

THE STATUTORY PRESUMPTION OF PATENT VALIDITY IN  
ANTITRUST CASES

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I. INTRODUCTION

“To promote the Progress of Science and useful Arts,” the U.S. Constitution authorizes Congress to grant inventors the right to exclusive use and control of their inventions.<sup>1</sup> However, inventors only have the right to exclude others from using a patented invention — and then only when the patent is valid. Unfortunately, many recently challenged patents were found to be enforced beyond their bounds by eager patentees, and a significant number did not hold up under close scrutiny and were declared invalid.<sup>2</sup> While defendants faced with an infringement action can contest the scope and validity of the asserted

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1. U.S. CONST., art. I, § 8, cl. 8 (granting Congress authority to “promote the Progress of Science and useful Arts, by securing for limited Times to . . . Inventors the exclusive Right to their . . . Discoveries.”).

2. See Univ. of Hous. Law Ctr., *Decisions for 2000–2004*, PATSTATS.ORG, [http://www.patstats.org/Composite%20Table%20\(2000-2004\).html](http://www.patstats.org/Composite%20Table%20(2000-2004).html) (last visited Dec. 21, 2011).

patent, third parties lack standing to challenge the patent's validity, even though in many cases third parties bear some costs if the litigation settles.<sup>3</sup> One example is reverse settlements in pharmaceutical patent litigation,<sup>4</sup> where third parties, such as insurance companies and state medical programs, have a strong interest in preventing coordination between drug companies.<sup>5</sup> Without standing to challenge the patent directly, affected third parties often must resort to the antitrust laws to prevent collusion between settling parties.

When third parties bring antitrust suits challenging competitors' patent agreements, courts grapple with the fact that antitrust and patent laws often conflict. U.S. antitrust laws promote competition by declaring illegal "[e]very contract, combination . . . or conspiracy, in restraint of trade" and by expressly prohibiting unlawful monopolies.<sup>6</sup> At the same time, Congress grants inventors exclusive use and control of their inventions pursuant to its constitutional authority.<sup>7</sup> The competitive costs of granting temporary exclusive use and control to patent holders are outweighed in the long run by the cumulative innovation incentive that results from granting patents; the incentives created by the reward of patents to inventors spur the invention of technology that might not exist otherwise. Nevertheless, the grant of exclusive use and control does not render patent holders completely immune from the antitrust laws.<sup>8</sup> While in early cases patents provided a complete shield from the antitrust laws,<sup>9</sup> now "[t]he patent laws . . . are *in pari materia* with the antitrust laws and modify them *pro tanto*."<sup>10</sup> Thus, when the government issues a patent, the resulting monopoly over the technology does not violate the antitrust laws — nor does any related anti-competitive activity — so long as the patentee's activity falls within the confines of the patent.<sup>11</sup> Determining the confines of a patent — its scope — is therefore an important inquiry

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3. See *Webmethods, Inc. v. Iwork Software, LLC*, No. 03C838, 2003 WL 1908019 (N.D. Ill., Apr. 21, 2003) (holding a company that indemnified its customers for patent infringement did not gain standing to contest patent's validity).

4. Reverse settlements earn their name because instead of an alleged infringer paying a patentee, the patentee pays the alleged infringer. For pharmaceutical companies, this occurs under the Hatch-Waxman Act and results in branded drug companies paying generic manufacturers to delay their entry into the market. The negotiated entry date of the generic is earlier than the expiration of the patent term but later than when the generic would have entered the market had it prevailed in the patent dispute. See Gregory Dolin, *Reverse Settlements as Patent Invalidation Signals*, 24 HARV. J.L. & TECH. 281, 282 (2011).

5. See, e.g., *In re Tamoxifen Citrate Antitrust Litig.*, 466 F.3d 187 (2d Cir. 2006); *In re Cardizem CD Antitrust Litig.*, 332 F.3d 896 (6th Cir. 2003).

6. 15 U.S.C. §§ 1–2 (2006).

7. U.S. CONST., art. I, § 8, cl. 8; 35 U.S.C. § 271 (2006).

8. *Standard Oil Co. v. United States*, 283 U.S. 163, 169 (1931).

