Planet v. Huawei & Conversant v. Huawei and ZTE*, UK Supreme Court 26 August 2020 - Case No. [2020] UKSC 37.

6 See *Nokia v. Daimler*, Landgericht Mannheim [LG Mannheim] [District Court of Mannheim] Aug. 18, 2020, Case-No. 2 O 34/19 (Ger.); *Qualcomm*, 969 F.3d 974; *Avanci*, 2019 WL 6735604.

7 U.S. Dep't of Just., PTO, & NIST, *supra* note 2, at 5.

8 *Id.*

9 Makan Delrahim, *Keynote Address at University of Pennsylvania Law School, The "New Madison" Approach to Antitrust and Intellectual Property Law* at 2 (Mar. 16, 2018), https://www.justice.gov/opa/speech/assistant-attorney-general-makan-delrahim-delivers-keynote-address-university [hereinafter "New Madison" Approach].

10 *Id.* ("If a patent holder effectively loses its right to an injunction whenever a licensing dispute arises, or is deterred from seeking an injunction due to the prospect of treble damages, an implementer can freely infringe, knowing that the most he or she will eventually have to pay is a reasonable royalty rate.").

11 This letter emphasized that the right of SEP holders to seek injunctive relief should not be limited; hold-up had proved not to be a competitive problem; and the best method for determining FRAND loyalty rates was not the use of the smallest saleable patent practicing unit ("SSPPU"). See Letter from Makan Delrahim to Sophia A. Muirhead, Gen. Counsel & Chief Compliance Officer, Ins. of Elec. & Elec. Eng'rs (Sept. 10, 2020) [hereinafter DoJ 2020 IEEE BRL].

The 2020 decision in *FTC v. Qualcomm Inc.*[12] illustrates the judicial expression of the "New Madison Approach." There the Ninth Circuit explained that in the absence of exclusionary effects, an alleged breach of a FRAND commitment is not an actionable offence under antitrust law and is better addressed under contract or patent law.[13]

In Europe, the case law that developed following the decision of the European Court of Justice ("ECJ") in *Huawei v. ZTE*[14] instantiates the global shift towards stronger protection of IPRs and a limited role for antitrust in SEP disputes. While the *Huawei* decision held that seeking injunctive relief with respect to a FRAND-encumbered SEP may violate Article 102 of the Treaty on the Functioning of the European Union, it also established a readily available safe harbor in which courts will not find an SEP holder in violation of antitrust law. Additionally, the ECJ placed the burden on the alleged infringer to "diligently respond" to a license offer in order to be considered a "willing" licensee. The application of the *Huawei* criteria by national courts allows SEP holders to protect their IPRs and limits the role of antitrust in SEP disputes.

II. AN SEP HOLDER'S RIGHT TO SEEK AN INJUNCTION

As recently as 2016, several U.S. courts were of the view that an SEP holder's promise to license under FRAND terms implicitly waived its right to seek an injunction against an unlicensed implementer and that seeking an injunction would be anticompetitive.[15] Not all courts agreed, as shown by the case of *Apple v. Motorola*, in which the Federal Circuit rejected the notion that a FRAND commitment categorically precluded an SEP holder from obtaining an injunction.[16] Courts are increasingly abandoning this view as they realize that antitrust sanctions are both unnecessary to protect consumers — who are adequately protected by the law of contracts and the standards that must be met to get an injunction — and by devaluing IPRs, diminish the incentive to innovate.[17]

The European Commission originally adopted a strong stance against SEP holders seeking injunctive relief. In *Motorola Mobility*[18] and *Samsung*,[19] the Commission prohibited injunctive relief under the theory that it would allow the SEP holder to "hold-up," that is, overcharge would-be licensees.[20] In *Motorola Mobility*, however, the Commission clarified its view that an injunction against infringement of a FRAND-encumbered SEP should be available when the patent holder is dealing with an unwilling licensee.[21]

The stringent EU stance against injunctions began to shift with the *Huawei* case. In that case, the ECJ clarified the conditions that allow an SEP holder to seek an injunction without violating Article 102 of the Treaty on the Functioning of the European Union. ("TFEU"}. The court held the holder of a FRAND-encumbered SEP does not necessarily abuse its dominance merely by seeking an injunction or by seeking a recall of the infringing products.[22] It will be held harmless if, prior to bringing a court action, the holder has notified the implementer that the implementer is infringing its patent(s) and specified the infringed patent(s) along with the manner of infringement; if the alleged infringer expressed its willingness to reach a licensing agreement on FRAND terms, then the SEP holder must have presented the infringer with a written offer for a license on

12 969 F.3d 974 (9th Cir. 2020).

13 See *id.* at 986-87. See also *Avanci*, 485 F. Supp. 3d 712.

14 Case C-170/13, *Huawei Tech. Co. v. ZTE Corp.*, ECLI:EU:C:2015:477 (July 16, 2015).

15 See, e.g. *Microsoft Corp. v. Motorola, Inc.,* 696 F.3d 872, 885 (9th Cir. 2012) ("Implicit in such a sweeping promise is, at least arguably, a guarantee that the patent-holder will not take steps to keep would-be users from using the patented material, such as seeking an injunction, but will instead proffer licenses consistent with the commitment made."); *Microsoft Mobile Inc. v. Interdigital, Inc.*, 2016 WL 1464545, at *1 (D. Del. Apr. 13, 2016); Answer, Affirmative Defenses, and Counterclaims, *Huawei Techs. Co. v. T-Mobile US, Inc.*, 2016 WL 8470351 (E.D. Tex. Dec. 6, 2016).

16 *Apple Inc. v. Motorola, Inc.*, 757 F.3d 1286, 1331-32 (Fed. Cir. 2014) ("FRAND commitments are certainly criteria relevant to its entitlement to an injunction, [but] we see no reason to create . . . a separate rule or analytical framework for addressing injunctions for FRAND-committed patents.").

17 See, e.g. *Qualcomm*, 969 F.3d at 988, 997; *Avanci*, 485 F. Supp. 3d at 730–733.

18 Case AT-39985, *Motorola Mobility* (Apr. 29, 2014) available at https://ec.europa.eu/competition/antitrust/cases/dec_docs/39985/39985_928_16.pdf [hereinafter EC Motorola].

19 Case AT-39939, Samsung (Apr. 29,2014) available at https://ec.europa.eu/competition/antitrust/cases/dec_docs/39939/39939_1501_5.pdf.

20 See Eur. Comm'n, Press Release, Antitrust: Commission accepts legally binding commitments by Samsung Electronics on standard essential patent injunctions, (Apr. 29,2014) https://ec.europa.eu/commission/presscorner/detail/en/IP_14_490; Eur. Comm'n, Press Release, Antitrust: Commission sends Statement of Objections to Motorola Mobility on potential misuse of mobile phone standard-essential patents- Questions and Answers (May 6, 2013), https://ec.europa.eu/commission/presscorner/detail/en/MEMO_13_403.

21 *EC Motorola* at ¶ 423.

22 *Huawei*, ECLI:EU:C:2015:477, at ¶ 71; see also Eur. Comm'n, Licensing Terms of Standard Essential Patents: A Comprehensive Analysis of Cases 67 (2017), https://publications.jrc.ec.europa.eu/repository/bitstream/JRC104068/jrc104068%20online.pdf.

FRAND terms, specifying the royalty rate and showing how the royalty is to be calculated.[23] The implementer or alleged infringer must promptly respond in writing either by accepting or by making a counteroffer.[24] Should the implementer fail to make either response, then it must provide security against the possibility that it will be held liable to the SEP holder.[25]

Further, the ECJ clarified that the assertion of an IPR by seeking an injunction cannot "in itself, constitute an abuse of a dominant position"[26] absent unspecified "exceptional circumstances."[27] The ECJ reasoned that, although a FRAND commitment justifies imposing some obligations on the SEP holder, it cannot deprive the holder of the ability to enforce its "exclusive right."[28]

In the wake of *Huawei v ZTE*, application of the safe harbor by national courts has resulted in the grant of injunctions and limiting the role of antitrust in SEP disputes. For example, in its May 2020 Sisvel v. Haier decision, the German Federal Court of Justice held an SEP holder that had committed to offer a license on FRAND terms was entitled to an injunction when its patents were infringed.[29] After lengthy proceedings before the Federal Patent Court and the Appeal Court, the FCJ held the patent in question was essential to the GPRS standard and had been infringed.[30] Moreover, the FCJ held Sisvel had not infringed Article 102 of the TFEU by initiating infringement proceedings against Haier.[31]

Similarly, in *Nokia v. Daimler*, the District Court of Mannheim rejected arguments that an SEP holder abused its dominant position under the standards of *Huawei*.[32] The court emphasized that SEP holders are not *per se* disallowed from enforcing the exclusivity arising from their patents.[33] That a patent is standard essential does not mean the patent holder is obligated to tolerate the use of its technology without compensation.[34] As long as the patent holder complies with its duties under the *Huawei* framework, it will not be held to have abused its dominance.[35] Along the same lines, the Paris Court of Appeal said in *Conversant v. LG* held that the mere filing of an injunctive action based upon SEPs could not in itself constitute an abuse of dominance.[36]

Further, the court found that Daimler did not adequately express its willingness to negotiate a FRAND license with Nokia. Therefore, Daimler could not rely upon a FRAND defense to avoid an injunction.[37] Having declared its willingness to take a license was not enough to discharge its obligation to negotiate in good faith.[38]

23 *Huawei*, ECLI:EU:C:2015:477, at ¶ 63.

24 *Id.* at 66; see also Eur. Comm'n, Licensing Terms of Standard Essential Patents: A Comprehensive Analysis of Cases 67 (2017), https://publications.jrc.ec.europa.eu/repository/bitstream/JRC104068/jrc104068%20online.pdf.

25 *Id.*

26 *Huawei*, ECLI:EU:C:2015:477, at ¶ 38.

27 *Id.* at ¶ 47.

28 *Id.* at ¶¶ 58-59.

29 Plaintiff Sisvel held SEPs for several wireless communication standards. The defendants were German and French subsidiaries of the Chinese Haier group which produces and sells, among other things, electronic devices complying with the GPRS standard. The controversy between Sisvel and Haier started in 2012, when Sisvel informed the parent company of the Haier group that it was infringing its patents. In April 2013 Sisvel made a commitment to the European Telecommunications Standard Institute ("ETSI") to license in FRAND terms and conditions. After its offer was rejected by Haier in September 2014, Sisvel filed an infringement action against Haier before the district court of Duesseldorf based on an SEP covering data transmission technology under the GPRS standard. Haier filed a nullity action against the patent in suit before the German Federal Patent Court in March 2015. See *Sisvel v. Haier*, Federal Court of Justice (Bundesgerichtshof) 5 May 2020 - Case No. KZR 36/17 at ¶¶ 67, 69.

30 *Id.* at ¶ 9 *et seq.*

31 *Id.* at ¶ 52.

32 Nokia, at ¶ 144.

33 *Id.* at ¶ 146.

34 *Id.*

35 *Id.* at ¶ 147.

36 *Conversant v. LG, Court of Appeal of Paris,* April 16, 2019 - Case No. 061/2019, RG 15/17037 at 3.

37 Nokia, at ¶¶ 157–231.

38 *Id.* at ¶ 258.

Again, in *NTT DoCoMo v. HTC*, the District Court of Mannheim highlighted that the exercise of the exclusive rights conveyed by a patent may be blocked only in exceptional circumstances, which the implementer has the burden to demonstrate. [39] The court also discussed the implementer's duty to respond diligently to the SEP holder's offer of a license.[40] The implementer's response in this case was insufficient because it made no counteroffer for a year and a half after receiving the SEP holder's offer and half a year after the SEP holder had filed suit. Additionally, the implementer failed to provide adequate security following the rejection of its counteroffer.[41]

In *OLG Düsseldorf*, the Higher Regional Court of Düsseldorf clarified that the criteria for issuing a preliminary injunction involving an SEP are the same as the criteria for an injunction involving patents that are not SEPs.[42] The SEP holder must establish the validity of the SEP, its use by the alleged infringer, and the urgency of its request for a preliminary injunction.[43] Of course, the SEP holder must also have followed the procedures laid out in *Huawei* before filing for an injunction.[44]

In *Unwired Planet Int'l v. Huawei Technologies Ltd.*, the Supreme Court of the United Kingdom addressed appeals in two related cases concerning patents developed for the ETSI that were potentially essential to wireless telecommunications standards.[45] The Supreme Court held that under the ETSI IPR Policy, SEP holders are not prohibited from seeking an injunction.[46] Rather, the possibility to stop infringement through an injunction is a necessary component of the balance the IPR Policy seeks to strike, and the threat of an injunction ensures that implementers are incentivized to negotiate a FRAND license.[47]

These cases demonstrate the trend in Europe toward allowing injunctions for SEP infringements. Following the creation of the safe harbor in *Huawei*, courts across Europe have allowed SEP holders to seek injunctions as long as they follow the Huawei procedures. By treating SEPs as they do other patents and shifting their focus to the negotiation process, these court decisions have virtually eliminated the role of antitrust in SEP disputes.

III. THE LIMITED ROLE FOR ANTITRUST IN SEP DISPUTES

Courts have increasingly recognized the importance of protecting IP rights in order to foster innovation. To determine whether antitrust law has been violated, the relevant question is not whether an agreement was breached but whether there was anticompetitive harm arising from the breach.

In *Qualcomm*, the Ninth Circuit did not jump from an alleged breach of FRAND to an antitrust violation.[48] The court rejected the allegations that the FRAND commitment Qualcomm had made to two SDOs created an antitrust duty to license the company's IP to chip manufacturers (as opposed to makers of the final device).[49] The court stressed that a cautious approach should be taken when using antitrust to address what are essentially contractual disputes between parties engaged in the pursuit of technological innovation.[50] The DoJ filed an amicus brief in the case arguing the district court's ruling had improperly applied Section 2 of the Sherman Act to condemn unilateral licensing activity in a manner threatening competition and innovation.[51]

39 *NTT DoCoMo v HTC,* January 29, 2016 - Case No. 7 O 66/15 at ¶ 59 (referencing *Huawei*).

40 *Id.* at ¶ 94.

41 *Id.*

42 OLG Düsseldorf July 18, 2017 - Case No. I-2 U 23/17.

43 *Id.*

44 *Id.*

45 The first case involved a dispute between Unwired Planet holding a portfolio of SEPs reading on several wireless telecommunications standards, and two companies of the Huawei group, a Chinese manufacturer and vendor of standard compliant mobile phones. The second case revolves around a dispute between the licensing company Conversant and Huawei as well as two companies of the ZTE group. ZTE is a China-based group of companies manufacturing network equipment, mobile phones, and consumer electronics sold worldwide. *Unwired Planet v Huawei & Conversant v Huawei and ZTE*, UK Supreme Court, August, 26 2020 - Case No. [2020] UKSC 37.

46 *Id.* at ¶ 61.

47 *Id.*

48 See *Qualcomm*, 969 F.3d at 997

49 *Id.* at 993.

50 *Id.* at 997.

51 See United States' Statement of Interest Concerning Qualcomm's Motion for Partial Stay of Injunction Pending Appeal, *Qualcomm, Inc.*, 2020 WL 4591476 (No. 19-16122), 2019 WL 3306496.

The Northern District of Texas echoed the views of the Ninth Circuit in *Cont'l Auto. Sys., Inc. v. Avanci, LLC*:[52] "An SEP holder may choose to contractually limit its right to license the SEP through a FRAND obligation, but a violation of this contractual obligation is not an antitrust violation."[53] The court rejected the argument that it violates the Sherman Act to create a patent licensing pool that extracts non-FRAND terms from licensees, especially when there is a "'realistic opportunity' to obtain individual licenses outside of the pool.'"[54] Conduct must harm the competitive process to be deemed anticompetitive, but there was no evidence that violation of the FRAND commitment would have that effect.[55] The DoJ submitted a Statement of Interest explaining that Continental's attempt to base a Section 2 violation upon an alleged breach of FRAND licensing commitments did not state a cognizable antitrust claim.[56]

U.S. courts are aligning with European courts to limit the role of antitrust in SEP disputes. Recent decisions demonstrate a commitment to examine competitive harm instead of automatically accepting an allegation that violation of a FRAND commitment constitutes a violation of antitrust law.

IV. IPRS DO NOT PRESUMPTIVELY CREATE MARKET POWER

In the 2007 case of *Broadcom Corp. v. Qualcomm Inc.*,[57] the Third Circuit held the breach of a FRAND commitment could violate the antitrust laws if a patent-holder deceived a standard developing organization ("SDO") regarding its intention to license on FRAND terms.[58] The court did not conclude that breach of an SDO contract alone — even if it results in higher royalty rates — has an anticompetitive effect.[59] (Indeed, the Ninth Circuit in *Qualcomm* strongly rejected the view that SEPs necessarily give their holders market power.[60]) Instead, it was the alleged deception that purportedly gave the SEP holder market power sufficient to constitute monopolization in violation of section 2 of the Sherman Act.[61] Even so, no other Court of Appeals has followed the approach taken in *Broadcom*.

In *Sisvel v. Haier*,[62] the German FCJ held Sisvel had a dominant position in its market,[63] but that was not attributable solely to the exclusivity rights granted by a patent.[64] When a patent is essential for complying with a standard or a de facto standard and technical alternatives are not available for products sold on a downstream market, then the assessment of dominance requires defining a distinct market in which licenses for the patent in question are offered.[65]

As these decisions show, American and European courts agree that holding a patent — even if standard essential — does not imply the patent owner has market power. Rather, plaintiffs must properly define a market and demonstrate anticompetitive effects.

52 485 F. Supp. 3d 712 (N.D. Tex. 2020).

53 *Id.* at 743; see also *Microsoft Corp. v. Motorola, Inc.,* 795 F.3d 1024, 1040-45 & n.2 (9th Cir. 2015) (upholding district court's analysis of FRAND rate and range in breach of contract action).

54 *Avanci,* 485 F. Supp. 3d at 732.

55 *Id.* at 729.

56 See United States' Statement of Interest Concerning *Continental Automotive Systems, Inc. v. Avanci, LLC et al*, Docket No. 3:19-cv-02933 (N.D. Tex. Dec 12, 2019).

57 501 F.3d 297 (3d Cir. 2007).

58 *Id.* at 314.

59 See 501 F.3d at 314 ("Deception . . . harms the competitive process by . . . increasing the likelihood that patent rights will confer monopoly power on the patent holder."); Wright, *supra* note 2, at 803 (citing *Rambus Inc. v. FTC*, 522 F.3d 456, 466–67 (D.C. Cir. 2008), *cert. denied*, 555 U.S. 1171 (2009); *Broadcom*, 501 F.3d at 310–12).

60 See 969 F.3d at 987 (rejecting the district court's inference of anticompetitive harm as a result of Qualcomm's conduct with respect to the SDO and FRAND licensing).

61 *Id.* at 312–16. The Northern District of Texas's decision in *Research in Motion Ltd. v. Motorola, Inc.,* 644 F. Supp. 2d 788, 793 (N.D. Tex. 2008), misinterpreted *Broadcom* as suggesting that having an SEP could in itself give the holder monopoly power.

62 See Bundesgerichtshof [BGH] [Federal Court of Justice] May 5, 2020, 36 Entscheidungen des Bundesgerichtshofes in Zivilsachen [BGHZ] 17, ¶ 54.

63 *Id.* at ¶ 54.

64 *Id.* at ¶ 56.

65 *Id.* at ¶ 57 *et seq.*

V. THE SSPPU IS NOT THE PREFERRED METHOD FOR DETERMINING SEP ROYALTY RATES AND DIFFERENT ROYALTIES DO NOT NECESSARILY CONSTITUTE DISCRIMINATION

In determining the value of an SEP, courts and agencies have rejected the smallest, salable, patent practicing unit ("SSPPU") as the preferred metric for calculating royalties and recognized that the analysis of comparable licenses may best reflect what market participants consider to be a FRAND rate.

In 2020 the DoJ clarified in a supplement to the 2015 IEEE Business Review Letter ("BRL") that the Department's 2015 recommendation to use the SSPPU as the appropriate royalty base reflected a faulty assessment of the then-underdeveloped case law, which "was not well-supported and has not proven accurate."[66] The DoJ issued the supplemental letter out of concern that its recommendation in the earlier BRL was discouraging participation in SDOs and potentially chilling innovation.[67]

Quoting the Federal Circuit's holding in *Exmark Mfg. Co. Inc. v. Briggs & Stratton Power Prod. Grp., LLC*,[68] the DoJ said there are "'a variety of ways' parties might value patented technology."[69] SSPPU is one method, but another equally valid method involves "using the accused [end-product] as a royalty base and apportioning through the royalty rate."[70] Similarly, in *Ericsson, Inc. v. D-Link Sys., Inc.*,[71] the Federal Circuit stated that an appropriately apportioned royalty award could not be designed by starting with the entire market value of a multi-component product because "reliance on the entire market value might mislead the jury."[72] In *Qualcomm*, the Ninth Circuit noted that "no court has held that the SSPPU concept is a *per se* rule for 'reasonable royalty' calculations"; it is, rather, merely a tool to "minimize potential jury confusion[.]"[73]

Similarly, in *Intel Corp. v. Fortress Inv. Grp. LLC*,[74] the DoJ argued antitrust law did not bar the defendant's efforts to aggregate and to monetize its patents.[75] The district court for the Northern District of California agreed with the DoJ and dismissed the complaint because, among other reasons, the plaintiffs failed to show the royalty rates were supracompetitive or that any supracompetitive pricing would have been attributable to the aggregation of patents that are viable substitutes for one another.[76]

In *Nokia v. Daimler*,[77] the District Court of Mannheim rejected the SSPPU because the patent exhaustion doctrine would prevent the SEP holder from participating in the value created at the final stage of the value chain.[78] The court explained that the patent holder is entitled freely to choose the stage in the supply chain at which it will assert its rights.[79] Further, the non-discrimination provision of Article 102(c) TFEU should not be interpreted as requiring equal fees or treatment of licensees insofar as a difference is justified.[80]

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66 Letter from Makan Delrahim, Assistant Att'y Gen., U.S. Dep't of Just., to Sophia A. Muirhead, Gen. Counsel. IEEE (Sep. 10, 2020), available at https://www.justice.gov/atr/page/file/1315291/download.

67 See *id.*

68 879 F.3d 1332, 1348 (Fed. Cir. 2018).