9. See *Ill. Tool Works, Inc. v. Indep. Ink, Inc.*, 547 U.S. 28, 39 (2006) (citing *Int'l Salt Co. v. United States*, 332 U.S. 392, 395–96 (1947)); *Standard Oil*, 283 U.S. at 169.

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

11. *In re Ciprofloxacin Hydrochloride Antitrust Litig.*, 261 F. Supp. 2d 188, 248 (E.D.N.Y. 2003) (citing *United States v. Line Materials Co.*, 333 U.S. 287, 308 (1948)).

in an antitrust case that centers on the use of that patent. But recently, courts have refused to even consider the issue, instead relying on a patent's presumption of validity to avoid this central question.<sup>12</sup>

Relying upon this historic presumption, several circuit courts — including the Federal Circuit — have held that an antitrust case is not an appropriate venue for contesting a patent's validity.<sup>13</sup> However, some plaintiffs that would have standing in an antitrust case do not have standing in an action challenging patent validity, thus putting these antitrust plaintiffs in the impossible situation of having potential harm without any prospect of relief. This Note asserts that such an application of the presumption of patent validity is erroneous and contrary to the intent underlying the presumption. This incorrect application in antitrust cases can lead courts to uphold agreements that are likely anticompetitive, barring legitimate antitrust victims from seeking the relief to which they are entitled. This Note argues that courts should not shy away from examining the validity and scope of patents in antitrust claims that center on patent agreements, even though there may be some decisional costs associated with such an analysis. In order to minimize these costs while still encouraging competition, courts should carefully manage the types of antitrust cases in which they conduct patent-related inquiries.

In Part II, this Note examines how courts have approached antitrust cases that involve patent agreements. In Part III.A, it goes on to explore the relevant statutory language and the presumption of validity as they have been interpreted in other cases. In Part III.B, the Note examines the Supreme Court's recent decision in *eBay v. MercExchange, LLC*<sup>14</sup> and concludes that the presumption of validity is being applied in a manner inconsistent with that decision. Finally, in Part III.C, it discusses some concerns with exploring a patent's validity and how courts can limit potential problems when examining a patent.

## II. ANTITRUST COURTS' AVOIDANCE OF EXAMINING PATENTS

Recognizing that the scope of a patent provides a demarcation between the proper and improper use of the patent, courts historically examined a patent's scope and validity in antitrust cases when the parties argued the issue. *Standard Oil v. United States*<sup>15</sup> illustrates a particularly laborious effort to examine relevant patents in an antitrust

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12. 35 U.S.C. § 282 (2006).

13. *In re Ciprofloxacin Hydrochloride Antitrust Litig.*, 544 F.3d 1323 (Fed. Cir. 2008); *In re Tamoxifen Citrate Antitrust Litig.*, 466 F.3d 187 (2d Cir. 2005); *Schering-Plough Corp. v. FTC*, 402 F.3d 1056 (11th Cir. 2005); *In re Cardizem CD Antitrust Litig.*, 332 F.3d 896 (6th Cir. 2003).

14. 547 U.S. 388 (2006).

15. 283 U.S. 163 (1931).

case. In *Standard Oil*, the court appointed a special master to hear evidence and make determinations with respect to the contested patents. After nearly three years of hearings, 327 exhibits, and a 4300-page record, the special master produced a 240-page report that focused primarily on the patents and the defendants' licensing agreements.<sup>16</sup>

While courts historically did not shy away from scrutinizing patents in antitrust cases, they did avoid addressing the question unless one of the parties explicitly raised the issue. For example, in *United States v. General Electric Co.*,<sup>17</sup> neither party raised the potential issues of patent scope and validity during the course of the antitrust dispute. Ultimately, the Supreme Court allowed General Electric to fix prices for light bulbs, a patented invention, without examining the scope of the underlying patent.<sup>18</sup>

In the 1990s, courts began to turn away from examining patents that were at issue in antitrust suits. In 1997, the Ninth Circuit acknowledged that “[m]uch depends . . . on the definition of the patent grant and the relevant market.”<sup>19</sup> Nevertheless, the court declined to consider the patent's validity and proceeded on other grounds.<sup>20</sup>

Many courts, however, do not explicitly refuse to examine a patent. Instead, they rely on the statutory presumption that begins any examination into the scope and validity of a patent: that the patent is valid.<sup>21</sup> Though this presumption has existed since the early years of American patent law,<sup>22</sup> the standard of proof necessary to rebut it has been hotly debated through the present day.<sup>23</sup> The presumption is so strong that some courts assume that patents are valid without even making reference to the “presumption,”<sup>24</sup> though some courts are more explicit about their reliance on the presumption.<sup>25</sup>

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16. *Id.* at 166.