69 DoJ 2020 IEEE BRL at 7.

70 *Exmark Mfg. Co.,* 879 F.3d at 1348.

71 773 F.3d 1201 (Fed. Cir. 2014).

72 *Id.* at 1227.

73 969 F.3d at 998.

74 2020 WL 6390499 (N.D. Cal. July 15, 2020).

75 See Dep't of Just., Statement of Interest of the United States (Mar. 20, 2020) at 14, *Intel Corp. v. Fortress Inv. Grp. LLC*, 2020 WL 6390499 (N.D. Cal. Nov 20, 2019).

76 *Intel Corp.*, 2020 WL 6390499, at *25.

77 Landgericht Mannheim [LG Mannheim] [District Court of Mannheim] Aug. 18, 2020, Case-No. 2 O 34/19 (Ger.).

78 *Id.* at ¶ 172.

79 *Id.* at ¶ 202.

80 *Id.* at ¶ 203.

In *Unwired Planet v. Huawei*,[81] the Supreme Court of the United Kingdom analyzed the interpretation of the non-discrimination element of FRAND.[82] The Court held Unwired Planet had not breached the non-discrimination requirement by offering Huawei less favorable license terms than those to which it had agreed with Samsung after trial. The Court held that FRAND does not require the patent holder to offer the same or similar terms to all similarly situated licensees.[83] Instead, the FRAND obligation is satisfied when the rate is objectively determined based on the value of the portfolio and different rates are attributed to seeking different licenses.[84] Moreover, the court noted there is no general presumption that price discrimination is harmful to the private or public interests involved.[85]

Finally, in *Koninklijke Philips N.V. v Asustek Computer Inc.*,[86] a patent enforcement case, the Court of Appeal of the Hague upheld the validity and essentiality of the plaintiff's patent, rejected the defendant's FRAND defense on the ground that it was not a willing licensee, and entered an injunction against Asustek for its products infringing the patent in suit.[87] Among other things, the Court held Philips's blanket declaration did not infringe Article 101 of the TFEU because, under the European Commission's Guidelines on Horizontal Agreements, blanket declarations are an acceptable way to declare patents are SEPs for the purposes of EU competition law.[88]

These cases show there is increasing agreement among courts that patent owners are not limited to calculating royalties based upon the SSPPU, but instead have the freedom to determine how they will value their IPRs. Additionally, FRAND terms do not require patent owners to offer identical terms to all licensees. Instead, FRAND requires only that patent owners offer the same terms for the same license.

VI. THE LEVEL AT WHICH SEPS MAY BE LICENSED

While some have argued a FRAND commitment restricts an SEP holder's freedom to choose the level at which to license its patent,[89] no U.S. court has adopted this position. In *Qualcomm*, the Ninth Circuit acknowledged not only that an SEP holder could choose the level at which to license but that it only made commercial sense for Qualcomm to base its licenses in such a way as to avoid patent exhaustion.[90] The court also noted there is generally no duty to deal with competitors and the limited exception in *Aspen Skiing*[91] was not applicable to Qualcomm's practice of licensing only to end product manufacturers.[92] The same approach was followed by the district court in *Continental Auto Systems Inc. v. Avanci, LLC*,[93] when it rejected the claim that the practice of licensing SEPs to car manufacturers, rather than to component manufacturers, violated antitrust laws.[94]

This question also arose in Europe pursuant to the *Huawei* decision. In that case the ECJ refers to SEPs subject to FRAND commitments as creating "'particular circumstances'" that justify distinguishing "cases brought under the (otherwise restrictive) EU competition case-law on essential facilities."[95] These "particular circumstances" are the creation of legitimate expectations, which the ECJ held established expectations for the terms of licenses but did not create a duty to license at every level.[96]

81 *Unwired Planet v Huawei* [2020] UKSC 37 (appeal taken from Eng.).

82 *Id.* at ¶¶ 106 *et seq*.

83 *Id.* at ¶ 121.

84 *Id.* at ¶ 192, 198.

85 *Id.* at ¶ 126.

86 Hof's–Gravenhage, May 7, 2019, ECLI:NL:GHDHA:2019:1065 (*Koninklijke Philips N.V./Asustek Computers Inc.*) (Neth.).

87 *Id.* at ¶¶ 4.186, 5.1–11.

88 *Id.* at ¶ 4.164.

89 See, e.g. Herbert Hovenkamp, *FRAND and Antitrust*, 105 Cornell L. Rev. 1683, 1689 (2020).

90 969 F.3d at 984.

91 *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585, 601 (1985) ("The absence of a duty to transact business with another firm is . . . the counterpart of the independent businessman's cherished right to select his customers and his associates. The high value that we have placed on the right to refuse to deal with other firms does not mean that the right is unqualified.").

92 See *Qualcomm*, 969 F.3d at 993-95.

93 2019 WL 6735604 (N.D. Cal. Dec. 11, 2019).

94 *Id.* at *3.

95 See Jean-Sébastien Borghetti, Igor Nikolic & Nicolas Petit, *FRAND Licensing Levels under EU Law*, Eur. Competition J 1, 6 (2021) (quoting Judgment of 16 July 2015, *Huawei v. ZTE*, C–170/13, ECLI:EU:C:2015:477, ¶¶ 46–48).

96 *Id.* at 8–9 (citing *Huawei v. ZTE*, ¶ 54).

VII. POLICY IMPLICATIONS AND CONCLUSIONS

A strong patent law is crucial not only for market incumbents but even more for would-be entrants as it "tends to enable smaller, less integrated, more disruptive innovators."[97] The possibility of obtaining injunctive relief against infringement of an SEP is crucial to encourage innovation and entry.

At the same time, policies that encourage innovators to participate in the standard development process result in more competition to shape the standard, making it more likely that the best technologies will be adopted. Less participation could result in suboptimal standards and less implementation in the marketplace, which would tend significantly to diminish interconnectivity and interoperability. Therefore, as a general principle, policies that protect IPRs and promote participation in the standard development process have the potential to promote innovation and consumer welfare.

There is no benefit to be had from imposing antitrust liability upon a patentee merely for seeking to enforce its property right. Indeed, to hold that seeking an injunction may be anticompetitive negatively affects an important right that promotes dynamic competition by ensuring there are strong incentives to invest in innovative technologies.[98] More important still, imposing antitrust liability for enforcing an SEP frustrates the constitutional purpose of conferring patent rights, turning a property rule into a liability rule and creating a de facto compulsory licensing scheme.[99]

Competition and consumers both benefit when inventors have complete incentives to exploit their patent rights. This requires an assurance to inventors that they need not subsidize their competitors' business models.[100]

Finally, antitrust laws protect against conduct that harms consumers[101] and should not be used to protect particular firms or competitors from lawful competition. Patent and antitrust laws are aligned in their mutual aim to foster innovation that creates dynamic competition.[102] They accomplish this objective by ensuring that innovators have adequate incentives to invest in, and to monetize, their technological advances.

97 Allen Grunes, *Of Antitrust and Patents: the Quiet Return of the Status Quo at the DOJ's Antitrust Division*, ProMarket (Apr. 26, 2021), https://promarket.org/2021/04/26/antitrust-patents-status-quo-doj-makan-delrahim/, drawing upon Jonathan Barnett, Innovators, Firms, and Markets: The Organizational Logic of Intellectual Property (Oxford, 2021).

98 See, e.g. Ginsburg, et al, *supra* note 2, at 4.

99 See *id.* at 2. The patent laws are rooted in the Constitution, which establishes a patent framework bestowing inventors with "exclusive Right[s]" over their "Writings and Discoveries," in order "[t]o promote the Progress of Science and useful Arts." U.S. Const. art. I, § 8, cl. 8.

100 See "New Madison" Approach, *supra* note 9, at 16.

101 See *United States v. Microsoft Corp.*, 253 F.3d 34, 58 (D.C. Cir. 2001) (*en banc*) (*per curiam*).

102 See DoJ FTC Antitrust Guidelines for the Licensing of Intellectual Property at § 1.0.

WHY THE NEW ADMINISTRATION SHOULD BURY THE NEW MADISON APPROACH

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1 Distinguished Professor, Rutgers Law School; Intellectual Property Fellow, Innovators Network Foundation. Copyright © 2021 Michael A. Carrier. Parts of this essay have been adapted from previous work.

I. INTRODUCTION

The "New Madison" approach sounds so promising. Old but new. Updating the classics for the modern era. What could be bad?

In a word: everything. The intersection of patent and antitrust law has a long pedigree. For decades, antitrust's role in patent-based activity has been acknowledged. Patent licenses are subject to antitrust scrutiny. "Pay for delay" settlements are not entitled to antitrust immunity. And activity in the context of standard setting organizations ("SSOs") could conceivably violate antitrust law.

That history has recently come under attack. Between 2017 and 2020, the head of the Department of Justice's Antitrust Division, Makan Delrahim, introduced a radical framework — the "New Madison" approach — that extricated patent-based conduct from antitrust scrutiny. Such a gambit diverged from the longstanding bipartisan approach that had recognized antitrust's role in policing standards-based conduct.

This essay introduces standards and then addresses five tenets of Delrahim's approach. For each, it presents the argument and then discusses its flaws.

II. STANDARDS

A standard is a common platform that allows products to work together. Standards are ubiquitous in our economy. They allow us to speak to and understand one another. They let consumers access credit card and ATM machines. They underlie phone and wireless networks. They permit computer users to share videos. They appear in countless other settings.

Standards are crucial to our economy. They are especially needed in *network effects markets*, in which users benefit from an increase in the number of other users in the system. A social network or e-mail system, for example, becomes more valuable as more users connect to it. Networks also feature positive feedback. The more popular a computer operating system becomes, the more applications will be written for it.

Even though standards are vital, antitrust traditionally viewed the process of setting standards with suspicion. SSOs tend to be composed of industry rivals discussing sensitive information such as price. As Adam Smith worried: "People of the same trade seldom meet together even for merriment or diversion, but the conversation ends in a conspiracy against the public, or in some contrivance to raise prices."[2]

Despite antitrust's concern, competitors have good reason to engage in such discussions. Before the selection of a standard, an SSO often can choose from an array of alternative technologies.[3] After the SSO chooses a standard, however, the owner of the selected technology may gain significant power. If the technology is patented, the owner (in what is known as "patent holdup") could impose excessive licensing terms that reflect not just the value of the patent but also the significant costs of switching to a new technology. In many cases, the royalties are passed on to consumers, who are forced to pay higher prices.[4]

Nor can SSO members, faced with demands for excessively high royalties, migrate easily to a different technology. After a standard is selected, industry participants begin designing, testing, and producing goods that conform to the standard. That, as former FTC Chair Deborah Platt Majoras explained, is "the whole idea of engaging in standard setting."[5] But these efforts, in learning about a particular technology and investing in equipment and complementary products, typically do not have value if the user switches to an alternative technology.[6] As a result of these costs (as well as the costs of selecting a new standard), the industry will be locked into the chosen standard.

This threat of holdup explains why SSOs have required members to provide certain information or make certain promises before the standard's selection. Some SSOs have mandated that participants disclose patents that could be implicated by the standard. Many have required members to agree to license their IP on fair, reasonable, and nondiscriminatory ("FRAND") terms. Antitrust law traditionally has been suspicious

2 Adam Smith, An Inquiry into the Nature and Causes of the Wealth of the Nations 145 (1776).

3 In certain settings, there may be only one superior technical option.

4 Deborah Platt Majoras, Chair, Fed. Trade Comm'n, *Recognizing the Procompetitive Potential of Royalty Discussions in Standard Setting*, Sept. 23, 2005, at 3., http://www.ftc.gov/speeches/majoras/050923stanford.pdf; Joseph Farrell, John Hayes, Carl Shapiro & Theresa Sullivan, *Standard Setting, Patents, and Hold-Up*, 74 Antitrust L. J. 603, 645 (2007).

5 Majoras, *supra* note 3, at 3.

6 Daniel G. Swanson & William J. Baumol, *Reasonable and Nondiscriminatory (RAND) Royalties, Standards Selection, and Control of Market Power*, 73 Antitrust L. J. 1, 9 (2005); Farrell et al., 74 Antitrust L. J. at 612 n.35.

of such price-related activities, which deters SSO members from sharing information that could prevent holdup. But any information a patent holder provides before the SSO adopts a technology involving its patents promises to be useful. And that is why in the past several decades, the antitrust agencies have challenged various types of patent-related behavior in the standard-setting context.[7]

The anticompetitive harms from patent holdup also have been consistently acknowledged by officials in Republican and Democratic administrations. The unanimously adopted 2007 joint report of the Department of Justice and Federal Trade Commission explained the difference between a patentee's power *ex ante* (when "multiple technologies may compete to be incorporated into the standard") and *ex post* (when "the chosen technology may lack effective substitutes precisely because the SSO chose it as the standard"), with this disparity allowing the patentee to "extract higher royalties or other licensing terms that reflect the absence of competitive alternatives."[8] The FTC also unanimously endorsed a 2011 Report that highlighted how "an entire industry" could be "susceptible" to the "particularly acute" concern of holdup, which can result in "higher prices" and "discourage standard setting activities and collaboration, which can delay innovation."[9]

In a radical reversal, Makan Delrahim cast aside this bipartisan treatment. His approach consisted of five pillars, based on patents' (1) absolute right to exclude and (2) automatic right to injunctive relief, together with (3) an emphasis on "holdout" rather than holdup, (4) skepticism about the need for antitrust, and (5) a restricted conception of innovation.

III. NEW MADISON APPROACH

The first pillar of Delrahim's approach centered on the "core of what it means to hold an IP right — namely, the right to exclude."[10] Patents are "a form of property, and the right to exclude is one of the most fundamental bargaining rights a property owner possesses."[11] Patent rights "function best if an owner retains a right to exclude," and "[d]epriving a patent holder of this right would skew the bargain away from the free-market incentive scheme the Constitution and Congress have established."[12]

Delrahim turned for support to the Constitution's text, which provides that "Congress shall have the Power . . . to promote the progress of science and useful arts, by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries."[13] He asserted that "the authors of the Constitution not only used the word 'right,' but . . . also preceded it with the equally important word 'exclusive.'"[14] And he stated that patent law "offer[s] incentives for holders of valid patents to seek the greatest rewards possible for their inventions."[15] In underscoring the importance of absolute exclusionary rights and ignoring the *utilitarian* justification that links these rights with societal welfare, Delrahim's position implicated a *natural rights* justification for property.

7 See e.g. *FTC v. Qualcomm Inc.,* Case 5:17-cv-00220-LHK, May 21, 2019, https://www.ftc.gov/system/files/documents/cases/qualcomm_findings_of_fact_and_conclusions_of_law.pdf, *judgment in favor of FTC reversed by* 969 F.3d 974 (9th Cir. 2020); FTC, *Analysis of Proposed Consent Order To Aid Public Comment, In the Matter of Motorola Mobility LLC and Google Inc.*, File No. 121-0120, Jan. 3, 2013, at 6, https://www.ftc.gov/sites/default/files/documents/cases/2013/01/130103googlemotorolaanalysis.pdf; FTC, *FTC Order Restores Competition in U.S. Market for Equipment Used to Recharge Vehicle Air Conditioning Systems*, Nov. 26, 2012, https://www.ftc.gov/news-events/press-releases/2012/11/ftc-order-restores-competition-us-market-equipment-used-recharge; FTC, *FTC Challenges Patent Holders' Refusal to Meet Commitment to License Patents Covering "Ethernet" Standard Used in Virtually All Personal Computers in U.S.*, Jan. 23, 2008, https://www.ftc.gov/news-events/press-releases/2008/01/ftc-challenges-patent-holders-refusal-meet-commitment-license; *In re* Rambus, No. 9302, 2006 WL 2330117 (Aug. 2, 2006); *In re* Union Oil Co. of California, No. 9305 (F.T.C. Nov. 25, 2003); *In re* Dell, 121 F.T.C. 616 (1996).

8 U.S. Dept. of Justice & FTC, Antitrust Enforcement and Intellectual Property Rights: Promoting Innovation and Competition 35-36 (2007); see also *id.* at 37-38 (quoting witness who stated that holdup results in "either [not] mak[ing] the standard you acceded to [or] blackmail").

9 FTC, The Evolving IP Marketplace: Aligning Patent Notice and Remedies With Competition 234 (2011). Similarly, former FTC Commissioner McSweeny lamented the DOJ's "unlearn[ing] lessons of 15 years of scholarship and bipartisan study" and "question[ed] longstanding support for combating holdup based on vague concerns about overdeterrence." Commissioner Terrell McSweeny, FTC, *Holding the Line on Patent Holdup: Why Antitrust Enforcement Matters*, at 1, Mar. 21, 2018. And former FTC Chairman Joe Simons stated that "holdup raises potential antitrust issues" and that there is "no special privilege or exemption under the antitrust laws for fraud, deception, or breaches of contract merely because those acts occurred in a standard-setting process." *Prepared Remarks of Chairman Joseph Simons*, Georgetown Law Global Antitrust Enforcement Symposium, at 6, Sept. 25, 2018.

10 Makan Delrahim, *The "New Madison" Approach to Antitrust and Intellectual Property Law*, University of Pennsylvania Law School, Mar. 16, 2018 [*Penn speech*].

11 *Assistant Attorney General Makan Delrahim Delivers Remarks at the USC Gould School of Law's Center for Transnational Law and Business Conference*, Nov. 10, 2017 [*USC speech*].

12 Makan Delrahim, *Protecting Free-Market Patent Bargaining, Competition, and the Right to Exclude*, Ottawa, Canada, Oct. 10, 2018 [*Ottawa speech*].

13 *Assistant Attorney General Makan Delrahim Delivers Remarks at the 19th Annual Berkeley-Stanford Advanced Patent Law Institute*, Palo Alto, CA, Dec. 7, 2018 [*Palo Alto speech*].

14 *Id.*

15 *Assistant Attorney General Makan Delrahim Delivers Remarks at IAM's Patent Licensing Conference in San Francisco*, San Francisco, CA, Dec. 7, 2018 [*San Francisco speech*].

Delrahim's second pillar centered on injunctions. A patentee's ability to obtain an injunction against infringement "gives it necessary leverage in a free market negotiation."[16] The "right to seek an injunction" is "enshrined in the Constitution as a foundation of free market negotiations for patented inventions."[17] Understanding "patent rights, once conferred, as a form of property right helps frame the current debate over injunctions, and demonstrates how far we've strayed off course."[18] In other words, "a violation by a patent holder of an SSO rule that restricts a patent-holder's right to seek injunctive relief should be appropriately the subject of a contract or fraud action and rarely if ever should be an antitrust violation."[19]

Third, Delrahim claimed that the notion of patent holdup is overblown. He stated that "in recent years, competition policy has focused too heavily on the so-called unilateral hold-up problem, often ignoring what fuels dynamic innovation and efficiency."[20] In fact, he lamented that "[e]very incremental shift in bargaining leverage toward implementers of new technologies acting in concert can undermine incentives to innovate."[21]

Delrahim worried that "[t]oo often lost in the debate over the hold-up problem is recognition of a more serious risk: the hold-out problem."[22] He warned that "implementers threaten to under-invest in the implementation of a standard . . . until their royalty demands are met."[23] This problem is "a more serious impediment to innovation" because (in contrast to implementers, some of whose investments "occur after royalty rates for new technology could have been determined"), innovators "make an investment before they know whether that investment will ever pay off."[24]

Fourth, Delrahim disclaimed a role for antitrust. He stated that "patent hold-up is not an antitrust problem"[25] and that "a unilateral refusal to license a valid patent should be per se legal."[26] A patent holder "cannot violate the antitrust laws by properly exercising the rights patents confer, such as seeking an injunction or refusing to license such a patent."[27] Nor should a "unilateral violation of a FRAND commitment . . . give rise to a cause of action under Section 2 of the Sherman Act, even if a patent holder is alleged to have misled or deceived a standard-setting organization with respect to its licensing intentions."[28] The reason is that "[a]pplying Section 2 to this sort of unilateral conduct would contravene the underlying policies of the antitrust laws."[29]

The fact that "a patent holder can derive higher licensing fees through hold-up simply reflects basic commercial reality," and "[c]ondemning this practice . . . as an antitrust violation, while ignoring equal incentives of implementers to 'hold out,' risks creating 'false positive' errors of over-enforcement that would discourage valuable innovation."[30] A monopolization cause of action "would skew the patent licensing bargain away from the bargaining outcome that a free market dictates."[31] It "would be a mistake to infer that a contractual FRAND commitment somehow establishes a duty under the antitrust laws to license on terms demanded by a licensee or that violations of an ambiguous FRAND term become an antitrust violation."[32] And even deception to an SSO "is not the sort of market-power-enhancing conduct that Section 2 should reach because

16 *Ottawa speech*, *supra* note 12.

17 *Id.*

18 *Penn speech*, *supra* note 10.

19 *USC speech*, *supra* note 11.

20 *Id.*

21 *Id.*

22 *USC speech*, *supra* note 11.

23 *Id.*

24 *Id.*

25 *Penn speech*, *supra* note 10.

26 *USC speech*, *supra* note 11; see also *Penn speech*, *supra* note 10.

27 *USC speech*, *supra* note 11.

28 *San Francisco speech*, *supra* note 15.

29 *Id.*

30 *Penn speech*, *supra* note 10.

31 *San Francisco speech*, *supra* note 15.

32 *Id.*

a cause of action for treble damages would impede the policies underlying the Sherman Act."[33]

Fifth, Delrahim minimized antitrust's role based on his conception of innovation. He stated that "[a]n antitrust duty to license on FRAND terms would . . . contravene the patent laws' policy of promoting innovation by offering incentives for holders of valid patents to seek the greatest rewards possible for their inventions."[34] Similarly, he "worr[ied]" that "enforcers have strayed too far in the direction of accommodating the concerns of technology implementers who participate in standard setting bodies, and perhaps risk undermining incentives for IP creators, who are entitled to an appropriate reward for developing breakthrough technologies."[35] And he lamented that "misapplication of the antitrust laws threatens to disrupt the free-market bargain, which could undermine the process of dynamic innovation."[36]

Delrahim additionally worried that "in recent years, competition policy has focused too heavily" on holdup, "often ignoring what fuels dynamic innovation and efficiency."[37] He viewed "[e]very incremental shift in bargaining leverage toward implementers of new technologies acting in concert" as potentially "undermin[ing] incentives to innovate."[38] And as a result, he "view[ed] policy proposals with a one-sided focus on the hold-up issue with great skepticism because they can pose a serious threat to the innovative process."[39]

IV. NEW MADISON CRITIQUE

While at DOJ, Delrahim offered an aggressive reformulation of the relationship between patent and antitrust law. But that radical rethinking was matched by a lack of support. In particular, each of his five pillars is hobbled by flaws.