17. 272 U.S. 476 (1926).

18. *Id.* at 490.

19. *Image Technical Servs., Inc. v. Eastman Kodak Co.*, 125 F.3d 1195, 1216 (9th Cir. 1997).

20. *See id.* at 1218–20 (examining various arguments for overturning a jury award on antitrust grounds but not examining the validity of the underlying patents).

21. 35 U.S.C. § 282 (2006); *see also* *Celluloid Mfg. Co. v. Goodyear Dental Vulcanite Co.*, 5 F. Cas. 345, 349 (C.C.S.D.N.Y. 1876) (No. 2543) (noting that receipt of a patent establishes a prima facie right to bring an action in court).

22. *Washburn v. Gould*, 29 F. Cas. 312, 320 (C.C.D. Mass. 1844) (No. 17-214).

23. *See* *Microsoft Corp. v. i4i Ltd. P'ship*, 131 S. Ct. 2238, 2244–49 (2011) (examining the history behind the presumption of validity and ultimately deciding the standard is clear and convincing evidence); *see also id.* at 2253–54 (2011) (Thomas, J., concurring) (disagreeing with the majority's historical analysis but agreeing with the clear and convincing standard).

24. *See Kodak*, 125 F.3d at 1217 (requiring that “some weight be given to the intellectual property rights of the monopolist”).

25. *See In re Indep. Serv. Orgs. Antitrust Litig.*, 203 F.3d 1322, 1327 (Fed. Cir. 2000) (stating that absent any indication of illegal tying, fraud on the PTO, or sham litigation, the

Courts apply the presumption even when antitrust plaintiffs allege that the patent is invalid or that the agreement is beyond the patent's scope.<sup>26</sup> In the case *In re Ciprofloxacin*, the Federal Circuit held that an "analysis of patent validity is [not] appropriate in the absence of fraud or sham litigation . . . [since] a patent is presumed to be valid."<sup>27</sup> Such avoidance is common: when antitrust law and patent law intersect, courts frequently avoid close scrutiny of the underlying patent.<sup>28</sup>

While the presumption of validity is strong, it can — like all presumptions — be rebutted by evidence satisfying the applicable standard of proof. In an infringement action, an accused infringer can overcome the presumption and prove invalidity by clear and convincing evidence.<sup>29</sup> But when a third party alleges that a patent-related agreement is anticompetitive, that party lacks the ability to challenge patent validity because no infringement action exists. By refusing to examine a patent's validity in this context, courts effectively make the presumption of validity irrefutable<sup>30</sup> — a result that is inconsistent with the intended application of the presumption.

Precedent supporting the refusal to examine the validity of patents in antitrust cases is sparse, further suggesting that courts are improperly applying the presumption of validity to dispose of patent questions in these cases. In *Schering-Plough Corp. v. FTC*, the Eleventh Circuit held that settlements falling within the exclusionary effects of a patent pose no antitrust problem.<sup>31</sup> For this proposition, the court relied on dicta from the 1964 case *Simpson v. Union Oil*.<sup>32</sup> *Simpson* itself, however, did not deal with any patented article. Instead, the *Simpson* Court distinguished the case from *United States v. General Electric*, which permitted GE to fix prices by issuing a license because the invention, the light bulb, was covered by a patent.<sup>33</sup>

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patent holder may exercise his or her statutory rights to make, use, or sell free from antitrust liability). Notably absent from the Federal Circuit's list is patent invalidity.

26. See *In re Ciprofloxacin Hydrochloride Antitrust Litig.*, 544 F.3d 1323, 1337 (Fed. Cir. 2008).

27. *Id.*

28. See, e.g., *Schering-Plough Corp. v. FTC*, 402 F.3d 1056, 1067 (11th Cir. 2005); *In re Tamoxifen Citrate Antitrust Litig.*, 466 F.3d 187, 208–09, 209 n.22 (2d Cir. 2005); *Valley Drug Co. v. Geneva Pharm., Inc.*, 344 F.3d 1294, 1304–09 (11th Cir. 2003); see also Henry N. Butler & Jeffrey Paul Jarosch, *Policy Reversal on Reverse Payments: Why Courts Should Not Follow the New DOJ Position on Reverse-Payment Settlements of Pharmaceutical Patent Litigation*, 96 IOWA L. REV. 57, 79 (2010).

29. *Microsoft Corp. v. i4i Ltd. P'ship*, 131 S. Ct. 2238, 2242 (2011); *Enzo Biochem., Inc. v. Gen-Probe Inc.*, 424 F.3d 1276, 1281 (Fed. Cir. 2005) ("A patent is presumed to be valid, and this presumption only can be overcome by clear and convincing evidence to the contrary." (citation omitted)).

30. See *In re Ciprofloxacin*, 544 F.3d at 1337.

31. See 402 F.3d at 1068.

32. *Id.* at 1067 (citing *Simpson v. Union Oil Co. of Cal.*, 377 U.S. 13, 24 (1964)) (asserting that patent and antitrust laws implicate the same subject matter and that patent laws modify antitrust laws to the extent they overlap).

33. See *id.* at 22–24 (citing *United States v. Gen. Elec. Co.*, 272 U.S. 476 (1926)).

In the absence of relevant binding precedent, antitrust courts rely on policy considerations to support their dismissal of patent invalidity contentions, expressing concern about the effect such an examination would have on licensees and patentees.<sup>34</sup> If courts resolve patent validity issues in antitrust cases arising out of patent settlements or licenses, then such licenses and settlements could give rise to treble damage awards under antitrust law. In addition, the patentee could lose the ability to enforce the patent against future infringers, either through collateral estoppel or simply because future courts may give deference to the antitrust court's determination.<sup>35</sup> This loss could dramatically alter a patentee's "bargain" with the public,<sup>36</sup> potentially increasing the liabilities of disclosing and managing a patent, and thereby reducing the incentive provided for future patentees to disclose their inventions.

Such concerns, though intuitively appealing, ignore the reality of the role patents play in the antitrust enforcement context. The Department of Justice, one of two agencies (along with the Federal Trade Commission) primarily responsible for enforcing U.S. antitrust laws, hires experts to assess patent scope when it reviews proposed patent pools.<sup>37</sup> In a patent pool, two or more patent owners agree to license one or more of their patents to each other party or to third parties.<sup>38</sup>

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34. *E.g.*, *In re Ciprofloxacin Hydrochloride Antitrust Litig.*, 363 F. Supp. 2d 514, 533 (E.D.N.Y. 2005), *aff'd*, 544 F.3d 1323 (Fed. Cir. 2008).

35. A full analysis of collateral estoppel implications is beyond the scope of this Note.

36. *See* *Bonito Boats, Inc. v. Thunder Craft Boats, Inc.*, 489 U.S. 141, 150–51 (1989).

37. Letter from Joel I. Klein, Acting Assistant Attorney Gen. for Antitrust, U.S. Dep't of Justice, to Gerrard R. Beene, Sullivan & Cromwell 10 (June 26, 1997), *available at* <http://www.justice.gov/atr/public/busreview/215742.pdf> ("The continuing role of an independent expert to assess essentiality is an especially effective guarantor that the Portfolio patents are complements, not substitutes."); Letter from Joel I. Klein, Assistant Attorney Gen. for Antitrust, U.S. Dep't of Justice, to Gerrard R. Beene, Sullivan & Cromwell 11 (Dec. 16, 1998), *available at* <http://www.justice.gov/atr/public/busreview/2121.pdf> ("[S]o long as the patent expert applies this [essentiality] criterion scrupulously and independently, it is reasonable to expect that the Portfolio will combine contemporary patent rights while not limiting competition between them and other patent rights for purposes of the licensed applications."); Letter from Joel I. Klein, Assistant Attorney Gen. for Antitrust, U.S. Dep't of Justice, to Carey R. Ramos, Paul, Weiss, Rifkind, Wharton & Garrison 12 (June 10, 1999), *available at* <http://www.justice.gov/atr/public/busreview/2485.pdf> (same). Charles A. James explains:

The arrangements proposed in connection with the Platform, including . . . the provisions for review of [patent] essentiality by component experts without conflicts of interest and payment of the costs of evaluation through fees assessed on applicants . . . provide reasonable assurance that patents combined in a single PlatformCo for a 3G radio interface technology will not be substitutes for one another.