First, the right to exclude is not sacrosanct. As I have shown elsewhere,[40] property owners do not have absolute rights to exclude. There are at least 50 doctrines (such as adverse possession, easements, eminent domain, nuisance, and zoning) that limit property owners' rights.[41] Just to pick one example, landowners cannot exclude others from entering their land to save lives or property or to avoid some other serious harm.

Delrahim's discussion of exclusive rights granted to patentees as a type of natural property rights also ignores the uncontroversial utilitarian framework for the patent grant. The Supreme Court has long made clear the primacy of the utilitarian justification. Half a century ago, for example, the Court in *Graham v. John Deere* explained that "[t]he patent monopoly was not designed to secure to the inventor his natural right in his discoveries," but instead was "a reward, an inducement, to bring forth new knowledge" and was to be granted only to "inventions and discoveries which furthered human knowledge."[42]

Exclusive rights exist not to bestow on patentees a moral right to a reward but to promote the best interests of society. That is why patents, like other forms of intellectual property, are subject to doctrines (like novelty, nonobviousness, the written description and enablement disclosure requirements, and a limited 20-year term) that ensure that protections for market competition balance patents' incentive effects. Relatedly, it tells only half the story to focus on the incentive relevant to the initial invention while ignoring follow-on innovation, which is just as important and may be significantly undermined when patent owners abuse their FRAND obligations.

33 *Id.*; see also *Penn speech*, *supra* note 10: ("I worry that courts and enforcers have overly indulged theories of patent holdup as a supposed competition problem, while losing sight of the basic policies of antitrust law.").

34 *San Francisco speech*, *supra* note 15.

35 *USC speech*, *supra* note 11.

36 *Id.*

37 *Id.*

38 *Id.*

39 *Id.*

40 Michael A. Carrier, *Cabining Intellectual Property Through a Property Paradigm*, 54 Duke L. J. 1 (2004).

41 *Id.*

42 383 U.S. 1, 9 (1966).

A focus on exclusionary natural rights also is inconsistent with Supreme Court rulings. In upholding the Patent Office's *inter partes review* process for administratively reconsidering patents, the Court made clear that "[p]atents convey only a specific form of property right — a public franchise."[43] In *FTC v. Actavis*, the Court explained that antitrust has a role to play within the scope of the patent, as it would be "incongruous" to "determine antitrust legality by measuring [a] settlement's anticompetitive effects solely against patent law policy, rather than by measuring them against procompetitive antirust policies as well."[44] And in *Lear v. Adkins*, the Court eliminated the doctrine of licensee estoppel, finding that a licensee could challenge patent validity even after licensing the patent.[45]

Second, the position that patent infringement automatically leads to an injunction is, for good reason, no longer the law. More than a decade ago, the Supreme Court ruled unequivocally that courts must decide whether to grant injunctions "consistent with traditional principles of equity, in patent disputes no less than in other cases."[46] To similar effect, the patent statute provides that courts "may grant injunctions in accordance with the principles of equity to prevent the violation of any right secured by patent, on such terms as the court deems reasonable."[47] In fact, the Federal Circuit, not historically associated with insufficient protection of patent rights, has made clear that the framework the Supreme Court set forth in *eBay v. MercExchange* "provides ample strength and flexibility for addressing the unique aspect of FRAND committed patents and industry standards in general."[48] Because there could be thousands of patents in a product today, it is not appropriate to uniformly apply standards from the 18th century, when there were so few patents in a product that "if you put technology in a bag and shook it, it would make some noise."[49]

In his rush to criticize every position that did not blindly accept an unadorned right to an injunction in every case, Delrahim inaccurately portrayed reasonable statements. For example, Delrahim withdrew from a 2013 statement[50] jointly issued by the DOJ and U.S. Patent and Trademark Office ("PTO") that acknowledged that "[i]n some circumstances, the remedy of an injunction or exclusion order may be inconsistent with the public interest" but also recognized that an exclusion order "may still be an appropriate remedy," such as when "the putative licensee is unable or refuses to take" a FRAND license.[51] The statement even found injunctions appropriate for "a constructive refusal to negotiate," which occurs when an implementer "insist[s] on terms clearly outside the bounds of what could reasonably be considered" to be FRAND terms "in an attempt to evade the putative licensee's obligation to fairly compensate the patent holder."[52] The statement was so reasonable that the Federal Circuit relied on it to explain why injunctions are warranted when it overturned a district court that had "applied a *per se* rule that injunctions are unavailable for SEPs" and delineating when "an injunction may be justified."[53]

Third, the holdup problem has been recognized by courts and standard setting organizations themselves as a real problem.[54] As one court stated, patent holdup is not a theoretical concern, but instead "is a substantial problem that [F]RAND is designed to prevent."[55] And a second court rejected the argument that "holdup does not exist in the real world," finding that such an argument "does not trump the evidence . . . that holdup took place in this case."[56]

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43 *Oil States Energy Servs. v. Greene's Energy Group*, 2018 WL 1914662, at *8 (U.S. Apr. 24, 2018); see also *id.* at *6 (patents "involv[e] public rights").

44 570 U.S. 136, 148 (2013).

45 395 U.S. 653, 668-75 (1969).

46 *eBay v. MercExchange*, 547 U.S. 388, 394 (2006).

47 35 U.S.C. § 283.

48 *Apple v. Motorola*, 757 F.3d 1286, 1332 (Fed. Cir. 2015).

49 Robert P. Merges, *As Many As Six Impossible Patents Before Breakfast: Property Rights for Business Concepts and Patent System Reform*, 14 Berkeley Tech. L.J. 577, 585 (1999).

50 DOJ & PTO, *Policy Statement on Remedies for Standard-Essential Patents Subject to Voluntary F/RAND Commitments*, Jan. 8, 2013, https://www.justice.gov/atr/page/file/1118381/download.

51 *Id.*

52 *Id.*

53 *Apple v. Motorola,* 757 F.3d 1286, 1331-32 (Fed. Cir. 2014).

54 For a discussion of the bipartisan recognition of the anticompetitive harms from patent holdup, see *supra* notes 7-8 and accompanying text.

55 *In re* Innovatio IP Ventures, 2013 WL 5593609, at *9 (N.D. Ill. Oct. 3, 2013).

56 *Microsoft v. Motorola*, 2013 WL 5373179, at *7 (W.D. Wash. Sept. 24, 2013).

Similarly, former FTC Commissioner Terrell McSweeny pointed to "ample evidence" of patent holdup, including FTC enforcement actions, panelists' acknowledgement of the problem, "strong anecdotal support," and courts' conclusions that patentees "demand[ed] far more than that to which they were entitled," with courts in two cases awarding only 1/150 and 1/500 of the royalties sought.[57] The fact that SSOs — those with the most knowledge of the issues — adopt FRAND policies is itself telling proof that holdup is a problem. Otherwise, it is unclear why they would adopt policies to prevent holdup.[58]

Finally, *holdup* presents a more serious antitrust concern than *holdout*. Implementers that suffer holdup because of sunk investments in a technology are vulnerable to paying supra-competitive royalties based on the entire value of the product, as opposed to the value of the patented technology.[59] In contrast, the risks faced by patent holders who complain about licensees "holding out" are consistent with the situation facing "anyone . . . that makes a speculative investment, whether in technology, real estate, corporate securities, or any other industry."[60]

To be sure, coordinated action between licensees could implicate antitrust law, but these concerns are not presented in licensing disputes at the core of holdout. Both licensors and licensees can engage in holdout, merely by "refus[ing] to perform in good faith or negotiate reasonably ."[61] In contrast, the holdup problem, and accompanying lock-in binding implementers, exist on only one side of the exchange.

Fourth, patentees that obtain or maintain monopoly power *as a result of* breaching a FRAND commitment present a straightforward monopolization case.[62] FRAND breaches could satisfy the elements of monopolization, in particular, the requirement that a plaintiff demonstrate exclusionary conduct by showing an exclusion of competitors (the exclusion of rival competitive technologies not chosen by the SSO) that results in competitive injury (price increases and innovation harms from the breach) and acquisition or maintenance of monopoly power (obtained through the breach). In addition, antitrust liability does not take aim only at a patentee's right to exclude but instead is on the table because of the *voluntary commitment* to license on FRAND terms.

Moreover, the conduct here is not immune from the application of antitrust law. Parties filing petitions with government agencies often can claim antitrust immunity based on the *Noerr-Pennington* doctrine, as "[t]hose who petition [the] government for redress are generally immune from antitrust liability."[63] But the "absolutist position" that the *Noerr* doctrine "immunizes every concerted effort that is genuinely intended to influence governmental action" would allow parties to violate the antitrust laws, for example by being "free to enter into horizontal price agreements."[64] A breach of a FRAND promise is "distinguish[able] from *Noerr* and its progeny" because it is "the type of commercial activity that has traditionally had its validity determined by the antitrust laws themselves."[65]

Fifth, a problem with linking innovation to only the initial patentee's contribution is that it ignores the advances contributed by implementers that incorporate the patented invention into their products. As industry organizations have explained, "the assumption that only the upstream inventions that are contributed to standard-setting activities merit protection is . . . incorrect."[66] The reason is that "[a] product can contain a multitude of technological innovations separate and apart from a given SEP."[67] For example, "different wireless access points may implement the same standard, but differ significantly relative to other features, such as throughput, antenna design, configuration and management, and interference management features that go beyond the standard."[68]

57 Commissioner McSweeny, *supra* note 9, at 4.

58 Timothy J. Muris, Bipartisan Patent Reform and Competition Policy, American Enterprise Institute Report 9 (2017).

59 A. Douglas Melamed & Carl Shapiro, *How Antitrust Law Can Make FRAND Commitments More Effective*, 127 Yale L.J. 2110, 2119 (2018).

60 *Id.*; see also *id.* ("Requiring that buyers guarantee an adequate return to those who make speculative investments would be antithetical to the operation of the market system and would badly distort investment incentives.").

61 Muris, *supra* note 58, at 9.

62 E.g. *Broadcom v. Qualcomm*, 501 F.3d 297, 314 (3d Cir. 2007); *Microsoft Mobile v. Interdigital*, 2016 WL 1464545, at *2 (D. Del. Apr. 13, 2016). Relatedly, seeking an injunction against a licensee willing to pay a FRAND rate — such as where LSI sought an exclusion order in the U.S. International Trade Commission before proposing a FRAND license to Realtek, *Realtek Semiconductor v. LSI*, 946 F. Supp. 2d 998, 1007-08 (N.D. Cal. 2013) — can constitute monopolization.

63 *Prof'l Real Estate Investors, Inc. v. Columbia Pictures Indus.*, 508 U.S. 49, 56 (1993).

64 *Allied Tube & Conduit Corp. v. Indian Head, Inc.*, 486 U.S. 492, 503 (1988).

65 *Id.* at 505; see also *FTC v. Superior Court Trial Lawyers Ass'n*, 493 U.S. 411, 424-25 (1990).

66 ACT / The App Ass'n et al., Letter to Assistant Attorney General Makan Delrahim, at 23, May 30, 2018, http://actonline.org/wp-content/uploads/05302018_Multi-Assn_DOJ-SEP-White-Paper_FINAL.pdf.

67 *Id.*

68 *Id.*

One prominent example of this observation is the smartphone, which includes "an advanced microprocessor, a sophisticated graphics processor, flash memory, [dynamic random-access memory] DRAM, location awareness technology, touch technology, voice recognition, high-definition still and video cameras, video and music replay, power management technology, and an advanced operating system."[69] Each of these technologies "provide[s] benefits to end users that are independent of the cellular technology that enables telephony connections" and that could be patented.[70]

In fact, "[t]he patent laws are intended to limit, not maximize, the royalties to which patent holders are entitled."[71] In particular, the patent statute limits a patentee's infringement remedies to compensatory damages not less than a "reasonable royalty" and enhanced damages up to a specified maximum.[72] Many cases have limited the amounts a patentee can recover,[73] with William Lee and Doug Melamed pointing out that "courts generally show concern about *over*compensating standard-essential patent holders."[74]

In short, each of the pillars on which Delrahim relies is hobbled by significant flaws.

V. CONCLUSION

The New Madison approach was not faithful to a longstanding bipartisan recognition of antitrust's importance for patent-related conduct. Relegating Makan Delrahim's outside-the-mainstream principles to the dustbin of history would do much to foster innovation and a reasonable approach to patents, antitrust, and standards.

69 *Id.* at 24.

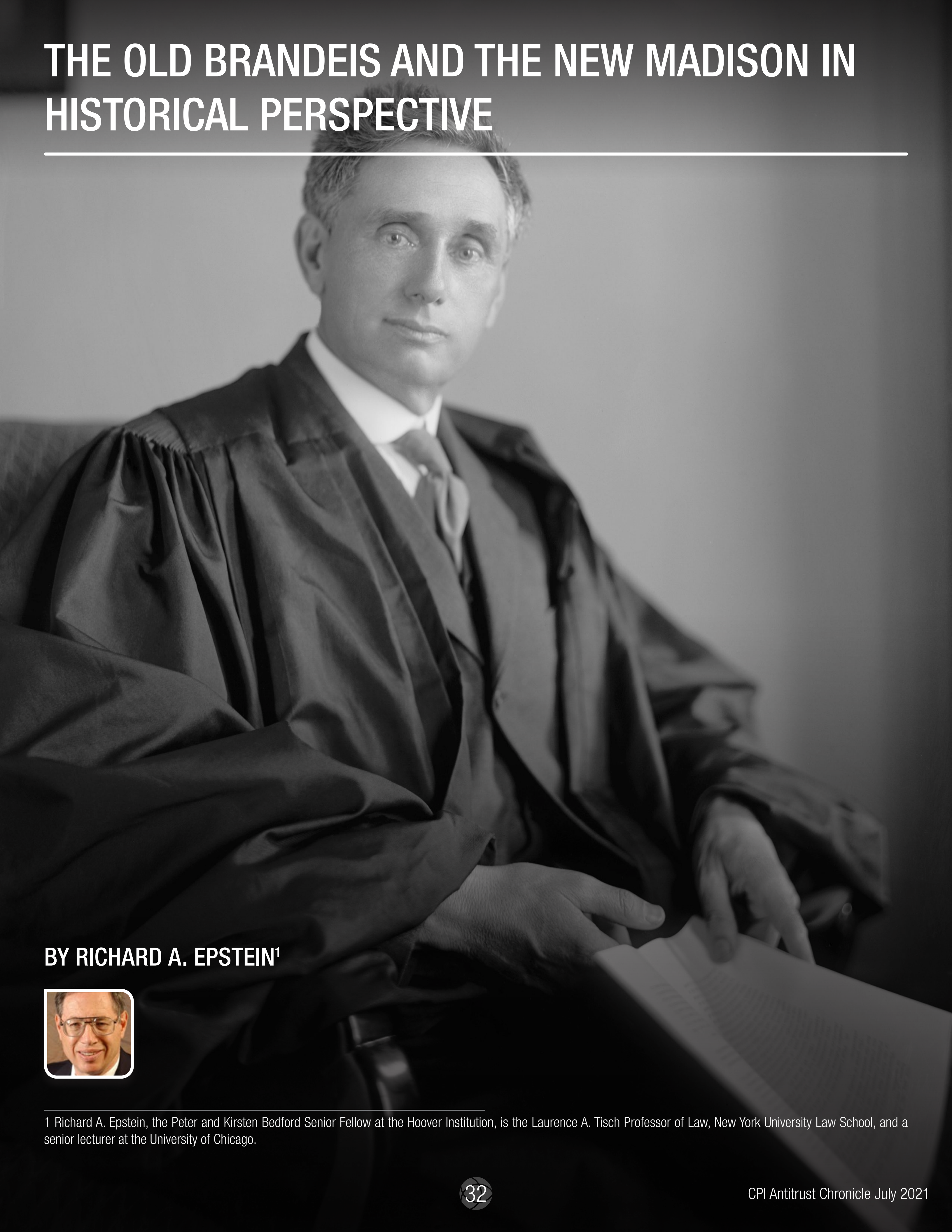
70 *Id.*

71 Melamed & Shapiro, *supra* note 58, at 2121.

72 See 35 U.S.C. § 284 (2012).

73 See e.g. *Microsoft Corp. v. Motorola, Inc.*, 795 F.3d 1024, 1031 (9th Cir. 2015); *Ericsson, Inc. v. D-Link Sys.*, Inc., 773 F.3d 1201, 1234 (Fed. Cir. 2014); *VirnetX, Inc. v. Cisco Sys., Inc.,* 767 F.3d 1308, 1326 (Fed. Cir. 2014); *In re* Innovatio IP Ventures, LLC Patent Litig., 2013 WL 5593609 (N.D. Ill. Oct. 3, 2013); Lucent Techs., Inc. v. Gateway, Inc., 580 F.3d 1301, 1324 (Fed. Cir. 2009).

74 William F. Lee & A. Douglas Melamed, *Breaking the Vicious Cycle of Patent Damages*, 101 Cornell L. Rev. 385, 430 (2016).



THE OLD BRANDEIS AND THE NEW MADISON IN HISTORICAL PERSPECTIVE

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I. INTRODUCTION

One striking feature about modern intellectual debates is how much emotional impact can be packed into a single word — big, as in bad. Today, a debate is raging in the overlapping areas of antitrust and patents. Their combination holds the keys to innovation, which everyone on both sides of the political spectrum seem, at least as at some abstract level, to support. But the means to that end, and its relationship to other social ends, divide the academic and practical worlds into two warring camps. On the one side stands the progressive tradition that attacks bigness. It most closely associated with the work of Louis Brandeis, both before and after he sat on the Supreme Court. Its modern exponents include two individuals, both holding prominent positions in the Biden Administration, who represent a powerful one-two punch. The first is Tim Wu, a Columbia Law professor and the author of *The Curse of Bigness: Antitrust in the New Gilded Age*,[2] about which I have expressed[3] my deep reservations. The second is Lina Khan, a newly minted Columbia Law professor, recently installed as Chair of the Federal Trade Commission, and the author of a highly cited law review student note,[4] *Amazon's Antitrust Paradox*, which attacks the firm for its big size, even as it provides reliable services at low prices. I have also criticized[5] her work for its failure to grasp traditional antitrust principles.

On the other side of the line, bigness is not so big. One of the intellectual leaders of the anti-big movement is former Assistant Attorney General for antitrust in the Trump Administration, Makan Delrahim. He has described,[6] with much immediate impact, what he calls the "New Madison"[7] approach towards antitrust and patent law. His views align squarely with the classical liberal tradition, with which I am closely associated. It flies under the consumer welfare standard, which insists that the sole function of antitrust law is to maximize the sum of consumer and producer surplus, not just the former. Champions of this approach include Robert Bork in *The Antitrust Paradox*,[8] and Richard Posner, who had long written[9] on the regulation of natural monopolies. It is no mystery on which side of this line my antitrust views are.

The consumer welfare view does not deny that there are other relevant issues — e.g. inequality and wealth distribution — but it does insist that different tools should be used to analyze these quite distinctive questions. Such a separation of topics is common in classical liberal thought for the simple reason no one policy instrument can adequately address two (or more) independent issues, which can converge or diverge in any given case. If the former, focusing on either will get you to the right place. If they oppose, someone has to decide which prevails and why. Hence on this view, in a first best world, taxation and welfare policy should address the inequality question; antitrust policy should seek to counter act behaviors that tend to reduce overall social output, whenever and however they occur. Patent law, meanwhile, encompasses the basic elements of this regulated area: patent-eligible subject matter as against those that fall into the public domain; allowable licensing agreements, which overlaps with antitrust principles; the nature of remedies, be them damages or injunctions or both; and the defenses available in cases of patent infringement. The fundamental empirical assumption under antitrust law is to protect competitive markets but to subject monopoly firms to regulation or break-up, at least if the transaction costs of these remedies are not too high. Such regulation could include structural remedies – breaking up the firm — or, when breakup is either impossible or too costly, conduct remedies — like forbidding tie-in or exclusive dealing provisions. Where patent law overlaps with antitrust is on the contested question of the nature of a patent: whether the exclusive right to sell should be regarded as tantamount to the creation of a permitted monopoly under the antitrust laws.

2 Tim Wu, The Curse of Bigness : Antitrust in the New Gilded Age.

3 Epstein, 'The Curse of Bigness' Review: Revisiting the Gilded Age, Wall Street Journal, December 2, 2018, available at https://www.wsj.com/articles/the-curse-of-bigness-review-revisiting-the-gilded-age-1543786330.

4 Lina M. Khan, Amazon's Antitrust Paradox, 126 Yale L.J. (2016), available at https://www.yalelawjournal.org/note/amazons-antitrust-paradox.

5 Epstein, *The Bezos Busters*, Monday, September 17, 2018, available at https://www.hoover.org/research/bezos-busters.

6 Delrahim, *Broke. . . but Not No More: Opening Remarks--Innovation Policy and the Role of Standards, IP, and Antitrust*, Washington, DC,, September 10, 2020, available at https://www.justice.gov/opa/speech/assistant-attorney-general-makan-delrahim-delivers-remarks-leadership-virtual-series.

7 Department of Justice, *New Heights for the New Madison Approach*, available at https://www.justice.gov/atr/division-operations/antitrust-division-update-2020/new-heights-new-madison-approach.

8 Bork, Robert H. *The Antitrust Paradox: A Policy at War with Itself*. New York: Basic Books, 1978.

9 Posner, Richard A., "Natural Monopoly and Its Regulation," 21 Stanford Law Review 548 (1968)., available at https://chicagounbound.uchicago.edu/journal_articles/1862/.

II. BRANDEIS, FIRST

The history of these two battling perspectives is worth expounding. The Brandeis position, which emerged in the two decades after the passage of the Sherman Antitrust Act[10] of 1890, did not see patents as a way to aid innovation and did not see antitrust law as a way to deal with efficient market structures and behaviors. Rather, throughout the early progressives were motivated by a pervasive fear that large combinations of wealth were in themselves the source of major social dislocation. In that sense, they were out of sync with the initial burst of judicial activity on both subjects, which tended to be patent protective on the one side, and worried about monopoly power, not size, on the other. The issues were uppermost throughout government, academic and business circles, as part of a comprehensive response to the massive industrialization of the post-Civil War period.