Letter from Charles A. James, Assistant Attorney Gen. for Antitrust, U.S. Dep't of Justice, to Ky P. Ewing, Vinson & Elkins 10 (Nov. 12, 2002), *available at* <http://www.justice.gov/atr/public/busreview/200455.pdf>.

38. *See* Joel I. Klein, Acting Assistant Attorney Gen. for Antitrust, U.S. Dep't of Justice, Address to the American Intellectual Property Law Association: Cross-Licensing and Antitrust Law (May 2, 1997), *available at* <http://www.justice.gov/atr/public/speeches/1118.htm>.

Every member of the pool can utilize other members' patents without risking infringement. In reviewing these pools, the Department of Justice retains an expert to determine if overlapping or alternative technologies are included. If so, then the pool will not be approved because it reduces competition between the competing technologies and violates antitrust law.

Admittedly, this situation is different from the hypothetical third-party patent-validity challenger discussed earlier. The Department of Justice is not alleging that the patents are invalid or that the proposed pool is outside any patent's scope. But the practice is significant because it shows that the Department of Justice does not rely on presumptions and instead independently examines the scope of a patent when making antitrust determinations.<sup>39</sup> The Department does not possess any regulatory competence for examining the scope of a patent. Because of its lack of competence in patent law, the Department retains outside, independent experts to examine the patents, unlike economic analyses that are largely done by in-house economists. Similarly, courts can either appoint an independent expert to advise the court<sup>40</sup> or have the parties make opposing arguments relative to the patent and then make a finding. Presently, courts do neither.

### III. REVERSING PRESUMPTIONS

Some courts make a larger mistake than merely relying on the presumption of validity to avoid examining patents; they rely on it too much and place the burden of proving non-infringement on the alleged infringer, rather than placing the burden of proving infringement on the party alleging infringement.<sup>41</sup> In *Schering-Plough*, the Eleventh Circuit made this mistake.<sup>42</sup> The court reversed the burdens, stating that "Schering obtained the legal right to exclude [the generic companies] from the market until [the generic companies] proved either that the '743 patent was invalid or that their products . . . did not infringe Schering's patent."<sup>43</sup> Validity and infringement are distinct issues. Therefore, in spite of the presumption of validity, the burden to demonstrate that the patent was infringed remains on the party alleging infringement.<sup>44</sup>

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39. Admittedly, there is no evidence that the Department examines a patent's validity.

40. Although rarely used, the Federal Rules of Evidence allow courts to "appoint expert witnesses of [their] own selection." FED. R. EVID. 706.

41. See Lucy Grace Dearce, *Deconstructing and Recalibrating the Valley Drug Analysis of Reverse Payments*, 47 IDEA 587, 588 (2007).

42. Brief of States as Amici Curiae in Support of FTC at 16–17, *FTC v. Schering-Plough Corp.*, 548 U.S. 919 (2006) (No. 05-273), 2005 WL 2454839, at \*12.

43. *Schering-Plough Corp. v. FTC*, 402 F.3d 1056, 1066–67 (11th Cir. 2005).

44. *Titan Tire Corp. v. Case New Holland, Inc.*, 566 F.3d 1372, 1380 (Fed. Cir. 2009).

*A. The Presumption of Validity Is Misplaced in Antitrust Cases*

Exactly how the presumption of validity should be applied is unclear when patent and antitrust laws intersect in a case. The notion that a patentee faces antitrust scrutiny for actions “[b]eyond the limited monopoly which is granted [by the patent]”<sup>45</sup> is well established; but at the same time, where patent and antitrust laws overlap, the patent laws modify the antitrust laws.<sup>46</sup> The statutory language of the presumption of validity does little to clarify the issue: “A patent shall be presumed valid.”<sup>47</sup> The statute’s remaining language describes specific situations of independent and dependent claims, composition and nonobviousness issues, and discovery timing.<sup>48</sup> Finally, although the statutory language is broad — indicating no explicit limits on the type of case where the presumption applies — the presumption of validity appears in chapter 29 of title 35, labeled “Remedies for Infringement of Patent, and Other Actions.” Normally the title of the chapter would be irrelevant, but when statutory language is ambiguous “the title of a statute or section can aid in resolving an ambiguity in the legislation’s text.”<sup>49</sup> Beyond this one clue about the presumption’s meaning, the statute provides no guidance on how Congress intended to apply the presumption, leaving courts to flesh out the details.

In order to apply the presumption, courts must first determine its strength. In a hypothetical case where both parties present no evidence and make no argument, a presumption’s strength plays a simple role — its mere existence would be conclusive as to the outcome. But beyond such an unlikely case, the strength of a presumption may significantly alter the outcome of the case. History provides a helpful starting point to determine the strength of the presumption. In the early nineteenth century, a patent issued by the appropriate government official created a conclusive presumption of validity, beyond reproach by the courts.<sup>50</sup> In 1875, the presumption was reduced from creating an irrefutable conclusion to a prima facie showing of validity.<sup>51</sup> At the turn of the twenty-first century the presumption now apparently establishes a heavy burden for challengers to overcome,<sup>52</sup> though some still succeed in meeting that burden.<sup>53</sup>

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45. *United States v. Masonite Corp.*, 316 U.S. 265, 277 (1942).

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

47. 35 U.S.C. § 282 (2006).

48. *Id.*

49. *INS v. Nat’l Ctr. for Immigrants’ Rights, Inc.*, 502 U.S. 183, 189 (1991).

50. *Phila. & Trenton R.R. Co. v. Stimpson*, 39 U.S. (14 Pet.) 448, 458 (1840); Kenneth S. Broun, *The Unfulfillable Promise of One Rule for All Presumptions*, 62 N.C. L. REV. 697, 700 (1984).

51. *Reckendorfer v. Faber*, 92 U.S. 347, 354–55 (1875).

52. *Microsoft Corp. v. i4i Ltd. P’ship*, 131 S. Ct. 2238, 2245–46 (2011).

53. *Id.*; *Titan Tire Corp. v. Case New Holland, Inc.* 566 F.3d 1372, 1385 (Fed. Cir. 2009) (affirming refusal to grant preliminary injunction and noting that presumption of validity



However, all of these cases addressing the presumption's strength involved assertions of invalidity in the context of infringement actions brought by a patentee. Because no infringement action exists when a third party brings an antitrust suit on the grounds of alleged monopolization or collusion, these cases are distinguishable, and thus, the presumption's strength in a non-infringement action remains uncertain. While the presumption's strength in the infringement context does not directly answer our question, it does indicate that the presumption is likely to place a high burden of proof on any party challenging patent validity.

Second, courts must determine whether the presumption of validity is merely procedural or whether it has substantive effect. In recent cases, the presumption has been used as a procedural device<sup>54</sup> and has carried no substantive effect.<sup>55</sup> Preliminary injunctions provide an example of the procedural effect of the presumption.<sup>56</sup> In *Amazon.com, Inc. v. Barnesandnoble.com, Inc.*, the Federal Circuit overturned a preliminary injunction issued against Barnesandnoble.com ("BN") for a patent on Amazon's "one-click" ordering system.<sup>57</sup> In so doing, the Federal Circuit placed the burden of showing a likelihood of success on the merits on Amazon in spite of the presumption of validity:

Amazon must show that, in light of the presumptions and burdens that will inhere at trial on the merits . . . Amazon's infringement claim will likely withstand BN's challenges to the validity and enforceability of the '411 patent. If BN raises a substantial question concerning either infringement or validity, *i.e.*, asserts an infringement or invalidity defense that the patentee cannot prove "lacks substantial merit," the preliminary injunction should not issue.<sup>58</sup>

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could be overcome at trial); *Enzo Biochem, Inc. v. Gen-Probe Inc.*, 424 F.3d 1276, 1281 (Fed. Cir. 2005) (stating that the presumption of validity can be overcome by clear and convincing evidence at trial).