The theme of this movement is not bigness, but contracts in restraint of trade. The roots of this movement date back to 1711 in *Mitchel v. Reynolds*,[11] when an employer sought to limit the freedom of former employer to ply his own trade after the employment contract had been terminated. The two parties may be able to negotiate an optimal deal for themselves, but the deal's externality — the loss of another competitor — reduces consumer choice. Yet at the same time, the absence of some measure of protection renders the employer less likely to share trade secrets and other information with the employee, so that the business operates at less than ideal efficiency. The case is tailor-made for the rule of reason, which allows for some but not all potential restrictions. And the usual synthesis of "one-year, same location, same line of business" has endured just long enough to make it look like a sensible accommodation.

The hard question is whether that formula or approach can work when the size and scale of the business enterprises both in the United States and abroad have expanded greatly in the decades after the Civil War. The Brandeisian world view answered that question emphatically in the negative, and in so doing it captured the massive social unease with the new economic order. In his book,[12] *Other People's Money*, Brandeis invoked the powerful image of "the curse of bigness," which cast suspicion on the key "robber barons" of the age, based on their size alone, regardless of their behavior in any particular market or class of transactions. That overall suspicion made it unnecessary in this world view to offer any analysis of how this conduct could influence the quantity of goods and services sold, or the prices, terms and conditions on which they were sold.

Brandeis' fear of concentrated political power in the hands of small elites swept aside any mundane concerns about price, terms and quantity of exchange. In this struggle, antitrust laws should be invoked to cut these large firms down to size, regardless of their performance in the any real world market. At the same time, smaller aggregations of farmers and workers (later joined by renters and consumers) had to enjoy protection for collective action among potential competitors that would expand their own position in the market — so that, in *their* case, size was not all that mattered, and its relative expansion was justified based on myriad factors. This schizophrenic attitude was quickly enacted into law with Section 6 and Section 7 of the Clayton Act. Section 7 expanded the reach of the antitrust law against firms by allowing the federal government to challenge any mergers whose effects "may be substantially to lessen competition, or to tend to create a monopoly," even if they did not meet the more demanding standard under Sections 1 and 2 of the Sherman Act. At the same time, the farmers and the labor unions had a field day under Section 7, which exempted their ordinary activities from the Sherman Act with these stirring words: "The labor of a human being is not a commodity or article of commerce.[13] Nothing contained in the antitrust laws[14] shall be construed to forbid the existence and operation of labor, agricultural, or horticultural organizations, instituted for the purposes of mutual help, and not having capital stock or conducted for profit, ..." Little people could ban together to again in the way that big business could not.

The debates over the focuse of the antitrust laws led to huge partisan uproar, at a time when agrarian and labor interests were far stronger than they were today. Indeed, this development has had profound implications for the political economy of government regulation. One of the most famous articles on the subject, George Stigler's 1971 *A Theory of Economic Regulation*,[15] contains two interrelated propositions. The first attacks as myth the romantic view that legislatures somehow act solely in the public interest. The second is that in a world of competitive interest

10 Sherman Antitrust Act, 1890, available at https://www.ourdocuments.gov/doc.php?flash=false&doc=51.

11 *Mitchel v. Reynolds*, Court of King's Bench 24 Eng. Rep. 347 (1711), available at https://www.quimbee.com/cases/mitchel-v-reynolds.

12 Brandeis, Louis D., *Other People's Money*, available at https://louisville.edu/law/library/special-collections/the-louis-d.-brandeis-collection/other-peoples-money-by-louis-d.-brandeis.

13 See https://www.law.cornell.edu/definitions/uscode.php?width=840&height=800&iframe=true&def_id=15-USC-509055121-1913737444&term_occur=999&term_src=title:15:chapter:1:section:17.

14 See https://www.law.cornell.edu/definitions/uscode.php?width=840&height=800&iframe=true&def_id=15-USC-66100559-1913737444&term_occur=999&term_src=.

15 See Stigler, George J., *The Theory of Economic Regulation,* The Bell Journal of Economics and Management Science*,* Vol. 2, No. 1 (Spring, 1971), pp. 3-21, available at https://www.jstor.org/stable/3003160?seq=1

group contexts, the regulated industry often emerges as the victor in the struggle for political advantage. As I have recently argued, the activities in the first and second progressive periods (Woodrow Wilson and Franklin Delano Roosevelt) show that the first proposition has a lot of legs, but that the second is far more doubtful. In both periods, the large industrial firms lost out consistently to a group of farmers or workers whose larger numbers translated into votes, allowing for the triumph of the systematic protection of cartels of individuals. That observation does not translate well to all cases (think the organization of the Civil Aeronautics Board). It only means that the initial positions of, and the bargaining strategies by, the various interest groups resist any strong empirical generalization. The welfare implications in both cases are negative, but even here, all things considered, cartels are less efficient systems of production than single monopolies, which do not have to accommodate the same distributional demands that inefficient firms within a cartel do. Bigness has some social advantages.

There is yet another more damning implication in this set of cases. No matter who wins the struggle between cartels and monopolies, the public is always a loser. Thus, the Brandeis view talways looks for some reason to oust competitive markets, but it typically fails to justify the efficiency losses that result from blocking competitive outcomes. In particular, any supposed distributional account has to be suspect because the economic statuses of the winners and losers under these cartel arrangements are hard to understand. Some workers are excluded, and many consumers of both manufactured and agricultural goods and commodities are indeed less well off than the union and agricultural interests that secured the passage of these actions. It is even more ironic, perhaps, market forces being so powerful at this time, that the exemption from antitrust laws did not protect either of these groups from competition by new entrants. A generation later, when labor unions were under the National Labor Relations Act ,[16] Section 7 gave exclusive rights of representation that excluded competitors, and farmers received production quotas under the Agricultural Adjustment Acts of 1933 and 1938 that worked to prevent any cheating on the cartel. The Brandeisian model should never be used to justify big cartels.

The point, moreover, was not lost ironically on Brandeis himself. If his *Other People's Money* was a tedious populist diatribe written on the concentration of wealth, Brandeis himself was in fact one of the leading practitioners of the classical liberal view that he challenged with his larger philosophy. The most notable instance was his orchestration[17] of the United Shoe Machinery deal, which involved the coordination of multiple parties in the production chain, each with patent protection for certain processes needed to assemble the completed product. The United Shoe Machinery Company had a title that reflected the vertical integration within a single firm that was able to withstand early challenges under the antitrust laws in *United States v. Winslow*[18] (1913) and *United States v. United Shoe Machinery*[19] (1918). The argument in favor of this merger was two-fold. First, it meant that outsiders did not have to decide when a product failed, which of the various companies in the supply chain was responsible.

Second, it avoided the double marginalization problem[20] whereby each company in the chain of production, acting unilaterally, would charge prices that in toto substantially reduced the producer surplus for the product. These are both neoclassical explanations, which did not apply in *United States v. United Shoe Machinery Corp.*[21] (1968), when the Supreme Court broke up the company at the height of aggressive antitrust enforcement against mergers, when the firm faced tough Japanese competition that had already eroded any monopoly power than the company may have previously possessed. That decision was by no means alone — similar decisions in cases such as *Brown Shoe v. United States*[22] (1962) and *United States v. Von's Grocery*[23] (1966) also blocked standard mergers even though modern Brandeisians have never come up with a nonefficiency rationale to turn these social losses into social gains under standard metrics. The simple model of Oliver Williamson outlined in his article[24], *Economies as an Antitrust Defense: The Welfare Tradeoffs* (1968), asked the right question about the relationship between operational efficiencies on the one side and increased monopoly power on the other, which has long provided an accurate roadmap. It applies to other situations that the Brandeisians addressed, such as the effects of the Robinson-Patman Act of 1936 in regulating price discrimination in various markets. The Act was justified as a way to protect small businesses against big businesses in the form chain-store competition. Its effect was anticompetitive by propping up inefficient firms to the detriment of consumers whose dollars now did not go as far.

16 See https://www.nlrb.gov/about-nlrb/rights-we-protect/the-law/interfering-with-employee-rights-section-7-8a1.

17 See Epstein, Richard A., Antitrust Consent Decrees in Theory and Practice: Why Less Is More Aei Press (March 15, 2007)

18 *United States v. Winslow*, 227 US 202 - Supreme Court 1913

19 https://supreme.justia.com/cases/federal/us/247/32/.

20 For illustrative images, see https://www.google.com/search?q=double+marginalization+problem&client=safari&tbm=isch&source=iu&ictx=1&fir=GLBkOQ307Gu-cFM%252Cny06XdVEZUoUfM%252C_&vet=1&usg=AI4_-kR7uQov6d45D5OXZ44hQmTrQX0gmA&sa=X&ved=2ahUKEwiXoJ6P_7zxAhUJbs0KHRhfD1wQ_h16BAgMEAE.

21 *United States v. United Shoe Machinery Corp.*, 391 U.S. 244 (1968), available at https://supreme.justia.com/cases/federal/us/391/244/.

22 *Brown Shoe Co., Inc. v. United States*, 370 U.S. 294 (1962), available at https://supreme.justia.com/cases/federal/us/370/294/.

23 *United States v. Von's Grocery Co.*, 384 U.S. 270 (1966), available at https://supreme.justia.com/cases/federal/us/384/270/.

24 Williamson, Oliver E. *Economies as an Antitrust Defense: The Welfare Tradeoffs*, The American Economic Review, vol. 58, no. 1, 1968, pp. 18–36. JSTOR, www.jstor.org/stable/1831653.

The lesson of these examples is to never believe the antitrust horror story that some juggernaut firm will take over the entire market. In dynamic and resilient markets, small firms, even without legal protection, can specialize in various forms of consumer surplus to create goodwill and survive. It is common in evolutionary biology to note that the ocean does not consist only of whales, but rather has all sorts of different kinds of species, down to minnows, each occupying its own niche, which could grow or fall with time. The same applies to business. It is not only that the direct competitor of the big-chain store survives. It is also (as is common in shopping centers) that anchor tenants bring in their wake smaller businesses that have a synergistic interaction with the larger firms. These patterns are difficult to predict but in general easier to observe. It is not as though McDonald's and companies have driven out all one-of-a-kind shops.

Lina Khan's student note resurrected these old views that posited that an attack on Amazon was justified because it was able in the long run to sustain sales at lower prices than many of its smaller competitors. That logic gets matters backwards. The durability of Amazon's pricing strategies makes it unlikely that these actions were forms of below-cost predation, which in most cases poses no social threat either. Nor does it take into account that, for all the protests about the employment practices of the firm, Amazon was easily able to beat back[25] a unionization effort in April 2021 for the simple reason that the employees thought that they got a better deal without going through a union middleman, who would skim off the top. The real beef against Amazon lies in its high-handed approach to selective bans on speech content — actions that would be unwelcome even if it had a tiny share of the market.

But, if the neo-Brandeisians cannot bring back the anti-chain store attitude of the 1930s, they can both in academic work and in proposed legislation try to do away with the framework of Section 7 of the Clayton Act by claiming that certain nascent mergers, as argued by Scott Hemphill and Tim Wu,[26] could eliminate future competitors that could go head-to-head with today's giants. At least these efforts purport to work with traditional efficiency explanations, but in general the overall venture is ill-advised.[27] The current regime, while surely not perfect, is not way of whack. Yet, this new proposal gives no assurance that, left to its own devices, an acquired firm could have reached the same level of success. There are many small firms that are not acquired, but which fail because they do not have either the expertise of capital to mount a successful campaign. It may well be that the securities law makes things more difficult by imposing onerous requirements on taking private firms public, but if so, the remedy is not to distort antitrust law. It is to remove the barriers that stifle the operation of the securities market. Nonetheless, new legislation, as I have argued elsewhere,[28] is moving exactly in the wrong direction, including the proposal by Amy Klobuchar in her Consolidation Prevention and Competition Promotion Act[29]. Two wrongs never cancel out; instead, they tend to cumulate. We should then look upon with dread the prospects of these misguided Brandeisian reforms.

III. THE NEW MADISON APPROACH

The new Madison approach does not attempt to grapple with the Brandeisians across the full range of issues, but they do join issues on a number of point where the patent and the antitrust law might arguably collide. The source of this interaction is the claim that a patent confers a monopoly position on its holder, and thus automatically attracts antitrust scrutiny. But in fact, that false equivalence is mistaken both for real and intellectual property. The exclusive right to a given piece of land puts it in competition with other owners of other parcels. As was well recognized in the 1855 case of *Allen v. Hunter*[30]

> Patentees are not monopolists. . . . No exclusive right can be granted for anything which the patentee has not invented or discovered. . . . [T]he law repudiates a monopoly. The right of the patentee entirely rests on his invention or discovery of that which is useful. And which was not known before. And the law gives him the exclusive use of the thing invented or discovered, for a few years, as a compensation for 'his ingenuity, labor, and expense in producing it.'

In the modern context, patents might give someone the exclusive right to a given drug, but never give a right to exclude everyone else who wants to use a similar drug within the same class to treat the same or similar conditions. The device or the formula will differ which makes

25 Herrera, Why Amazon Workers in Alabama Voted Against Union, WSJ, Aptil 10, 2021, available at https://www.wsj.com/articles/why-amazon-workers-in-alabama-voted-against-union-11618066800.

26 Hemphill, C. Scott and Wu, Tim, *Nascent Competitors* (June 11, 2020). University of Pennsylvania Law Review, Forthcoming, NYU Law and Economics Research Paper No. 20-50 , Columbia Law and Economics Working Paper No. 645, Available at SSRN: https://ssrn.com/abstract=3624058 or http://dx.doi.org/10.2139/ssrn.3624058.

27 Epstein, Richard A., *Is There An Antitrust Crisis In Big Tech?*, October 12, 2020, available at https://www.hoover.org/research/there-antitrust-crisis-big-tech.

28 Epstein, Richard A., *Klobuchar's Antitrust Blunder*, available at https://www.hoover.org/research/klobuchars-antitrust-blunder.

29 See https://www.congress.gov/bill/116th-congress/senate-bill/307/text.

30 *Allen v. Hunter*, 1 F. Cas. 476, 6 McLean 303 (1855).

for competition between different sellers with exclusives over different products. Indeed, the secret for understanding how the patent universe operates is to draw,[31] as I have argued elsewhere, analogies from the physical space to the intellectual property space.

Here is one recent example,[32] offered by Robert Greenspoon, of how that process of analogy works. Patrick Leahy and Thom Tillis have proposed in the misnamed Endless Frontier Act[33] that the failure to register a patent should exclude the patentee from seeking extra damages for the willful infringement of a patent right, even for valid holders of the patent. But, the analogy in physical space is that the owner of newly purchased property cannot seek extra damages for willful trespasses unless that title is recorded. In both cases the nonsequitur is clear. To win the case against trespass or infringement the claimant has to show a valid title that is superior to the claim of the outsider. The purpose of recordation is to prevent double dealing in titles, but there is no reason why a party who fails to protect itself against one risk should be unnecessarily exposed to a second. It is a common feature of the Brandeisians to constantly seek to reduce the scope of patent damages, such that infringement carries with it little or no consequences. But weak remedies encourage infringement, which then puts a greater strain on the universe of voluntary transactions. A firm stand against deliberate infringements is therefore critical in dealing with tort remedies, whether for real of intellectual property, while nonetheless allowing for more accommodations with innocent intrusions that do not carry the serious risk of repetition, both by the initial wrongdoer and by eager imitators. The world in physical space cannot follow a regime where anyone can walk to an automobile dealership, take out a car, and then tell the original owner to bring a damage action. The whole set of antecedent criminal and civil remedies are needed to preserve markets.

To his great credit, Delrahim takes the same attitude on the more limited set of questions that he approaches. Most of his proposals overlap closely with work that I have done with Kayvan Noroozi — *Why Incentives for "Patent Holdout" Threaten to Dismantle FRAND, and Why It Matters* [34] — to develop the similar point that a robust set of patent rights is needed throughout the entire cycle of patent development, from the creation of the invention, formula ore device, to licensing, to production, to remedies for breach. Delrahim takes the right attitude on all the points that he mentions. He does not begin his analysis with issues of patent eligibility or nonobviousness. Instead he starts with the proper modes for the commercialization of patentable technologies, often by coordinating multiple distinct patents into more usable packages, chiefly by a range of licensing techniques. This effort is absolutely critical[35] because (as was the situation in *United Shoe Machinery*) the boundary lines around a single invention are often rather small. So assume that we have 100 patents, arrayed in a 10 by 10 grid, each of which is needed to development some special patentable device, like a handset. If each of the patents is treated as an island onto itself, the number of boundary lines in this grid is 220, with pitfalls along each of these margins. Yet if all of the patents are *complements* to each other, then the number of boundaries drops to four, each of which is longer and clearer than the multitude of other boundaries. The delineation of the new space makes it easier for any third party to license the bundle of patents, and easier for the group to fend off outsiders. The full protections of these devices do not carry any serious antitrust risk, which would arise if owners of substitute patents agreed to restrict output and raise prices, in what would be in any market a *per se* violation of the antitrust laws.

In light of these considerations it is clear that Delrahim is correct when he recommends that "an SEP [standard essential patent] holder reneging on their agreed-upon obligation with a Standard Development Organization ("SDO") to license their patent to implementers on fair, reasonable and non-discriminatory terms ("FRAND")[36] is fundamentally not an antitrust violation, but rather, fraud or a breach of contract." The point here is that we want to encourage individuals to enter into these types of arrangements. That will not take place if the formation of a SDO becomes a trap door, so that once the agreement is made, it slams shut so that outsiders are entitled to treat actions that are said to renege on the basic agreement as the opportunity to bring a treble damage action against the party who is said to have reneged. The point is even more important in practice because the determination of who has reneged is often far from clear in litigation. There are constant readjustments in these pools, which could turn on the need to renegotiate the terms of the initial deal in light of changes in the relevant value of the various components. The antitrust hammer could easily lie over these transactions as well. The fraud and the contract remedies use only common law tools to deal with the usual pitfalls on contractual negotiation, which is all to the good.

31 Epstein, Richard A., *The Property Rights Movement and Intellectual Property*, available at https://www.oxfordhandbooks.com/view/10.1093/oxfordhb/9780198758457.001.0001/oxfordhb-9780198758457-e-7.

32 Greenspoon, Robert P., *Reflections on Unintended Consequences of Proposed Patent Law Amendments,* available at https://www.ipwatchdog.com/2021/05/28/reflections-on-unintended-consequences-of-proposed-recordation-amendments/id=134046/.

33 See https://www.congress.gov/bill/117th-congress/senate-bill/1260

34 Epstein, Richard A & Kayvan Noroozi, *Why Incentives for "Patent Holdout" Threaten to Dismantle Frand, and Why It Matters*, 32 Berkeley Technology Law Journal 1381.(2017). Available at https://chicagounbound.uchicago.edu/cgi/viewcontent.cgi?article=13768&context=journal_articles.

35 See https://www.innovationpolicyplatform.org/www.innovationpolicyplatform.org/printpdf/innovation_policy_platform_-_patent_pools_and_antitrust_-_2015-10-01/index.pdf.

36 See https://www.justice.gov/atr/page/file/1228016/download.

It also follows from the basic understanding of these arrangements that innovation will be better achieved through Delrahim's proposition that "an SDO should not be an apparatus for a coordinated effort by market participants to favor implementers over patent holders." That outcome will not emerge if it is the innovators who are entitled to determine the scope and condition of their patent pool, subject to the antitrust limitation that substitute products cannot be put into the same patent pool. It is, of course, the case that the innovators have to have direct contact with the implementers in order to ensure some degree of complementarity. And, it is also the case that these pools will not stay together if injunctive relief is denied against third parties that seek to use one or more of the patents in the pool without obtaining the proper consent. Thus, Delrahim is also correct on his third point, already discussed above, that "an essential component of patent rights is the right to exclude, which should encourage courts to avoid limiting that right by disfavoring injunctive remedies."

eBay v. MercExchange[37] remains as wrong now as when first promulgated in 2006 by deviating from the correct rule that injunctive relief is presumptively justified in all cases of breach until shown otherwise. It is always a mistake to use damages as a first cut remedy in these cases. The correct approach starts with injunctions, and then asks whether they should be conditioned or limited in some cases, including those of innocent infringement where massive dislocations can be offset by less intrusive remedies. The same rules that apply in the end cases should apply here as well.

The correct overlap between antitrust and patent law therefore shows the soundness of Delrahim's last point, which is that "antitrust laws should consider a unilateral decision by a patent holder not to license a patent as 'per se' legal." The point here follows from the general proposition that antitrust law should deal with cases of collective actions, not individual decisions, which deserve the same level of respect for intellectual property that they do for land or any other asset. The patent is thus subject to competition from other devices that are covered by other patents, so that they operate largely in a competitive environment. And, even if there is no immediate rival, the knowledge of a gap of competition in any given niche is likely to spur another firm to enter that space, so that the potential competition from entry exerts a sensible restraint on prices even if no new competitor has yet to appear.

IV. CONCLUSION

One way to assess the strength of these principles is to see what happens when they are violated. A key case is of course the 2019 decision of the District Court in *Federal Trade Commission v. Qualcomm*,[38] where District Court Judge Lucy Koh entered a massive judgment against Qualcomm by violating all these principles, as I have argued elsewhere.[39] Unilateral market decisions by Qualcomm on how to market its various devices and its general technology were subject to extensive review by the Court who then posited that it was appropriate to force the company to license its direct competitors world-wide, subject to supervision of the Court, which wanted to turn itself into a rate-making entity. In so doing, she asserted that a demand that the purchasers of Qualcomm chips had to obtain a Qualcomm license would have undercut the power of injunctive relief, even when Qualcomm had a constant practice of licensing its technology to any persons who wished to purchase their chips from other suppliers, including the highly successful Taiwanese company, MediaTek.[40]

In so doing, the Court did not once consider whether the various schemes that Qualcomm had devised had resulted in higher prices, which, as shown[41] by Alexander Galetovic and Stephen Haber, had not been the case, in light of the massive improvements in quality that paralleled sharp declines in prices resulting from new entry from other competitors. The market was working as it should, and it was a welcome relief that a strong Ninth Circuit[42] decision overturned the District Court judgment before it could work serious harm. There is an evident lesson here, which is that the inefficiencies engendered by false accusations of monopoly power have no redeeming features. It is a lesson that the ascendant New Brandeisians should learn before it is too late.