54. See *New Eng. Braiding Co. v. A.W. Chesterton Co.*, 970 F.2d 878, 882 (Fed. Cir. 1992); *Nutrition 21 v. United States*, 930 F.2d 867, 869 (Fed. Cir. 1991).

55. *New Eng. Braiding Co.*, 970 F.2d at 882 (finding that the presumption cannot be "evidence which can be 'weighed' in determining the likelihood of success" at the preliminary injunction stage); see also *Avia Group Int'l, Inc. v. L.A. Gear Cal., Inc.*, 853 F.2d 1557, 1562 (Fed. Cir. 1988) ("[T]he presumption is one of law, not fact, and does not constitute 'evidence' to be weighed against a challenger's evidence.").

56. When seeking a preliminary injunction, the burden to show a reasonable probability that he will succeed on the merits rests on the party seeking the injunction, usually the patentee.

57. 239 F.3d 1343, 1347 (Fed. Cir. 2001).

58. *Id.* at 1350–51 (citation omitted).

More recently the Federal Circuit has attempted to clarify conflicts like that of *Amazon* — where the benefit of the presumption lies with the patentee, yet the burden of satisfying the requirements for obtaining an injunction also lies with the patentee. In *Titan Tire Corp. v. Case New Holland, Inc.*, the plaintiff sought to enjoin Case New Holland's use of a design patent.<sup>59</sup> The trial court ruled that every factor favored granting an injunction — except the likelihood that Case New Holland's invalidity defense would succeed.<sup>60</sup> The trial court thus denied the preliminary injunction because Titan was unable to overcome Case New Holland's invalidity assertion.<sup>61</sup>

Regarding the question of how to utilize the presumption of validity in the context of a preliminary injunction squarely before the court, the Federal Circuit affirmed the trial court's ruling.<sup>62</sup> In analyzing the presumption's application, the court examined several different approaches to implementing the presumption in the context of a preliminary injunction. In a normal infringement and invalidity hearing, the presumption means that an accused infringer must prove invalidity by clear and convincing evidence.<sup>63</sup> If an accused infringer does not raise an invalidity claim, then the presumption means the patentee is likely to succeed on the validity issue.<sup>64</sup> However, if the infringer does challenge the patent's validity in a preliminary injunction hearing, then the court must accept evidence and determine whether the infringer raised a substantial question regarding the patent's validity.<sup>65</sup> The burden to produce evidence sufficient to demonstrate a likelihood of success always rests on the plaintiff.<sup>66</sup> So while the court describes the substantial question inquiry as “a useful way of initially evaluating the evidence,” the inquiry does not transfer the burden to prove the likelihood of success onto the patent challenger.<sup>67</sup> Thus despite the presumption of validity, the patentee still bears the burden of proving each factor — such as the likelihood of success — in seeking a preliminary injunction.<sup>68</sup>

In contrast, the Eleventh Circuit in *Schering-Plough* found that the presumption granted the legal right to enjoin the defendants from

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59. *Titan Tire Corp. v. Case New Holland, Inc.*, 566 F.3d 1372, 1374–75 (Fed. Cir. 2009).

60. *Id.* at 1375.

61. *Id.*

62. *See id.* at 1376, 1385.

63. *Microsoft Corp. v. i4i Ltd. P'ship*, 131 S. Ct. 2238, 2238 (2011).

64. *Titan Tire*, 566 F.3d at 1377.

65. *Id.* at 1377–79. A “substantial question” standard is lower than the “clear and convincing” standard at trial. *Id.* at 1379–80.

66. *See id.* at 1380.

67. *Id.*

68. *Id.*; Joseph Scott Miller, *This Bitter Has Some Sweet: Potential Antitrust Enforcement Benefits from Patent Law's Procedural Rules*, 70 ANTITRUST L.J. 875, 884–86 (2003).

using the patent until the defendants proved non-infringement.<sup>69</sup> In no other context does an alleged infringer bear the initial burden of proving non-infringement.<sup>70</sup>

In sum, courts stretch the presumption of validity too far when they use it to elide the issue of patent validity in antitrust cases. While raising a high burden during an invalidity trial, the presumption diminishes in strength when confronted with conflicting burdens of persuasion, such as during a preliminary injunction evaluation. This demonstrates that patent rights, while safeguarded by the courts, do not trump all other considerations.