37 *eBay Inc. v. Mercexchange*, Ll, 547 US 388 - Supreme Court 2006, available at https://scholar.google.com/scholar_case?case=4819344338954570996&q=eBay+v.+MercExchange+2006&hl=en&as_sdt=8006.

38 *FTC v. Qualcomm Inc.*, 411 F. Supp. 3d 658 - Dist. Court, ND California 2019, available at https://scholar.google.com/scholar_case?case=6588913420164874313&q=ftc+v+qualcomm+inc&hl=en&as_sdt=8006.

39 https://core.ac.uk/download/pdf/286364339.pdf.

40 https://www.mediatek.com/.

41 Galetovic, Alexander and Haber, Stephen H., *SEP Royalties: What Theory of Value and Distribution Should Courts Apply* (September 4, 2019). Available at SSRN: https://ssrn.com/abstract=3447641 or http://dx.doi.org/10.2139/ssrn.3447641.

42 *FTC v. Qualcomm Inc.*, 969 F. 3d 974 - Court of Appeals, 9th Circuit 2020, available at https://scholar.google.com/scholar_case?case=5420885724600138871&q=Qualcomm+v.+FTC+ninth+circuit+2020&hl=en&as_sdt=8006.

THE NEW MADISON APPROACH: KEEPING ANTITRUST IN ITS LANE

BY GREGORY J. WERDEN[1]

1 The author retired in 2019 from his position as Senior Economic Counsel, Antitrust Division, U.S. Department of Justice. Before retirement, the author had a hand in articulating the New Madison Approach.

On March 16, 2018 Assistant Attorney General Makan Delrahim proclaimed the New Madison Approach ("NMA") to the interface between antitrust and intellectual property.[2] The pattern for the name was the New Brandeis Movement, which advocates broad attacks on big business.[3] James Madison's name was taken because he was most responsible for the Constitution's Intellectual Property Clause[4] and his advocacy of patent protection counterpoints views of Thomas Jefferson quoted in leading patent decisions.[5]

AAG Delrahim addressed disputes involving standard essential patents ("SEPs") on which standard setting organizations ("SSOs") extracted commitments to fair, reasonable, and non-discriminatory ("FRAND") licensing.[6] He sought to distance the Trump Administration from the Obama Administration's sympathies to contentions that SEP holders were engaging in "patent hold-up" by waiting until standard implementers made substantial sunk investments then demanding high royalties.

As articulated by AAG Delrahim, the NMA holds that:

> (1) patent hold-up is fundamentally not an antitrust problem, and therefore antitrust law should not be used as a tool to police contractual commitments patent holders make to SSOs; (2) SSOs should not become vehicles for implementers to skew conditions in their favor when incorporating a patented technology; (3) SSOs and courts should have a very high burden before adopting rules that severely restrict the right of patent holders to exclude or—even worse—adopting rules that amount to a de facto compulsory licensing scheme; (4) a unilateral and unconditional refusal to license a patent should be considered per se legal from the perspective of the antitrust laws.[7]

A few months after becoming AAG in charge of the Antitrust Division, Makan Delrahim gave a speech asserting that concerted action by standard setting organizations can raise antitrust concerns, but antitrust has little or no role to play in FRAND royalty disputes.[8] He also argued that "the hold-out problem is a more serious threat to innovation than the hold-up problem."[9] SEP licensees engage in "patent hold-out" by refusing to pay a reasonable royalty. AAG Delrahim explained that royalties are negotiated after inventors incur all unrecoverable development costs but before implementers incur some unrecoverable implementation costs, and this asymmetry makes hold-out more serious than hold-up.

Following the speech, an industry group wrote to AAG Delrahim, arguing that his "novel approaches" "threaten US industry and consumer interests, harm US innovation, and interfere with parties' right to contract."[10] Unpersuaded, AAG Delrahim went on to announce the NMA. The following day, 77 academics and former government officials expressed "concern."[11] They asserted eight propositions, some of which could have benefitted from additional exposition. For example, they asserted that "patentees that obtain or maintain monopoly power *as a result of* breaching a FRAND commitment present a standard monopolization case," but they did not address the D.C. Circuit's *Rambus* decision (discussed below), which is rather to the contrary.[12]

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2 The speech was published as: Makan Delrahim, *The "New Madison" Approach to Antitrust and Intellectual Property Law*, 1 J.L. & Innovation 1 (2019).

3 See Lina A. Khan, *The New Brandeis Movement: America's Antimonopoly Debate*, 9 J. Eur. Competition L. & Practice 131 (2018).

4 On August 18, 1787, Madison submitted to the Constitutional Convention a long list powers to be granted the legislature, including "To grant patents for useful inventions" and "To secure to Authors exclusive rights for a certain time." On September 5, the Committee on Detail, of which Madison was a member, proposed the language that was adopted in the Constitution. Madison also campaigned in favor of the Intellectual Property Clause in *The Federalist No. 43*.

5 The Supreme Court quoted Jefferson's views on what is essentially patentability. See *Bonito Boats, Inc. v. Thunder Craft Boats, Inc.*, 489 U.S. 141, 147 (1989); *Diamond v. Chakrabarty*, 447 U.S. 303, 308–09 (1980); *Graham v. John Deere Co. of Kansas City*, 383 U.S. 1, 7–11 (1966).

6 The author's views on the subject were set out in Gregory J. Werden & Luke M. Froeb, *Why Patent Hold-Up Does Not Violate Antitrust Law*, 27 Tex. Intell. Prop. L.J. 1 (2019).

7 Delrahim, *supra* note 2, at 1–2.

8 Makan Delrahim, Take It to the Limit: Respecting Innovation Incentives in the Application of Antitrust Law, remarks at USC Gould School of Law (Nov. 10, 2017), https://www.justice.gov/opa/speech/file/1010746/download.

9 AAG Delrahim relied on: Luke Froeb h& Mikhael Shor, Innovators, Implementers, and Two-Sided Hold-Up, Antitrust Source, August 2015; Bernhard Ganglmair, Luke M. Froeb & Gregory J. Werden, *Patent Hold-Up and Antitrust: How a Well-Intentioned Rule Could Retard Innovation*, 60 J. Indus. Econ. 249 (2012); Richard A. Epstein & Kayvan B. Noroozi, *Why Incentives for "Patent Holdout" Threaten to Dismantle FRAND, and Why it Matters*, 32 Berkeley Tech. L.J. 1381 (2018).

10 Industry Letter to DOJ Regarding Standards, Innovation and Licensing (Jan. 24, 2018), https://www.ccianet.org/wp-content/uploads/2018/01/Industry-Letter-to-DOJ-AAG.pdf.

11 Letter from Michael A. Carrier, Timothy J. Muris, et al. to Makan Delrahim (May 17, 2018), https://patentlyo.com/media/2018/05/DOJ-patent-holdup-letter.pdf. The letter must have been in preparation for some time.

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

The bedrock issue, which has not gotten the attention it deserves, is the appropriate reward to owners of SEPs. AAG Delrahim doubted that they were getting their fair share and sought "to put implementers and patent holders on equal footing."[13] Others believe that SEP owners should get just a tiny share of the revenue generated by the sale of smartphones and countless other technological devices that enormously benefit consumers and businesses. Spurred by this belief, many commentators urge the use of antitrust law to address what they believe to be a significant hold-up problem.[14]

Because higher royalties tend to reduce the rewards to device makers and increase device prices (if only by a few dollars on an expensive device), commentators perceive threats to competition and consumers in the efforts of SEP owners to get a larger share. The NMA keeps antitrust in its lane,[15] while its opponents steer antitrust to where they conjecture that it can do some good. Herbert Hovenkamp argues that "when one party is undermining another party's investments in a way that is conducive to reduced output and higher prices, antitrust intervention is appropriate."[16] And Carl Shapiro & Mark Lemley contend that "antitrust still has an important role to play when contract law and anti-fraud laws fail to fully address the patent holdup problem."[17]

Opponents of the NMA reject patent hold-out. Shapiro & Lemley assert that "[p]atent holdout is incoherent" because the vast majority of infringement defendants are unaware of the patent they allegedly infringe.[18] Standards implementers, however, generally know they are using technologies claimed by SEPs, since SSOs require disclosure. Shapiro & Lemley assert that: "Those who express concerns about patent holdout seem to want to increase the returns to patent holders whose inventions add little or no incremental value."[19] But they ignore the enormous value of some inventions. Shapiro & Lemley argue that the hold-up problem exists because a patent holder "has the law on its side."[20] Yet the law has systematically denied SEP holders' requests for preliminary injunctions since the 2006 *MercExchange* decision.[21]

In rejecting patent-hold out, Hovenkamp focuses on scenarios not normally included within that rubric — concerted conduct by SSOs to exclude particular technologies or extract below-market royalties.[22] Hovenkamp devotes a single paragraph to the hold-out problem in royalty negotiations, and he argues that: "Refusing to accept and pay for a license on an untested patent is not abuse of the system."[23] He is correct to the extent that he argues that legitimate reasons exist for not concluding licensing agreements sooner, and to the extent that he argues that SEPs could be invalid. But these circumstances set the stage for the opportunism by licensees.

Those opposed to the NMA contend that SEP holders violate antitrust law in royalty disputes, but only one theory of an antitrust violation has been blessed by an appeals court, and that theory involves harm to the competition among technologies in setting a standard. The Third Circuit's *Broadcom* decision held that "a patent holder's intentionally false promise to license essential proprietary technology on FRAND terms," the SSO's "reliance on that promise when including the technology in a standard," and "the patent holder's subsequent breach of that promise, is actionable anticompetitive conduct."[24]

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13 An Interview with Makan Delrahim, former Assistant Attorney General for the Department of Justice Antitrust Division, The Federalist Society (Mar. 22, 2021), https://fedsoc.org/commentary/fedsoc-blog/an-interview-with-makan-delrahim-former-assistant-attorney-general-for-the-department-of-justice-antitrust-division. See, e.g. Letter of Makan Delrahim to Sophia A. Muirhead, IEEE (Sept. 10, 2020), https://www.justice.gov/atr/page/file/1315291/download (on the Antitrust Division website under the heading "comments to states and other organizations"); Brief for the United States*, HTC Corp. v. Telefonaktiesbolaget LM Ericsson*, No. 19-40566 (5th Cir., Oct. 30, 2019), https://www.justice.gov/atr/case-document/file/1214541/download.

14 Shapiro & Lemley purport to present "empirical evidence" demonstrating that patent hold-up is significant, but they show only that substantial sunk investments are associated with implementing technology standards and that industry participants take steps to guard against opportunistic behavior. Carl Shapiro & Mark A. Lemley, *The Role of Antitrust in Preventing Patent Holdup*, 168 U. Pa. L. Rev. 2019, 2035–36 (2020).

15 Under AAG Delrahim, the Justice Department advocated the NMA in statements of interest filed in district courts and amicus briefs filed in appeals courts. E.g. Statement of Interest of the United States, *Cont'l Auto. Sys., Inc. v. Avanci, LLC*, 485 F. Supp. 3d 712 (N.D. Tex. 2020), https://www.justice.gov/atr/case-document/file/1253361/download.

16 Herbert Hovenkamp, *FRAND and Antitrust*, 105 Cornell L. Rev. 1683, 1720 (2020). See *id.* at 1743 ("Among the various legal tools for policing the FRAND process antitrust is only one, but it is an important one and has its own unique requirements and tools for analysis.").

17 Shapiro & Lemley, *supra* note 14, at 2058.

18 *Id.* at 2049.

19 *Id.*

20 *Id.* at 2050.

21 *eBay Inc. v. MercExchange, L.L.C.*, 547 U.S. 388 (2006) (holding the usual principles of equity govern injunctions for patent infringement). Patent holders have even met with difficulty in obtaining permanent injunctions following judgments of infringement. See *Apple Inc. v. Samsung Elects. Co.*, 809 F.3d 633 (Fed. Cir. 2015) (reversing denial of permanent injunction).

22 Hovenkamp, *supra* note 16, at 1729–32.

23 *Id.* at 1733.

24 *Broadcom Corp. v. Qualcomm Inc.*, 501 F.3d 297, 314 (3d Cir. 2007).

Complaints asserting a *Broadcom* theory can survive dismissal motions, but the theory is unlikely to be sustainable at trial. The underlying fraud on which the theory relies could be committed only by a company well aware that its technology offers little incremental value over the best alternative technology. A company believing instead that its technology offers substantial value could truthfully promise to license on FRAND terms while intending to demand a large royalty. When the Third Circuit decided *Broadcom*, there was no basis for believing that a large royalty could not also be fair and reasonable.

Another limitation of the *Broadcom* theory was made clear by the D.C. Circuit's *Rambus* decision. The court set aside the FTC's administrative determination that Rambus had violated Section 2 of the Sherman Act by deceiving an SSO to avoid a FRAND commitment.[25] Critically, the FTC had no idea whether the SSO would have selected a different technology in the absence of deception by Rambus. The D.C. Circuit rejected the FTC's contention that, "because the ability to profitably restrict output and set supracompetitive prices is the *sine qua non* of monopoly power, any conduct that permits a monopolist to avoid constraints on the exercise of that power must be anticompetitive."[26]

The FTC's suit against Qualcomm provided an opportunity to address hold-up and hold-out without any suggestion of misbehavior in the standard setting process. In ruling for the FTC, Judge Koh implicitly rejected the NMA.[27] In reversing, the Ninth Circuit implicitly embraced it.[28] The Ninth Circuit's decision was controversial and its timing was unfortunate: The window during which the FTC could have sought Supreme Court review closed before Biden appointees were in place at the FTC and Department of Justice.

Qualcomm pioneered cellular technology and contributed to each subsequent generation. Qualcomm now derives much of its revenue from licensing its patents, which include SEPs subject to FRAND commitments. Qualcomm also earns substantial revenue from the sale of "modem chips," which cellular phones and similar devices use to transmit and receive data. The FTC's case presumed that licensing rival suppliers of modem chips would exhaust Qualcomm's patent rights, but a careful parsing of Qualcomm's patent claims might indicate that a device incorporating a licensed modem chip still needs a Qualcomm license.

Qualcomm's business model was to license device makers and to pressure them to take licenses with a "no license, no chips" policy, under which Qualcomm sold chips only to licensed device makers. To comply with FRAND obligations, Qualcomm pledged not to assert its patents against rival suppliers of modem chips. If device makers needed Qualcomm licenses even though they used licensed chips, the pledge was equivalent to royalty-free licenses to rival suppliers of modem chips. If device makers did not need Qualcomm licenses when they used licensed chips, the pledge avoided patent exhaustion. The details of Qualcomm's patent claims, therefore, perhaps should have been at issue in the case, but they were not.

The FTC convinced the district court that Qualcomm's "no license, no chips" policy violated Section 2 of the Sherman Act, but the Ninth Circuit reversed in a decision that some commentators find deeply troubling.[29] Whatever one thinks about the propriety of Qualcomm's conduct, the FTC did not advance a sound basis under Section 2 of the Sherman Act for enjoining the "no license, no chips" policy,[30] so the Ninth Circuit was justified in vacating the injunction and in ruling that the FTC articulated no "cogent theory of anticompetitive harm."[31]

The FTC argued that device makers were paying Qualcomm both a legitimate "royalty" and an illegitimate "surcharge," which they were forced to pay by the "no license, no chips" policy. And the FTC argued that the "surcharge" caused rival suppliers of modem chips to get less for their chips. But proving these things did not establish a Section 2 violation under existing law.[32] Antitrust law distinguishes harm to competitors from harm to competition, and the FTC did not effectively explain why the lower chip prices implied harm to competition.

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

26 *Id.* at 466.

27 *FTC v. Qualcomm Inc.*, 411 F. Supp. 3d 658 (N.D. Cal. 2019).

28 *FTC v. Qualcomm Inc.*, 969 F.3d 974 (9th Cir. 2020).

29 See e.g. Hovenkamp, *supra* note 16, at 1685–86, 1704, 1743–44; Shapiro & Lemley, *supra* note 14, at 2058–60.

30 The case also involved exclusive dealing allegations, which might have had merit. But the alleged exclusive dealing was not ongoing conduct, and the FTC did not stress these allegations on appeal. The Ninth Circuit seemed well justified in holding that the district court's injunction could not be supported by the exclusive dealing alone.

31 *Qualcomm*, 969 F.3d at 998.

32 The theory resembles a margin squeeze theory, which the Supreme Court rejected in *Pac. Bell Tel. Co. v. linkLine Commc'ns, Inc.*, 555 U.S. 438 (2009).

If the FTC was right about how modem chip prices were determined, any Qualcomm royalty, no matter how low or who paid it, reduced rival suppliers' modem chip prices, but the FTC contended that Sherman Act liability arose only from charging more than an unknowable legitimate "royalty." The Ninth Circuit reasonably declined "to adopt a theory of antitrust liability that would presume anticompetitive conduct any time a company could not prove that the 'fair value' of its SEP portfolios corresponds to the prices the market appears willing to pay for those SEPs in the form of licensing royalty rates."[33]

Shapiro & Lemley argue that the Ninth Circuit erred as a matter of economics by declaring Qualcomm's licensing "chip-supplier neutral" because "the royalty surcharge reduces the gains from trade between an OEM and a rival modem-chip supplier but does not reduce the gains from trade between the OEM and Qualcomm."[34] But the court rightly focused on whether Qualcomm's licensing distorted supplier choice, and it did not. The FTC relied on precedent holding that Section 2 had been violated by a pricing scheme distorting supplier choice.

Shapiro & Lemley argue that the Ninth Circuit erred as a matter of law by rejecting "the well-established principle that harming customers can be a way of harming competition,"[35] but they neither elaborate this "principle" nor cite any authority for it. Harming competition normally harms consumers, but causation running the opposite direction requires explanation. Shapiro & Lemley charge that the Ninth Circuit assumed away the "surcharge," but the court held that it was "an issue that sounds in patent law, not antitrust law."[36] Shapiro & Lemley argue that antitrust law should have been applied because that would have benefited consumers, but the Ninth Circuit rightly held that there must be a limiting principle.

Hovenkamp laments what he clearly views as a wrongheaded decision by the Ninth Circuit.[37] Like Shapiro & Lemley, he pillories the court for ignoring obvious consumer harm,[38] but he does not explain how the consumer harm was associated with harm to competition. Hovenkamp asserts that the "no license, no chips" policy was "classical tying,"[39] but the FTC did not pursue a tying theory. He asserts that the Ninth Circuit misread *Aspen Skiing*,[40] but the FTC disclaimed reliance on it. Unlike Shapiro & Lemley, Hovenkamp does not defend the legal theory the FTC actually relied upon.

Hovenkamp concludes, in part:

> Oversight of FRAND obligations is one area where it is critical for the courts to keep an eye on longer run concerns for innovation. FRAND has evolved into a highly successful but nevertheless vulnerable mechanism for facilitating joint innovation and product development. . . . That system will be undermined, however, if one firm is able to renege on its voluntarily entered obligations, because others will then do the same. The regime of collaborative innovation that FRAND contemplates would very likely fall apart, and at great harm to competition and economic welfare. The Ninth Circuit's 2020 Qualcomm decision indicates that this fear is more than fanciful.

The *Qualcomm* decision does indicate that there is a problem, but it has nothing to do with competition or antitrust. No antitrust plaintiff has ever sustained an FRAND theory both on the law and on the facts. What threatens to undermine innovation and SSO collaboration is the failure to address the core question: What is the SEP owners' fair and reasonable share of the bounty from devices that standards-based technologies enable? Patent hold-up and patent hold-out problems would be trivial if SSOs, or society at large, would just make the call so licensors and licensees could anticipate the outcome of FRAND litigation. Antitrust litigation over FRAND royalty disputes is failed attempt to avoid getting at the root of the problem.

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33 *Qualcomm*, 969 F.3d at 999.

34 Shapiro & Lemley, *supra* note 14, at 2059.

35 *Id.*

36 *Qualcomm*, 969 F.3d at 1002.

37 See Hovenkamp, *supra* note 16, at 1686–87, 1692, 1696, 1704, 1713, 1725, 1741, 1743.

38 *Id.* at 1686–87.

39 *Id.* at 1704. The "classical tying" label does not fit because Qualcomm was using its economic leverage to avoid litigation over whether device makers needed to take licenses and over the FRAND royalty.

40 *Id.* at 1713, 1725, citing *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585 (1985).

APPLYING SECTION 2 TO FRAND VIOLATIONS: "IT'S ELEMENTARY, MY DEAR WATSON"

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1 Orrick, Herrington & Sutcliffe, LLP. The views expressed in this article are those of the authors and should not be attributed to Orrick or any Orrick client.

I. INTRODUCTION

Commitments by holders of standards-essential patents ("SEPs") to license their patented technology on fair, reasonable, and nondiscriminatory ("FRAND") terms serve as "important safeguards against monopoly power."[2] So when companies that make FRAND commitments do not follow through on them, they bypass these important safeguards. Thus, it is elementary that a SEP-holder's violation of a prior FRAND commitment can be exclusionary conduct that distorts competition. Accordingly, various well-reasoned cases have concluded that a SEP-holder's breach of its FRAND commitment may constitute a violation of Section 2.[3]

Nonetheless, in recent years, a small but vocal minority has increasingly questioned the appropriateness of applying Section 2 to violations of the FRAND obligation. The strongest voice in this contingent came from the prior administration's Justice Department, which went on an aggressive campaign to promote this misguided view.[4] That administration's DOJ and other proponents of this position often rely on the D.C. Circuit's 2008 decision in *Rambus v. Federal Trade Commission*. In that case, the court overturned an FTC order finding that Rambus engaged in unlawful monopolization due to its failure to disclose its patents to a standard-setting organization ("SSO"). *Rambus* held that a "lawful monopolist's use of deception simply to obtain higher prices normally has no particular tendency to exclude rivals and thus to diminish competition."[5] For this point, *Rambus* repeatedly misapplied the Supreme Court's 1998 *NYNEX Corp. v. Discon, Inc.*[6] decision.

Contrary to this characterization in the *Rambus* decision, *NYNEX* does not support the conclusion that a SEP-holder's breach of its FRAND commitments is outside the scope of Section 2. This is because *NYNEX* is inapplicable to voluntary standard-setting activities where market power arises not from a natural, legal monopoly — as was the situation in *NYNEX* — but rather from the act of standardization. This article will (1) explain why *Rambus* was incorrectly decided, including its misinterpretation of *NYNEX*, and (2) describe the circumstances under which a unilateral breach of FRAND is a cognizable Section 2 violation under traditional application of antitrust law.

II. *RAMBUS'S* CONCLUSION STEMMED FROM FLAWED LEGAL REASONING

The FTC in *Rambus* alleged that Rambus engaged in patent ambush before the Joint Electron Device Engineering Council ("JEDEC") by failing to disclose relevant patents during the standardization process. After an administrative law judge dismissed the FTC's complaint, the Commission ruled that Rambus had violated Section 2 through this deceptive behavior. The FTC relied on two alternative theories of competitive harm, without determining which one was more likely: (1) that disclosure would either have given JEDEC a chance to exclude Rambus' patents from the standard entirely, or (2) disclosure would have allowed JEDEC to ensure that Rambus commit to FRAND licensing.[7]

The D.C. Circuit set aside the FTC's decision because the FTC's "either/or" counterfactual failed to demonstrate that Rambus harmed competition by foreclosing alternative technologies.[8] The court held that "JEDEC lost only an opportunity to secure a [F]RAND commitment from Rambus," which "is not a harm to competition from alternative technologies."[9] This conclusion was premised on the principle that "an otherwise lawful monopolist's end-run around price constraints, even when deceptive or fraudulent, does not alone present a harm to competition in the monopolized market,"[10] which the court derived from *NYNEX*.

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2 *Broadcom Corp. v. Qualcomm, Inc.*, 501 F.3d 297, 314 (3d Cir. 2007); see also *Microsoft Corp. v. Motorola, Inc.*, 696 F.3d 872, 876 (9th Cir. 2012) ("[O]nce a standard has gained such widespread acceptance that compliance is effectively required to compete in a particular market, anyone holding a standard-essential patent could extract unreasonably high royalties from suppliers of standard-compliant products and services.").

3 *Broadcom*, 501 F.3d at 318-19; *Lenovo v. InterDigital Tech. Co.*, 2021 WL 1123101, at *8 (D. Del. Mar. 24, 2021); *Wi-LAN Inc. v. LG Elecs.*, Inc., 382 F. Supp. 3d 1012, 1022-1023 (S.D. Cal. 2019); *u-blox AG v. InterDigital, Inc.*, 2019 WL 1574322, at *4 (S.D. Cal. Apr. 11, 2019); *Funai Elec. Co. v. LSI Corp.*, 2017 WL 1133513, at *5 (N.D. Cal. Mar. 27, 2017); *Microsoft Mobile Inc. v. Interdigital, Inc.*, 2016 WL 1464545, at *2 (D. Del. Apr. 13, 2016); *Actividentity Corp. v. Intercede Grp. PLC*, 2009 WL 8674284, at *3 (N.D. Cal. Sep. 11, 2009); *Research In Motion, Ltd. v. Motorola, Inc.*, 644 F. Supp. 2d 788, 796 (N.D. Tex. 2008).

4 See, e.g. John "Jay" Jurata, Jr. & Emily Luken, *Out of Sync?: DOJ's Policy Reversal Towards SEPs Lacks Legal Support*, Global Competition Review (June 6, 2018), available at https://s3.amazonaws.com/cdn.orrick.com/files/GCROrrickArticle.pdf.

5 522 F.3d 456, 464 (D.C. Cir. 2008).

6 525 U.S. 128 (1998).

7 552 F.3d at 643.

8 On the first alternative, the D.C. Circuit assumed that this "was indeed anticompetitive," but noted that the Commission made clear in its remedial opinion that there was insufficient evidence that JEDEC would have standardized other technologies had it known the full scope of Rambus's intellectual property." *Id.* at 463-64.

9 *Id.* at 466.

10 *Id.*

NYNEX, however, has no bearing on the question presented in *Rambus. NYNEX* involved a provider of local telephone services, which had a lawful monopoly subject to government pricing oversight. Plaintiff Discon alleged that the provider switched its purchase of removal services of obsolete equipment from Discon to one of its higher priced competitors (AT&T) "as part of an attempt to defraud local telephone service customers by hoodwinking regulators."[11] Under the alleged scheme, the local telephone provider paid AT&T more than Discon would have charged for similar removal services so "it could pass the higher prices on to New York Telephone [the provider], which in turn could pass those prices on to telephone consumers in the form of higher regulatory-agency-approved telephone service charges."[12] The local provider would then receive a "special rebate" from AT&T at the end of the year, but consumers were still charged the higher rate.[13] Discon alleged that it was driven out of business because it refused to participate in this fraudulent scheme.

The Supreme Court ruled that these allegations did not support a claim for conspiracy to monopolize the market for removal services[14] because even though both Discon and consumers were harmed, there were insufficient allegations of harm to competition itself. The Court observed that "consumer injury naturally flowed not so much from a less competitive market for removal services, as from the exercise of market power that is *lawfully* in the hands of a monopolist, namely, New York Telephone, combined with a deception worked upon the regulatory agency that prevented the agency from controlling New York Telephone's exercise of its monopoly power."[15] In other words, *NYNEX* hinged on the fact that the defendant *already* possessed a legal monopoly *prior* to engaging in the deceptive behavior.[16]

Rambus and *NYNEX* therefore encompass two fundamentally different scenarios: Rambus's market power arose from the act of standardization, whereas New York Telephone's market power was preexisting. New York Telephone did not obtain its monopoly through deception in *NYNEX*, but Rambus was alleged to have done so. This distinction is significant for at least two reasons.

First, the FRAND commitment is designed to cap the market power that SEP-holders enjoy *after* standardization. A patent alone does not confer market power for purposes of antitrust law.[17] But because a "standard, by definition, eliminates alternative technologies,"[18] SEP-holder's market power many times stems from the fact of standardization. After standardization and subsequent widespread adoption, SEP-holders can wield this power to extract excessive royalties from potential licensees that inappropriately reflect the value of standardization, as opposed to the underlying technology, a tactic known as "hold up."[19]

It is precisely for this reason that SSOs require FRAND commitments as a condition of accepting offers from patent holders to include their technology in standards.[20] Even *Rambus* recognized that standardization alters the competitive landscape: "Before an SSO adopts a standard, there is often vigorous competition among different technologies for incorporation into that standard. After standardization, however, the dynamic typically shifts, as industry members begin adhering to the standard and the standardized features start to dominate."[21] The FRAND commitment is one way to preserve the benefits of this ex ante competition between technologies, one of the hallmarks of collaborative standard setting. But the court in *Rambus* failed to apply this lesson to its logical conclusion and, thus, did not recognize the market-shifting consequences of standardization. *Rambus's* analogy to *NYNEX*, where the telephone company had a preexisting legal monopoly, is inapposite because the patent holder in *Rambus* did not possess market power before the JEDEC standard was set.

11 525 U.S. at 132.

12 *Id.*

13 *Id.*

14 The Court also held that the allegations did not state a *per se* claim under Section 1 of the Sherman Act. *Id.* at 137.

15 *Id.* at 136 (emphasis in original).

16 See, e.g. George S. Cary, Paul S. Hayes, & Larry C. Work-Dembowski, *Antitrust Implications of Abuse of Standard-Setting*, 15 Geo. Mason L. Rev. 1241, 1252-53 (2009).

17 *Il. Tool Works Inc. v. Indep. Ink.*, 547 U.S. 28, 38 (2006).

18 *Broadcom*, 501 F.3d at 313; see also *Ericsson, Inc. v. D-Link Systems, Inc.*, 773 F.3d 1201, 1233 (D.C. Cir. 2014) ("When a technology is incorporated into a standard, it is typically chosen from among different options. Once incorporated and widely adopted, that technology is not always used because it is the best or the only option; it is *used because its use is necessary to comply with the standard.*") (emphasis added).

19 See, e.g. *Microsoft Corp. v. Motorola, Inc.*, 795 F.3d 1024, 1031 (9th Cir. 2015).

20 *Id.*

21 *Rambus*, 552 F.3d at 459.

Second, through the FRAND commitment, the SEP-holder voluntarily agrees *not* to seek monopoly pricing in exchange for inclusion of its patents in the standard. In the absence of a FRAND commitment, a patent holder has the right to charge whatever the market will bear — including monopoly pricing — because a patent confers the right to exclude.[22] But a FRAND commitment voluntarily relinquishes the rights to exclude and seek monopoly-level royalties in exchange for the benefit of inclusion in the standard. "Because of [the] [F]RAND commitment," a SEP-holder "cannot have . . . [a] policy for maintaining a patent monopoly."[23] This is why courts determining patent damages for FRAND-encumbered SEPs do not consider certain of the traditional *Georgia-Pacific* factors applicable to patent damages, including the patent-holder's established policy to "maintain [a] patent monopoly."[24] Properly framing the FRAND commitment in this context, *Rambus's* conclusion that JEDEC's "lost opportunity" to obtain a FRAND commitment is not a harm to competition is wrong.[25] Had Rambus made a FRAND commitment to JEDEC, Rambus would not have been free to seek monopoly pricing.

Rambus relied almost exclusively on *NYNEX* in its analysis concerning the lack of harm to competition.[26] The opinion acknowledged the Third Circuit's decision in *Broadcom v. Qualcomm* — which expressly held that an intentionally false FRAND commitment can constitute a Section 2 violation[27] — but summarily dismissed *Broadcom* as "conflict[ing] with *NYNEX*."[28] But again, *NYNEX* is irrelevant in the standard-setting context, which is likely why the *Broadcom* court did not discuss *NYNEX*. Absent *NYNEX*, as incorrectly interpreted through *Rambus*, there is no basis for holding that reneging on a FRAND commitment is outside the scope of Section 2.

As mentioned above, numerous decisions have recognized that the type of conduct at issue in *Rambus* (or similar allegations of deception in connection with the standard-setting process) comes within the purview of Section 2.[29] Of these cases, only one discussed *NYNEX* and appropriately observed that, contrary to the *Rambus* court's view, *Broadcom* does not conflict with *NYNEX*.[30]

III. UNILATERAL BREACH OF FRAND IS A COGNIZABLE SECTION 2 CLAIM UNDER CERTAIN CIRCUMSTANCES

Without the strictures of *Rambus's* flawed analogy to *NYNEX*, it is appropriate to treat a SEP-holder's unilateral breach of the FRAND commitment as a Section 2 violation under at least two circumstances: when unilateral exclusionary conduct (1) forecloses alternative technologies, and/or (2) decreases output of the technology or the downstream products incorporating that technology.[31]

Because the standardization process "creates an opportunity for companies to engage in anti-competitive behavior,"[32] FRAND commitments are designed, in part, to address potential collusion concerns. SSO members collectively make the decision what technologies to, and not to, include in a formal industry standard. Once finalized, that ends competition for other technologies within that standard.[33] Antitrust law generally permits this artificial decrease in competition because of the resulting efficiencies that arise from standard setting — including moving the opportunity for competition between technologies from ex post competition between standards in the market place to ex ante competition during the standard-setting process — as well as the fact that SSOs generally require those designing the standard to pledge to make their underlying technology incorporated into the standard available for licensing on FRAND terms as a condition of inclusion.[34]

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22 See, e.g. *Brulotte v. Thys Co.*, 379 U.S. 29, 30 (1964).

23 *Ericsson*, 773 F.3d at 1230.

24 *Id.*

25 *Rambus*, 552 F.3d at 466.

26 The opinion also cited a leading treatise for the proposition that "an antitrust plaintiff must establish that the [SSO] would not have adopted the standard in question but for the misrepresentation or omission." See *Rambus*, 552 F.3d at 466 (quoting 2 Hovenkamp et al., IP and Antitrust: An Analysis of Antitrust Principles Applied to Intellectual Property Law § 35.5). But whether the SSO would have adopted the technology but for the deception is a separate issue from the question of whether the loss of a FRAND commitment harms competition.

27 501 F.3d at 314.

28 *Rambus*, 552 F.3d at 466.

29 See *supra* note 3.

30 *Microsoft*, 2016 WL 1464545, at *2 n.1 ("I do not read *Broadcom* to be inconsistent with *NYNEX*.").

31 Assuming that the other requisite elements for a Section 2 violation as satisfied (as described later in this section).

32 *Microsoft*, 795 F.3d at 1030-31.

33 See, e.g. *Ericsson,* 773 F.3d at 1233.

34 See, e.g. Christopher R. Leslie, *The DOJ's Defense of Deception; Antitrust Law's Role in Protecting the Standard-Setting Process*, 98 Or. L. Rev. 379, 392-95 (2020).

But when SSO members fail to follow through on that pledge while still reaping the benefits of standardization — such as a much larger market for patent licenses — it brings into question (1) whether the underlying technology would have been included in the standard in the first place, or (2) if there is decreased output in downstream markets due to a FRAND breach. The first and simpler example is where the exclusionary conduct, the failure to disclose patents or the false promise to license on FRAND terms, forecloses the adoption of an alternative technology. This is the type of behavior that *Broadcom* and other decisions have recognized as actionable Section 2 violations.[35] In *Broadcom*, the failure to disclose was intentional, but such intentionality is not necessary for a Section 2 violation if the market impact is otherwise the same.

Increased prices also can harm competition when those increased prices reduce output of either the technology itself or downstream products. Such situations primarily arise when the increased prices result from the exercise of market power conveyed by the SSO process (as opposed to the pre-existing market power of the patent prior to standardization) and are passed on to consumers of those downstream products.[36] Outside of the standardization context, there is a long history in antitrust law of analyzing whether excess costs are passed through, thus decreasing downstream output.[37] Decreased output of downstream products can also occur in situations where higher prices are not passed on to consumers, but result in the decreased quality of those products.

Real world evidence shows that this harm occurred with the 4G/Long Term Evolution ("LTE") wireless standard. In 2008, there was substantial concern that the aggregate royalty stack for the standard was threatening its development and adoption given the potential competitive alternative of WIMAX to 4G/LTE.[38] This concern prompted numerous participants in the SSO process, including prominent SEP-holders such as Ericsson, Nokia, and Qualcomm, to publicly declare the maximum royalty stack for handsets would be in the single digit range.[39] Following those assurances, the 4G/LTE standard was adopted and became highly successful. That success, in turn, conferred additional market power on most, if not all patents reading on 4G/LTE. But subsequent decisions by 4G/LTE SEP-holders to breach FRAND commitments and seek aggregate royalties in excess of single digits of a handset price threatens to decrease consumer demand for downstream handsets.

In other words, as the price to license the SEP inputs increases, the output of downstream handsets will decrease, due to price-demand elasticity.[40] Because the increased prices are not the result of pre-SSO market power created by these patents, but rather resulted from the additional market power conferred on them via the fact of standardization, the decreased output of downstream products harms competition and the competitive process.

It is also worth emphasizing that continuing to apply Section 2 to certain unilateral FRAND breaches does not risk turning every breach of FRAND into a potential action for treble damages and attorneys' fees. Three additional conditions are necessary for Section 2 to apply:

- As with any Section 2 claim, the defendant, the SEP-holder, must have market power. There are at least two instances when this would not be true: (a) when there are competing standards to accomplish the same task — in which case an assessment of whether the alternative standard is an effective competition option is necessary; and (b) when the SEP reads upon an optional portion of the standard — in which case it is necessary to determine consumer demand for that option.

- The SEP-holder must be abusing additional market power conferred as the result of standardization, as opposed to pre-standardization market power arising from the underlying patented technology. If a patent was included in the standard because it was extremely valuable to begin with, that could be a situation where no additional market power is conferred as the result of standardization. In such circumstances, the underlying patented technology is included because it is, in fact, technologically superior to alternatives — and the additional market power conferred upon those patents via the fact of standardization may be marginal.

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35 See, e.g. *Broadcom*, 501 F.3d at 314.

36 See, e.g. *Microsoft Corp. v. Motorola, Inc.*, 2013 WL 2111217, at *11 (W.D. Wash. Apr. 25, 2013) ("In addition to harming firms that are forced to pay higher royalties, hold-up also harms consumers to the extent that those excess costs are passed onto them.").

37 For example, in states that permit indirect purchaser actions (which are not permitted under federal antitrust law due to the Supreme Court's *Illinois Brick Co. v. Illinois* (431 U.S. 720 (1977)) decision), there is a defense that the alleged overcharge was not passed through to consumers, generating substantial expert testimony on this question.

38 See, e.g. Eric Stasik, *Royalty Rates and Licensing Strategies for Essential Patents on LTE (4G) Telecommunications Standards*, Les Nouvelles (September 2010).

39 See *id.* at 115-16.

40 See, e.g. John "Jay" Jurata, Jr. & Emily Luken, Glory Days: *Do the Anticompetitive Risks of Standards-Essential Patent Pools Outweigh Their Procompetitive Benefits?*, 58 San Diego L. Rev. 417, 425 (2021).

- There needs to a clear link between the exclusionary conduct and harm to competition in the form of foreclosed technologies or decreased output. Competition can be harmed (a) if commercially viable alternative technologies are excluded during standardization; (b) if the increased price for SEP licenses, made possible by the increased market power provided by inclusion in the standard, decreases demand for downstream products; and (c) if the increased royalties are not passed onto consumers, but nonetheless reduce the incentive of product manufacturers to innovate, thus decrease product quality.

When these circumstances are met, there is a role for antitrust to play. The fact that breach of FRAND may also be addressed by contract law does not mean that contract law is the exclusive remedy, similar to how antitrust law also applies when other legal theories are relevant. For example, if a monopolist repeals a customer contract for its monopoly product as retaliation for the customer also dealing with a potential competitor, the mere fact that the customer could pursue a contractual cause of action would not preclude a monopolization claim. Similarly, if a company burns down a rival's factory to monopolize a market, it would be absurd to suggest that antitrust should not apply just because the rival also possesses an action under tort.[41]

IV. CONCLUSION

It is only elementary that Section 2 be available to address a SEP-holder's breach of its FRAND obligation under certain circumstances, as many courts have concluded. The leading case cautioning against application of Section 2 to FRAND violations, *Rambus*, was incorrectly decided because the case failed to understand the interplay between standardization, the FRAND commitment, and the source of the SEP-holder's market power. A SEP-holder's unilateral beach of FRAND violates Section 2 when that conduct forecloses alternative technologies from being standardized and/or results in decreased output in downstream markets.

41 To the extent that some may believe Section 2 liability might open the floodgates to class action litigation, addressing SEP abuse under Section 5 of the FTC Act would alleviate that concern.

PUTTING TOGETHER A COMPETITIVE PUZZLE: HOW TO UNDERSTAND AND ASSEMBLE THE PIECES OF THE NEW MADISON APPROACH

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At a time when our world is becoming increasingly interconnected – where 5G and the Internet of Things are both the technologies of the present and provide a glimpse of the future – the importance of technological standards can hardly be exaggerated. What is, however, often overstated are the anticompetitive aspects associated with standardization. Worse still, what is overlooked are the competitive, and even hyper-competitive, outcomes that spring from standards development. Understanding the pro-competitive benefits of standardization comes in part from a clear grasp of the standardization process and in part from recognizing the intersection and interrelationship of antitrust law, patent law, and contract law where technology standardization comes together. The New Madison Approach helps sort out these pieces at the intersection, fitting each into its proper place to form a complete and appealing puzzle.

I. AN OVERVIEW OF THE PUZZLE

It is easy to look at the realm of technology standards as an intractable problem, not one that you would want to solve for fun on a rainy day. There are literally thousands of moving parts – from companies that develop technology for incorporation into technology standards (contributors), to companies that make and sell standards-compliant goods and services (implementers), to organizing institutions (standards development organizations or "SDOs," also referred to as standards setting organizations or "SSOs"), to consumers. Adding to the complexity of the puzzle, at least as far as antitrust law is concerned, is the fact that standards development organizations are generally comprised of industry rivals. This alone is sufficient to raise competitive concerns, but then added to the mix is the notion that these firms that are typically competitors are making group decisions about the future direction of a given technology and then also generally hold property rights implicated in those decisions. Unfortunately, this is the point at which much criticism in this arena attaches; the outlook is bleak, the puzzle pieces are all dark and do not fit together – except as collusion.

There is, however, a more appealing picture that could emerge if the pieces of the puzzle are properly assembled. The image is not dark, but hopeful. This rosy picture is one where the standardization process is seen, in itself, as a pro-consumer, pro-innovation, and pro-competitive activity. Consumers benefit from the guaranteed interoperability and interconnectivity provided by standardization, as well as the ability to pick and choose from a multitude of standards-compliant products and services offered by variety of different companies. Innovation is encouraged when technologically savvy companies bring together their best solutions to technical problems and innovation is enhanced when, through iterative discussion and collaboration during the standards development process, these technical solutions are combined and improved. The entire process of standardization is a competitive process that requires scientific and technological experts to sort through a variety of technical alternatives to come up with an optimal solution given the available possibilities. Because the technical alternatives are offered up from a variety of innovative companies and combined and refined during the standards development process, there is inherent competition to have submitted contributions selected for incorporation into the standard. This competitive push drives innovation within these companies and forces expenditures under uncertainty in research and development, as well as participation at SDOs. This ex ante competition and incentive to innovate are good things that are rarely acknowledged as pro-competitive by critics of standardization. Moreover, there is competition that happens on the backend of standardization – that of implementers who, because they have the ready-made solution encompassed in the standard, can spend their research and development efforts differentiating their products on extra-standard features, services, and quality. This competition and innovation, even though more visible, is too often overlooked.

Given this more positive view of technology standards and the standards development process, it would be expected that standardization would be viewed favorably within the competition policy space – and yet, over the last five to ten years, there have been efforts on a variety of fronts to impede standards development, from implementers, from standards development organizations, from competition agencies, and from courts. Rather than recognizing standards development as fertile ground for competitive activity, a number of policies were proposed that could – and in some cases, did – negatively impact the desire of innovative companies to participate in standards development organizations. The Federal Trade Commission took Qualcomm to court based on its licensing program of computer chips. Multiple courts have refused to enjoin companies found liable for infringing valid patents covering technology incorporated into standards. The IEEE (Institute of Electrical and Electronics Engineers) amended its intellectual property rights policy to disallow the seeking of injunctive relief, as well as making a number of other changes that favored implementers and disfavored contributors. These outcomes and more are squarely based on the negative image of standardization, and particularly owners of standard essential patents.

II. LOOKING CLOSELY AT THE PIECES

Antitrust law, patent law, and contract law are all puzzle pieces in the standardization ecosystem, each having a vital role to play to encourage desired competitive and innovative behavior. Patent law provides, through its exclusive rights, the incentive to invent and innovate as well as the tools to provide for efficient transactions, such as licensing or transfer of the technology which is patented. Contract law provides a framework for agreement between firms, seeking fair negotiations that are to the benefit of both parties. Antitrust law protects competition within and without the standards field, between contributors, between contributors and implementers, and amongst implementers, all to the benefit of consumers. These pieces each have separate, but complementary, roles.

Critics argue that some of these pieces are not fulfilling their role. As one example, some state that patents being declared as standard essential are "weak;" essentially the claim is that patent law is not doing its job. As another example, commentators claim that patent holders are seeking unreasonably high royalty rates to use standard essential patents; the claim is that contract law, in the form of the contributor's agreement to license on fair, reasonable, and non-discriminatory ("FRAND") terms, is insufficient. To complete the puzzle without these allegedly missing pieces, these commentators suggest that antitrust should step in to the void.

However, when one of those pieces – such as antitrust law – is given an outsized role, the sought-for outcome of innovation is threatened. For example, if antitrust law is given precedence over patent law, the incentives that the patent system provides are devalued. Eviscerating the patent's right to exclude takes away the value of that patent. If antitrust law is given precedence over contract law, the desire to bargain in good faith and to participate in the iterative, negotiated process which is standards development is diminished. A puzzle composed only of edge pieces or only of center pieces – or worse, a 1000-piece puzzle where each of the pieces is the same – is not going to produce a desirable image.

It is in front of this backdrop that Mr. Delrahim set forth the New Madison Approach in 2018. In promoting and fleshing out the Approach throughout the rest of his tenure, he was setting the stage for viewing standards development as competitive behavior and encouraging contributors and implementers alike to engage with standardization. Specifically, the Approach explains the appropriate role, as well as the correct level of interaction between patent law, contract law, and antitrust law, particularly in the case of standards essential patents.

The Approach has four primary tenets. First, patent holdup is not an antitrust problem. Second, standards development organizations should not allow collective action by standard-implementers to disfavor patent holders in setting the terms of patents that cover a new standard. Third, given that a fundamental right of patent holders – in fact the only right – is the right to exclude, SDOs and courts should not readily restrict the ability of patent owners to seek injunctive relief or exclusion orders. Fourth, unilateral decisions by patent owners to not license a patent should be *per se* legal. Each of these tenets properly situates the role of the various pieces in the standardization ecosystem puzzle.

III. PATENT HOLDUP IS NOT AN ANTITRUST CONCERN

Patent holdup is the notion that patent holders regularly exploit their intellectual property rights to demand supra-competitive licensing fees, particularly in the case of standard essential patents. Recent empirical work refutes the extent, and even existence, of patent holdup. But even assuming that patent holdup can and does negatively affect implementers of standardized technology, the Approach recognizes the roles of the various puzzle pieces by demarcating patent holdup as a contract problem, not an antitrust issue. Specifically, a patent holder's demand for supra-competitive licensing is a breach of that patent holder's commitment to license the patent on FRAND terms. If the breach is in contract, then the solution also lies in contract – by forcing the patent holder to abide by its side of the agreement.

By situating patent licensing disagreements in contract law, especially in cases where there is a FRAND commitment in place, the underlying investments in research and development and competition to be incorporated into a standard are not disturbed or diminished. Antitrust remedies, by design, are more onerous to serve as a deterrence. Particularly because claims of patent holdup are often simply a matter of disagreement as to price, to then impose a heightened penalty would have the effect of deterring not just seeking what the patent holder considered a fair price, but also discouraging an innovative company from engaging in the underlying development and standards-development activities. A contractual remedy for implementers also protects hearty competition amongst implementers for consumers. At the end of the day, each implementer is paying a FRAND price to use the technology underlying the standard; while each implementer may not be paying an identical price, the ability of each implementer to fairly compete is made possible because every implementer has been able to obtain the technology on fair terms.

Critics claim patent holdup is due to additional market power that is conferred artificially by being incorporated in a technology standard. The claim of artificially created market power ignores the very process of standardization. Contributors develop technology and then compete, against other innovative companies, to have that technology incorporated into a standard. By the time the standard is adopted and an implementer is providing standards-compliant goods and services, the underlying technology has already been developed in uncertainty and selected through an iterative and competitive process. Any reward associated with being selected for incorporation in a standard is first, an acknowledgement of a technology that made it through the gauntlet of standards development and was eventually selected, and second, an offset for the many other technologies developed and submitted by the contributor that were not selected for incorporation. The idea that a company would engage in supra-competitive pricing also ignores the fact that standards development is an iterative and ongoing process. There are repeat-player dynamics that would be negatively affected were any patent owner to truly engage in patent holdup.

Additionally, these critics point to "weak patents" as exacerbating the problem. The existence of weak patents is also not an antitrust problem, but is instead, if it is actually an issue, a patent problem. On this front, the patent system has ample options for an implementer to challenge weak patents, whether it be through administrative proceedings at the Patent Office or as part of litigation in court. It is interesting, although perhaps telling, that few standard essential patents have been deemed invalid by courts, even when the same court uses the threat of patent holdup in determining the remedy for an implementer's infringement of that patent.

IV. SDOS CANNOT ALLOW IMPLEMENTERS ALONE TO DETERMINE THE TERMS

Standards development organizations must recognize the contract aspects of their intellectual property rights policies. Not only does a company's FRAND commitment represent a contractual obligation that must be satisfied, but the very nature of standards development participation is a bargained-for exchange. In exchange for membership fees and time commitments, a company can be represented during the discussions and decisions that are involved in standards development. In exchange for submitting technological solutions to the standards development organization to be considered for incorporation into a technology standard, a company agrees that, if their technology is selected, it will be made available for license to implementers on some set of terms set by the organization. Implementers similarly participate in standards development, recognizing that they will be able to help determine the direction of a technology standard and then have access to the incorporated technology on some set of terms. This is, very clearly, a set of agreements negotiated by a subset of a standards development organization to apply to all of its members.

The problem, however, is when a standards development organization empanels a subset of its members to negotiate its intellectual property rights policy and that entire subset represents only one type of member – the implementer. This was true for what became the 2015 Amendments to IEEE's intellectual property rights policy. Over objection and despite requests for contributor representation on the committee that was overseeing the amendments, the IEEE crafted an intellectual property rights policy that, not surprisingly, was extremely favorable to implementers and unfavorable to contributors. Essentially, a contract – which would have some retroactive effect – was drafted by only one party to the agreement – over the objections of and without the participation of the other. This is not the type of fair, balanced, and open negotiations between adverse parties that contract law is meant to encourage.

Moreover, as the Approach contends, in allowing an aligned, but competitive, set of firms to meet and make decisions for a larger group, the standards development organizations are running into the issue of antitrust. While critics are quick to see antitrust concerns where the matter is more properly addressed under contract law or patent law, they have been less willing to see potential antitrust violations committed by the standards development organizations. Allowing a set of implementers to collectively decide the terms of intellectual property rights for standards essential patents, and worse still, implying if not outright stating that ex ante pricing decisions may be more preferable to ex post FRAND negotiations smacks of anticompetitive behavior. Antitrust law does have a role to play in the standardization puzzle, and one primary role is ensuring that competition is protected at the standards development organizations.

V. INJUNCTIVE RELIEF MUST BE AVAILABLE

The sole right provided by a patent is an exclusive right. To provide an innovative company a patent as a reward and then suggest that injunctive relief is unavailable is to essentially eviscerate any value that the patent would confer. Outside the technology standards arena (and historically), a denial of injunctive relief would only occur in cases involving public health and safety. The Supreme Court's *eBay* decision altered this analysis slightly, causing more courts to focus on the factor that asks whether money damages would make the patent holder whole. In cases of patent licensing firms (who do not make their own products) and standard essential patents, a prevailing view is that the patent holder has opted to license its technology in exchange for money and thus damages are all that is required to make the patent holder whole. This view, coupled with the IEEE Amendment to its intellectual property rights policy that forbids patent holders of standard essential patents from even seeking injunctive relief, has the effect of devaluing any patents covering standardized technology.

This is problematic for two reasons. First, it largely removes patent law from the set of pieces available to solve this puzzle. A picture missing this set of pieces will be obviously incomplete. Moreover, patents are understood to encourage innovation and facilitate transactions, both important to competition itself. If patents become valueless, they can no longer be counted on to perform these functions in the ecosystem. In the alternative, innovative companies who rely on the value of their patents may opt out of the standardization ecosystem. This is not a slippery slope, parade of horribles claim; after the IEEE amended its policy in 2015, a number of firms signaled they would be opting out of IEEE standards development activities. Patents, and their associated exclusive rights, are a critical part of ensuring that the most innovative firms are participating in standardization.

Second, the removal of injunctive relief – either through policy like the IEEE Amendment or through repeated denials by courts to issue injunctions – has exacerbated the problem of predatory infringement. Also misnamed "efficient infringement," the removal of ready injunctive relief has the effect of encouraging implementers to "infringe now, pay later," because, at worst, the only threat hanging over them will be the requirement to royalties for their past infringement. That is, they will be on the hook for the same royalties they would have been paying all along if they had accepted a license before infringing; worse still, there is a better-than-average chance that a court will arrive at a royalty rate less than they would have agreed to pay at the outset, providing a win for implementers on multiple levels, even though they are liable for patent infringement. The unavailability of relief under patent law thus has created a vacuum under contract law as well, removing any incentive for an implementer to participate in FRAND negotiations with a contributor. Essentially, the lack of injunctive relief creates a puzzle that is composed purely of antitrust pieces – not a very attractive picture at all.

VI. REFUSALS TO LICENSE A PATENT SHOULD BE *PER SE* LEGAL

Related to the third point of the Approach, the refusal to license a patent is inherently linked with the patent's right to exclude. Without being able to refuse to license, again, the patent right is eviscerated and the patent's associated incentives are diminished. This ability to refuse a license can be overridden in cases of a public health or safety emergency, or it can be negotiated away as part of a contractual obligation. This is precisely what the FRAND commitment does. A patent holder, in exchange for having its technology considered for incorporation in a standard, agrees to license that technology to anyone, on a non-discriminatory basis, on fair and reasonable terms. If a patent holder who has submitted to a FRAND commitment then refuses to license that patent, this is a breach of that agreement but not an antitrust violation. Making a refusal to license a patent an antitrust violation takes both patent law and contract law out of the picture, again resulting in either an unsolvable puzzle or an unpleasant image.

VII. CONCLUSION

Standardized technology is an increasingly important part of our world. Not only do we enjoy the use of really fabulous new technology, but we also benefit from the interoperability and interconnectivity standardization provides. And, although the picture may not be instantly clear to us, we also greatly profit from the competition that both underlies and springs from standards development. For this reason, it is critical to recognize and rely on all of the puzzle pieces that support standardization – patent law, contract law, and antitrust law. The New Madison Approach was based precisely on that idea. Going forward, it will continue to be essential that none of these pieces is lost or left behind, overemphasized or ignored. Each piece has an important role to play in ensuring the innovation and competition that we desire.

"NOT" MADISON

BY JORGE L. CONTRERAS[1]

1 Presidential Scholar and Professor, University of Utah S.J. Quinney College of Law. The author thanks Tyler Ochoa and Christopher Beauchamp for valuable comments on this essay.

In March 2018, Makan Delrahim, President Donald Trump's Assistant Attorney General for the U.S. Department of Justice Antitrust Division, delivered a speech titled "The New Madison Approach to Antitrust and Intellectual Property Law."[2] In it, Mr. Delrahim sought to unseat Thomas Jefferson as the acknowledged "father of U.S. patent law" in favor of James Madison.[3] His stated rationale for doing so was to counteract the "vogue among some critics of the U.S. patent system to selectively quote Jefferson to make the case that intellectual property rights ought to be reined in."[4] Unlike Jefferson, Delrahim contended, Madison was a proponent of "strong patent protections."[5] As such, Delrahim argued that courts and scholars should regard Madison, not Jefferson, as the "true father of U.S. patent law,"[6] thereby embracing a more appreciative, and hands-off, attitude toward patent assertion.

Mr. Delrahim was particularly concerned with patents that are essential to industry standards, an area in which he saw an alarming shift toward "reducing the power of intellectual property rights."[7] In essence, the four "basic premises" of the New Madison approach would have relieved patent holders of antitrust scrutiny for exacting rents from manufacturers of standardized products, notwithstanding their commitments to license those patents on terms that are "fair, reasonable and nondiscriminatory" (FRAND).[8]

Mr. Delrahim's strenuous advocacy on behalf of patent holders generated both praise[9] and criticism.[10] This essay does not rehash my prior critiques of the Trump DOJ's positions on standards or intellectual property law.[11] Rather, it challenges the recruitment of James Madison, one of the nation's founding intellects, the chief drafter of the Constitution and its fourth President, to the cause of patent maximalism.[12] First, it argues that Madison was not unique in supporting the authority of Congress to grant patents to inventors, a policy that was widely supported by his contemporaries. Second, rather than advocating for strong patent rights, Madison's writings reveal that he was concerned about the "exorbitant gains" that patents and other monopolies could confer upon their holders. Finally, and most importantly, the fact that Madison formulated his views a full century before the enactment of the antitrust laws, in an economic environment in which private firms could not practically acquire market power absent governmentally-issued monopolies, suggests that Madison is an inapt namesake for the policies of a federal agency that is charged with enforcing the antitrust laws today.

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2 Makan Delrahim, The "New Madison" Approach to Antitrust and Intellectual Property Law – Remarks as Prepared for Delivery at the University of Pennsylvania Law School, March 16, 2018.

3 *Id.* at 1.

4 *Id.* Over the past two decades, there has been significant debate regarding Jefferson's views on the patent system and what effect those views should have on current interpretations of the Patent Act. See e.g. Edward C. Walterscheid, The Nature of the Intellectual Property Clause: A Study in Historical Perspective ix (2002) (arguing that the Supreme Court in *Graham v. John Deere*, 383 U.S. 1 (1966), in discussing Jefferson's views, "materially mischaracterized and misrepresented both the role and the views of Jefferson in the development of the nascent United States patent system"); Adam Mossoff, *Who Cares What Thomas Jefferson Thought about Patents - Reevaluating the Patent Privilege in Historical Context*, 92 Cornell L. Rev. 953, 955 (2007) ("Jefferson's hegemony over the history of American patent law is as indisputable as it is wrong.")

5 Delrahim, *supra* note 2, at 4. Mr. Delrahim also makes the claim that, thanks to Madison, the Constitution guarantees to innovators the "right" to a patent – the only such "right" guaranteed by the original text of the Constitution. *Id.* at 3. This attempt to find an individual "right" to a patent within the Constitutional enumeration of Congressional powers is not well founded. For a discussion of the use of the word "right" in the Intellectual Property Clause, see e.g. Walterscheid, *supra* note 4, at 255-65.

6 Delrahim, *supra* note 2, at 1. In thus associating his proposed enforcement strategy with James Madison, Mr. Delrahim engages in what has been termed "Founders Chic" – "an excessive fascination with the thoughts and actions of a small group of elite men at the other political actors and social groups". Francis D. Cogliano, *Founders Chic*, 90 History 411, 412 (2005) (noting the scholarship of "variable quality" that has resulted from this trend and collecting references). I thank Chris Beauchamp for introducing me to the literature of Founders Chic.

7 Delrahim, *supra* note 2, at 4.

8 *Id.* at 5.

9 See e.g. David J. Teece, *Pivoting toward Schumpeter: Makan Delrahim and the Recasting of U.S. Antitrust towards Innovation, Competitiveness, and Growth*, 32 Antitrust 32 (2018), John D. Harkrider, *Antitrust in the Trump Administration: A Tough Enforcer That Believes in Limited Government*, 32 Antitrust 11 (2018).

10 See e.g. Christopher R. Leslie, *The DOJ's Defense of Deception: Antitrust Law's Role in Protecting the Standard-Setting Process*, 98 Oregon L. Rev. 379 (2020), Carl Shapiro & Mark A. Lemley, *The Role of Antitrust in Preventing Patent Holdup*, 168 Univ. Penn. L. Rev. 1 (2020).

11 See e.g. Jorge L. Contreras, *Taking it to the Limit: Shifting U.S. Antitrust Policy Toward Standards Development*, 103 Minn. L. Rev. Headnotes 66 (2018); Jorge L. Contreras, *Rationalizing U.S. Standardization Policy: A Proposal for Institutional Reform*, 35 Antitrust 41 (2021).

12 See Dotan Oliar, *Making Sense of the Intellectual Property Clause: Promotion of Progress as a Limitation on Congress's Intellectual Property Power*, 94 Geo. L.J. 1771, 1822 (2006) ("The heated debate over the desired shape of intellectual property law is commonly described as one between intellectual property minimalists (or "pessimists"), who wish to cut back on the current levels of protection or even abolish intellectual property law, and intellectual property maximalists (or "optimists"), who believe that expanding intellectual property rights in duration, scope, and subject-matter is socially desirable").

I. JAMES MADISON AND THE INTELLECTUAL PROPERTY CLAUSE

Article I, Section 8, Clause 8 of the U.S. Constitution (the "Intellectual Property Clause") grants Congress the power "to promote the progress of science and useful arts, by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries."

In 1787, as a member of Virginia's delegation to the Constitutional Convention in Philadelphia, James Madison was a principal drafter of the so-called "Virginia Plan" on which the federal Constitution was eventually modeled. Article I of the draft Constitution enumerated the powers of the proposed federal Congress. The predecessor of the Intellectual Property Clause was most likely introduced by Charles Pinckney of South Carolina, the only state then having its own patent legislation.[13] Pinckney's proposal was to authorize Congress "to grant patents for useful inventions." On the same day, Madison proposed a more vague power "to secure to the inventors of useful machines and implements the benefits thereof for a limited time" and "to encourage by premiums and provisions, the advancement of useful knowledge and discoveries."[14]

Though there are no known records of the Convention's debate on the Intellectual Property Clause, Professor Dotan Oliar convincingly traces the merger of Pinckney's and Madison's proposals into the eventual Clause approved by the Convention.[15] Based on contextual evidence, the current form of the Intellectual Property Clause likely represents a compromise between proponents of a strong national government (Madison, Pinckney, and Alexander Hamilton, among others) and those preferring strong states' rights.[16] There is no indication, however, that any of the Framers opposed the IP Clause as eventually drafted.

Following the Constitutional Convention, Madison, John Jay and Alexander Hamilton embarked on a campaign to persuade state conventions to ratify the new Constitution. This campaign resulted in the famous *Federalist Papers*, published between October 1787 and August 1788. *Federalist No. 43*, written by pseudonymously by Madison in January 1788, briefly addresses the Intellectual Property Clause, arguing that "'The utility of this power will scarcely be questioned. The copyright of authors has been solemnly adjudged, in Great Britain, to be a right of common law. The right to useful inventions seems with equal reason to belong to the inventors. The public good fully coincides in both cases with the claims of individuals ..."[17] The Constitution was ratified by the requisite majority of states in July, 1788, with no recorded debate concerning the Intellectual Property Clause.[18]

As summarized above, the historical record clearly shows that Madison supported the creation of a patent system. But he was hardly alone in this regard. By 1787, several states were already issuing patents, and South Carolina, Pinckney's home state, already had its own patent legislation.[19] Madison's primary concern, as articulated in *Federalist No. 43*, appears to have been centralizing the patent function in the new federal Congress, rather than allowing it to remain distributed across the states.[20]

Moreover, Madison's original proposals to the Constitutional Convention regarding the Intellectual Property Clause were more modest than the clause that was eventually adopted. For example, as Professor Oliar points out, Madison's original proposal would have authorized Congress to issue patents for "useful machines and implements," but not the broader category of "discoveries" that was included in the Intellectual Property Clause.[21] Indeed, Madison's original proposal was even narrower than Charles Pinckney's, which would have authorized the granting of patents

13 Kenneth W. Dobyns, The Patent Office Pony: A History of the Early Patent Office 24 (1994) (citing Levin H. Campbell, Power to grant patents for inventions - proceedings of the framers of the constitution in 1787, 64 Scientific Am. 241 (1891)); Walterscheid, *supra* note 13, at 101-04 ("Madison himself provides the best evidence that it was Pinckney who first proposed that the Constitution grant power to the Congress to issue patents for useful inventions").

14 Though there is some debate whether Madison actually proposed the "useful machines" clause at the Convention, Professor Oliar, after a detailed analysis, concludes that he did. Dotan Oliar, *The (Constitutional) Convention on IP: A New Reading*, 57 UCLA L. Rev. 421, 435-46 (2009).

15 Oliar, *Making Sense, supra* note 12, at 1788-1816.

16 *Id.* at 1813-14.

17 James Madison, Federalist No. 43 (1788), https://avalon.law.yale.edu/18th_century/fed43.asp.

18 See Walterscheid, *supra* note 4, at 2 ("The almost total lack of discussion in the federal convention was followed by an equal lack of discussion in the ratifying conventions"); Tyler T. Ochoa & Mark Rose, *The Anti-Monopoly Origins of the Patent and Copyright Clause*, 84 J. Patent & Trademark Off. Soc'y 909, 923 (2002) ("In the subsequent ratification debates, the Clause was rarely mentioned.")

19 See Walterscheid, *supra* note 4, at 57-58; Ochoa & Rose, *supra* note 18, at 921-22.

20 Federalist No. 43, *supra* note 17 ("The States cannot separately make effectual provisions for either of [patents or copyrights], and most of them have anticipated the decision of this point, by laws passed at the instance of Congress.") Difficulties arising from dispersed patent granting powers were well-known at the time. See e.g. Jeanne C. Fromer, *The Intellectual Property Clause's External Limitations*, 61 Duke L.J. 1329, 1345 (2012) (citing Bruce W. Bugbee, Genesis of American Patent and Copyright Law (1967)).

21 See Oliar, *New Reading, supra* note 14, at 457-58.

on "useful inventions." This evidence suggests that Madison was not among the promoters of strong patents at the Convention, placing Mr. Delrahim's characterization of Madison's "dogged perseverance in favor of strong patent protection"[22] at odds with the historical record.

II. MONOPOLIES, MADISON, AND JEFFERSON

Thomas Jefferson, who served as the American republic's Minister to France during the Constitutional Convention, initially disapproved of the Intellectual Property Clause.[23] Like many of the Founders, one of Jefferson's primary concerns was with monopolies – the exclusive privileges that had been granted by European governments to favored private parties.[24] Notorious examples of this practice included the monopoly in playing cards granted by Queen Elizabeth to one of her favorites,[25] the tea monopoly conferred by the crown on the British East India Company,[26] and the French tobacco and agricultural monopoly that Jefferson witnessed choke trade with the United States.[27] Government-granted monopolies offended the conscience of the Founders and many citizens of the new republic, who viewed them as serious impediments to the free ability to practice trades and engage in productive activities.[28] Worse, such monopolies were widely viewed as forms of political patronage, in which the government rewarded supporters and political cronies without regard to the economic opportunities that they foreclosed to others.[29]

During the debates over the Constitution, Jefferson believed that monopolies should be expressly prohibited.[30] When the Constitution was ratified (in his absence) without such a prohibition, he immediately began to propose amendments that would achieve that purpose.[31] Jefferson acknowledged that eliminating such monopolies could "lessen[] the incitements to ingenuity," but nevertheless concluded that "the benefit even of limited monopolies is too doubtful to be opposed to that of their general suppression."[32]

In an October, 1788 response to Jefferson, Madison agreed that monopolies were "justly classed among the greatest nuisances in Government." But Madison also asked whether "as encouragements to literary works and ingenious discoveries, they are not too valuable to be wholly renounced?"[33] Madison noted that, unlike Britain, in which Parliament was authorized to grant monopolies to its favorites, in the new and democratic United States, "Where the power … is in the many not in the few, the danger can not be very great that the few will be thus favored."[34]

22 Delrahim, *supra* note 2, at 4.

23 See Walterscheid, *supra* note 4, at 4 ("One may only speculate as to what the style and content of the Constitution might have been had [Jefferson] been present to take active part, but there is good reason to believe that he would have opposed the intellectual property clause.")

24 See e.g. Ochoa & Rose, *supra* note 18, at 926-28, Walterscheid, *supra* note 4, at 9-11; Steven G. Calabresi & Larissa C. Leibowitz, *Monopolies and the Constitution: A History of Crony Capitalism*, 36 Harvard J. L. & Pub. Pol. 983, 1009-15 (2013). But see Oliar, *Making Sense, supra* note 12, at 1785 ("there is some doubt that an intense abhorrence to monopolies existed generally at the time").

25 The Case of Monopolies (1603) 77 Eng. Rep. 1260 (Q.B.). See Adam Mossoff, *Rethinking the Development of Patents: An Intellectual History, 1550-1800*, 52 Hastings Law Journal 1255, 1267-70 (2001); Calabresi & Leibowitz, *supra* note 24, at 989-94.

26 See Amy Klobuchar, Antitrust: Taking on Monopoly Power from the Gilded Age to the Digital Age 24-27 (2021).

27 See Joseph J. Ellis, American Sphinx: The Character of Thomas Jefferson 106-07 (1997).

28 See Madison, *Property*, *supra* note 49.

29 See Calabresi & Leibowitz, *supra* note 24, at 1013 (quoting one 'Son of Liberty' who feared that "monopolies in trade, [would be] granted to the favorites of government, by which the spirit of adventure will be destroyed, and the citizens subjected to the extortion of those companies who will have an exclusive right, to engross the different branches of commerce.").

30 See Letter from Thomas Jefferson to James Madison, Dec. 20, 1787, https://founders.archives.gov/documents/Madison/01-10-02-0210 (suggesting a prohibition on monopolies in the body of the Constitution).

31 See Letter from Thomas Jefferson to James Madison, July 31, 1788, http://founders.archives.gov/documents/Madison/01-11-02-0147.

32 *Id.*

33 Letter from James Madison to Thomas Jefferson, Oct. 17, 1788, http://founders.archives.gov/documents/Madison/01-11-02-0218.

34 *Id.* In this sentence and elsewhere, Madison argues that rule by majority diminishes the risk that members of a powerful aristocratic minority will legislate to enrich itself through the grant of favorable trade monopolies, as did members of the British Parliament. Mr. Delrahim offers a mystifying interpretation of these words, arguing that "Madison understood that replacing monarchy with democracy reversed the threat of the misapplication of power, *creating a risk that patent holders might suffer from the tyranny of the majority Seeking to benefit unfairly from their innovation.*" Delrahim, *supra* note 2, at 3 (emphasis added). I find no plausible reading of Madison's words to support this interpretation.

Jefferson, who was himself a noted inventor, agreed.[35] Writing to Madison almost a year later, Jefferson proposed a clause for the new Bill of Rights providing that "Monopolies may be allowed to persons for their own productions in literature and their own inventions in the arts for a term not exceeding —— years but for no longer term and no other purpose."[36] Jefferson returned from Paris in October 1789 as the French Revolution became increasingly deadly. The Bill of Rights, which had been drafted principally by Madison, was ratified in December, 1791, but did not contain a prohibition on monopolies.

III. THE FATHER OF PATENT LAW?

Congress enacted the first Patent Act in April, 1790. Serving as Secretary of State under George Washington from 1790-93, Jefferson was one of the country's first patent commissioners and, as the Supreme Court has observed, became the group's "moving spirit."[37] As such, Jefferson is reputed to have reviewed personally every patent application filed under the 1790 Act.[38] Responding to deficiencies in the implementation of the 1790 Act, including the excessive workload on himself and his fellow commissioners, Jefferson supported the legislation that became the Patent Act of 1793.[39]

Despite his earlier misgivings, Jefferson came to accept and admire the patent system, writing in 1790 that "An act of Congress authorising the issuing patents for new discoveries has given a spring to invention beyond my conception. Being an instrument in granting the patents, I am acquainted with their discoveries. Many of them indeed are trifling, but there are some of great consequence which have been proved by practice, and others which if they stand the same proof will produce great effect."[40]

In 1807 (during his second term as President) Jefferson wrote that "Certainly an inventor ought to be allowed a right to the benefit of his invention for some certain time … Nobody wishes more than I do that ingenuity should receive a liberal encouragement."[41] Yet Jefferson's view of patents remained cautious, the "embarrassment of an exclusive patent" being outweighed in his mind only with respect to inventions of significant value to the public.[42] Jefferson's extensive writing and commentary on the patent system has been widely cited, including by the U.S. Supreme Court.[43]

Madison, in contrast to Jefferson, wrote little about the patent system or the Intellectual Property Clause. By the time that Madison became Secretary of State under Jefferson in 1801, the duties of patent examination had largely been delegated to lesser officials. Madison thus had less daily interaction with patent matters than Jefferson. His duties in this regard concerned the appointment in 1802 of the first superintendent of the newly-formed Patent Office,[44] opining on Congress's extension of expiring patent terms,[45] and, as President, in 1810, authorizing the purchase of the Blodgett Hotel in Washington, DC, to house the first permanent Patent Office.[46] If Madison is, as Mr. Delrahim has proposed,

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35 See William I. Wyman, *Thomas Jefferson and the Patent System*, 1 J. Pat. Off. Soc'y 5, 6 (1918) ("He was remarkably apt in the practical application of mechanical principles, as is shown by the fact that he was the first discoverer of an exact formula for the construction of mould-boards of least resistance for plows.").

36 Letter from Thomas Jefferson to James Madison, Aug. 28, 1789, Founders Online, National Archives, https://founders.archives.gov/documents/Jefferson/01-15-02-0354.

37 *Graham v. John Deere Co.*, 383 U.S. 1, 7 (1966).

38 See Wyman, *Jefferson, supra* note 35, at 6 , Walterscheid, *supra* note 4, .

39 *Graham*, 383 U.S. at 7 (claiming that Jefferson drafted the 1793 Act). But see Dobyns, *supra* note 13, at 47-48 (describing Jefferson's more limited role in the creation of the 1793 Act).

40 Letter from Thomas Jefferson to Benjamin Vaughan, Jun. 27, 1790, Founders Online, National Archives, https://founders.archives.gov/documents/Jefferson/01-16-02-0342.

41 Letter from Thomas Jefferson to Oliver Evans, May 2, 1807, Founders Online, National Archives, https://founders.archives.gov/documents/Jefferson/99-01-02-5538 (quoted in *Graham*, 383 U.S. at 8). For a detailed discussion of Jefferson's interactions with the inventor Oliver Evans, see Christopher Beauchamp, *Oliver Evans and the Framing of American Patent Law*, 71 Case Western Reserve L. Rev. (forthcoming 2022).

42 Letter from Thomas Jefferson to Isaac McPherson, Aug. 13, 1813, Founders Online, National Archives, https://founders.archives.gov/documents/Jefferson/03-06-02-0322 (quoted in *Graham*, 383 U.S. at 9-11). Jefferson's now-famous McPherson letter (which concerned the Evans patent, *supra* note 41) has been quoted often to support arguments to limit patent protection.

43 See, e.g., *Graham*, 383 U.S., Wyman, *Jefferson, supra* note 35, Ochoa & Rose, *supra* note 18, Mossoff, *supra* note 4, Beauchamp, *Evans, supra* note 41.

44 Madison appointed Dr. William Thornton to this position. See William I. Wyman, *The First Chief of the Patent Office*, 1 J. Pat. Off. Soc'y 152 (1918).

45 See Ochoa & Rose, *supra* note 18, at 930.

46 Dobyns, *supra* note 13, at 77.

to be rebranded as the "true father of U.S. patent law," then he must have been a disinterested parent, at best.[47]

IV. MADISON, PROPERTY, AND PATENTS

Like many of his contemporaries,[48] Madison supported the protection of private property against interference and expropriation by the government.[49] He is credited with introducing the protection of property against state seizure to the Bill of Rights, a guaranty that was eventually adopted as part of the Fifth Amendment.[50]

Yet during the eighteenth century, there is little evidence that the exclusive rights granted to inventors through patents were considered to be legal forms of "property," as opposed to government-issued monopolies, which is how they were typically characterized.[51] Madison, in fact, lumps patents together with other forms of monopoly when proposing that the federal government be entitled to revoke such "privileges" at will, upon payment to the holder of a specified amount.[52] He explains that such a right of revocation "would guard against the public discontents resulting from the exorbitant gains of individuals, and from the inconvenient restrictions combined with them."[53] Thus, far from endorsing the ability of patent holders to exploit their rights without limitation (as promoted under the "New Madison" approach), Madison expresses concerns about both the "exorbitant gains" that patent owners may make from their monopolies, and the accompanying "inconvenient restrictions" that they may place on individuals and the market. Thus, despite potential social benefits that might be encouraged by some monopolies, they must in any case be "guarded with strictness [against] abuse."[54]

Moreover, Madison does not speak of patents as property, but as governmental *limitations* on one's right to use and employ the property inherent in one's own persona and labor. This view of property is Lockean in nature,[55] encompassing the entire set of things and activities originating in one's person. He complains that monopolies act to prevent individuals from exercising their rights, asking, among other things, "What must be the spirit of legislation where a manufacturer of linen cloth is forbidden to bury his own child in a linen shroud, in order to favour his neighbour who manufactures woolen cloth?"[56]

In modern terms, Madison appears more interested in preserving individual "freedom to act" than giving inventors the right to exclude others from practicing their inventions. In his 1792 essay on Property, Madison reasons, "That is not a just government, nor is property secure under it, where arbitrary restrictions, exemptions, and monopolies deny to part of its citizens that *free use of their faculties, and free choice of their*

47 Neither the Intellectual Property Clause nor the patent system is discussed or indexed in the numerous modern biographies or historical accounts concerning Madison that the author has reviewed. See e.g. Noah Feldman, The Three Lives of James Madison: Genius, Partisan, President (2017), Joseph J. Ellis, The Quartet: Orchestrating the Second American Revolution, 1783-1789 (2015); Lynne Cheney, James Madison: A Life Reconsidered (2014); Richard Brookhiser, James Madison (2011), Andrew Burstein & Nancy Isenberg, Madison and Jefferson (2010); Edward J. Larson & Michael P. Winship, The Constitutional Convention: A Narrative History from the Notes of James Madison (2005); Irving Brant, James Madison: The Virginia Revolutionist (1941).

48 See Burstein & Isenberg, *supra* note 47, at 145 ("All were committed to the protection of property rights and class privilege. Madison had reason to expect that they and he were of one mind").

49 James Madison, Federalist No. 54 (1788) ("Government is instituted no less for the protection of the property than of the persons of individuals." (Regrettably, Madison makes this point in the midst of his infamous justification for counting slaves as only three-fifths of a person for purposes of determining the number of seats to be allocated to a state in the House of Representatives.)) See *also* James Madison, *Property*, in Papers 14:266-68 (Mar. 29, 1792), https://press-pubs.uchicago.edu/founders/print_documents/v1ch16s23.html ("Government is instituted to protect property of every sort").

50 See Burstein & Isenberg, *supra* note 47, at 197.

51 Professor Adam Mossoff disagrees, finding support in Madison's 1792 essay, *supra* note 49, for the idea that Madison and his contemporaries considered patents to be a form of property. Mossoff, *supra* note 4, at 985 n. 149.

52 See e.g. Letter to Jefferson, Oct. 1788, *supra* note 33 ("Would it not suffice to reserve in all cases a right to the Public to abolish the privilege at a price to be specified in the grant of it?"), James Madison, *Monopolies. Perpetuities. Corporations. Ecclesiastical Endowments.* Detached Memoranda (1819) in James Madison – Writings 756, 757 (Jack N. Rakove, ed., 1999) ("In all cases of monopoly, not excepting those specified in favor of authors & inventors, it would be well to reserve to the State, a right to terminate the monopoly by paying a specified and reasonable sum.") It is worth noting that several state patent statutes also included such buyout provisions prior to the enactment of the federal constitution. See Beauchamp, *Evans, supra* note 41, at § I.B.5.

53 Madison, *Monopolies*, *supra* note 52, at 757.

54 *Id.*

55 See Mossoff, *supra* note 4, at 971.

56 Madison, *Property, supra* note 49.

occupations, which not only constitute their property in the general sense of the word; but are the means of acquiring property strictly so called."[57]

For all of these reasons, it is hard to find a property-based rationale for characterizing Madison as a champion of strong patent rights.

V. ANTEBELLUM ANTITRUST?

Perhaps the most remarkable, and telling, aspect of the Trump Antitrust Division's adoption of James Madison as its historical standard-bearer is the fact that Madison formulated his views of the Constitution more than a century before the enactment of the antitrust laws in the United States. And while Madison and his contemporaries were concerned about governmental monopolies, as discussed above, these monopolies were not the types of private business arrangements that led to the enactment of the antitrust laws in the late nineteenth and early twentieth centuries. In the largely agrarian economy of Madison's day, monopolies could be granted by the sovereign, but the economic, legal and technological conditions necessary for the rise of dominant business combinations did not emerge until after the Civil War. Those conditions, which included sophisticated corporate governance mechanisms, increasingly liquid financial markets, increased industrialization, and a national communications and transportation infrastructure, gave rise to the infamous trusts that controlled the oil, railroad, steel, sugar, coal, lead and other industries from the late nineteenth to early twentieth centuries.[58] It is doubtful that Madison or his contemporaries could have envisioned the momentous technological, legal and financial changes that would sweep the country during the next century, or fathom the need for laws to curb the abusive practices of businesses that grew to unprecedented scale on the backs of those changes.

What's more, patents played only a minor role in the economic landscape of Madison's day. It was not until the administrative reforms of the 1830s, well after Madison had retired from public life, that patent issuances and litigation began to increase dramatically and to become tools of business competition and, occasionally, abuse.[59]

The Sherman Act, the Clayton Act, the Federal Trade Commission Act and other state and federal legislation enacted beginning in the last decade of the nineteenth century gave government and private plaintiffs the tools necessary to combat anticompetitive conduct, including conduct facilitated by patents.[60] It is ironic that a leader of the federal agency charged with enforcing these laws chose to base his antitrust philosophy on the purported theories of James Madison, a historical figure who had no relationship to antitrust law or enforcement and lived in an era in which the commercial environment that gave rise to the antitrust legislation of the late nineteenth century did not yet exist and could hardly have been imagined.

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57 Madison, *Property, supra* note 49 (emphasis added). Madison's understanding of patents as monopolies that tended to *restrict* one's exercise of property rights in his or her own labor or profession appears to mirror that of Jefferson, who took this view in his written debates with the inventor Oliver Evans. See Beauchamp, *Evans, supra* note 41, at Part III.B. Rather, it is Evans, the inventor, who argued that "a man's ideas and inventions, are, by natural law, his own exclusive property". Oliver Evans, Letter to the Editor, A Trip Made by a Small Man in a Wrestle with a Very Great Man, Niles' Wkly. Reg., Feb. 28, 1814 (Second Addenda to Vol. V), at 1 (1814) (quoted in Beauchamp, *Evans, supra* note 41, at Part III.B).

58 See, generally, Lawrence M. Friedman, A History of American Law, 405-06, 446-48 (1973) ("nothing could be more startling than the difference one century made in the law of the business corporation").

59 See Christopher Beauchamp, *The First Patent Litigation Explosion*, 125 Yale L. J. 848, 856-57, 902-03 (2016) (discussing the impact on patents of the shift from an "artisanal" to a "corporate" economy).

60 For a discussion of early twentieth century antitrust cases involving patents, see Ernest S. Meyers & Seymour D. Lewis, *Patent Franchise and the Antitrust Laws*, 30 Geo. L. J. 117 (1941), Jorge L. Contreras, *A Brief History of FRAND: Analyzing Current Debates in Standard-Setting and Antitrust through a Historical Lens*, 80 Antitrust L. J. 39 (2015).

VI. CONCLUSION: NEW MADISON OR NEO-MAXIMALIST?

The so-called New Madison approach was designed to promote the interests of patent holders, particularly in the area of standards. Far from new, such "maximalist" initiatives have existed throughout the history of patent law, and have been advanced by both private industry and government officials.[61] Nevertheless, even within the cynical world of Washington politics, it seems excessive to recruit to one's cause a Founding Father who had so little relation to the issue at hand. James Madison was no patent maximalist. Like his longtime friend Thomas Jefferson, he was an anti-monopolist who believed, along with most of his contemporaries, that Congress should have the authority to issue patents for limited periods to promote the creation of useful inventions.[62] Appropriating Madison's name to justify a neo-maximalist agenda of diminished antitrust enforcement is both wrongheaded and ahistorical, and the continued misuse of this label distorts the views of a major figure in American Constitutional history.

61 See e.g. Beauchamp, *Explosion, supra* note 59, at 924 ("between 1836 and 1861 … Congressional interventions, above all in the form of private bills extending patents, were highly influential and highly controversial in the politics of patents"), Deborah Halbert, *The Politics of IP Maximalism*, 3 WIPO J. 74, 76 (2011) ("to a disturbing degree, government reports and public comments about the role IP plays tend to reflect a maximalist position") and 77-79 (describing maximalist tendencies in U.S. administrations from Reagan to Obama).

62 Professor Oliar argues that Madison's original proposal to the Constitutional Convention would have given Congress greater power to issue patents, untethered to the need to promote the progress of the useful arts. See Oliar, *Making Sense, supra* note 12, at 1813-14.

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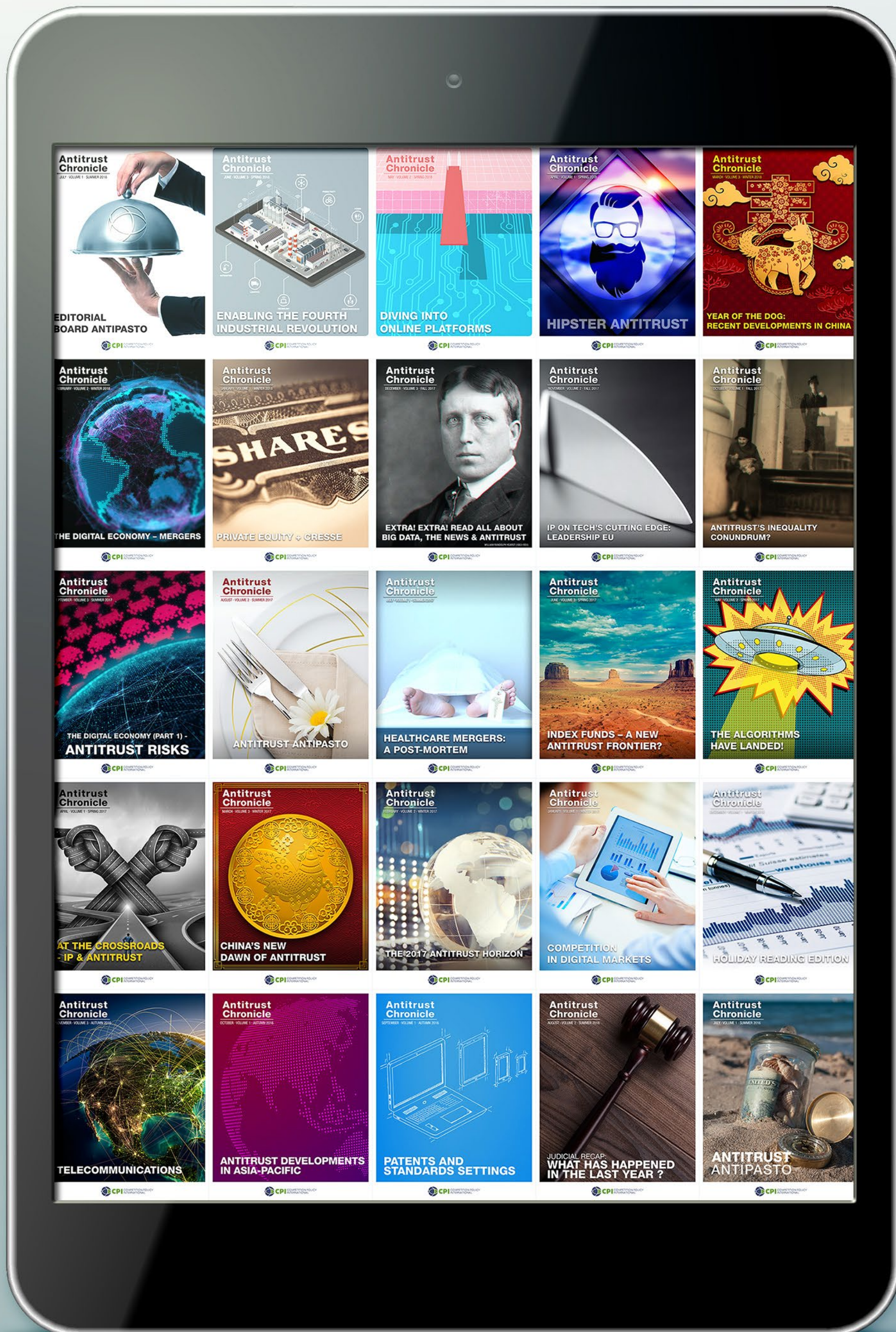

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