*B. Changes in Patent Law Suggest That Less Deference Should Be Given to the Incontestability of Patent Rights*

While some lower courts have been reluctant to examine a patent's validity partially due to concerns about weakening patent rights, the Supreme Court has been chipping away at patent rights for nearly a decade. The overarching message has been that patents, while an important part of the economy, are still subject to general principles of law<sup>71</sup> — such as avoidance of competitive harms. In light of the Supreme Court's recent precedents, courts should consider factors beyond the protection of patent rights when deciding an antitrust case centered on patents.

One of the Supreme Court's strongest signals that patent rights must sometimes yield to the public interest came in the area of permanent injunctions, in *eBay v. MercExchange, LLC*.<sup>72</sup> Prior to *eBay*, a strong patent rights view prevailed.<sup>73</sup> Defenders of this view assert that patents deserve the same protection as real property,<sup>74</sup> arguing that “exclusion may be said to [be] the very essence of the right conferred by the patent, as it is the privilege of any owner of property to

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69. *Schering-Plough Corp. v. FTC*, 402 F.3d 1056, 1066–67 (11th Cir. 2005).

70. Not only is the initial burden to prove infringement placed on patent holders, certain district courts even require that the patent holder point to the specifically infringed patent within the first few days of a case. *See, e.g.*, N.D. CAL. PAT. L.R. 3-1(c) (requiring that a party alleging patent infringement turn over, no later than 14 days after the Initial Case Management Conference, “[a] chart identifying specifically where each limitation of each asserted claim is found within each Accused Instrumentality . . .”). In these districts, if an antitrust plaintiff challenges an infringement settlement as anticompetitive, the patentee should be ready to point out which claims were infringed.

71. *See* Peter Lee, *Patent Law and the Two Cultures*, 120 YALE L.J. 2, 59 (2010).

72. 547 U.S. 388 (2006).

73. *See, e.g.*, Gilbert H. Montague, *The Proposed Patent Law Revision*, 26 HARV. L. REV. 128, 133, 142–43 (1912) (opposing compulsory licenses because a patent owner's rights are the same as those of an owner of unimproved land).

74. *Cont'l Paper Bag Co. v. E. Paper Bag Co.*, 210 U.S. 405, 424–25 (1908) (finding that a patent is “entitled to the same rights and sanctions as other property”); *see also* Montague, *supra* note 73, at 133, 142–43.

use or not use it, without question of motive.”<sup>75</sup> Providing any remedy besides enjoining the intrusion “takes away the privilege which the law confers upon the patentee.”<sup>76</sup> For decades, the Federal Circuit, following this logic, applied the rule that “injunctive relief against an adjudged infringer is usually granted,” resulting in permanent injunctions issuing almost as a matter of course.<sup>77</sup> Even the threat of putting the infringer out of business was not sufficient reason to deny an injunction.<sup>78</sup>

In 2006, the Supreme Court rejected the idea that any such automatic rule should apply in patent cases.<sup>79</sup> The *eBay* Court recognized the seriousness of replacing traditional notions of equity with a formalistic rule and refused to do so.<sup>80</sup> Specifically, the Court noted that the public interest is a key element in deciding when patent protection necessitates injunctive relief.<sup>81</sup> The *eBay* opinion expanded the relevant considerations by requiring courts to examine a patent and its market before issuing an injunction.<sup>82</sup> As described by Justice Kennedy’s concurrence, courts should consider “the nature of the patent being enforced and the economic function of the patent holder.”<sup>83</sup>

District courts now follow Justice Kennedy’s approach and analyze the remedies for a patent by holistically examining its application.<sup>84</sup> Consequently, injunctions have been issued less frequently since the Court decided *eBay*. In the first thirty cases to interpret and apply *eBay*, permanent injunctions were issued only 77% of the time,

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75. *Cont’l Paper Bag*, 210 U.S. at 429.

76. *Id.* at 430. F. Scott Kieff further explains:

Concerning IP law, the commercialization theory . . . shows how important it is to have IP subject matter protected by a property right backed up by a property rule. It is the credible threat of an injunction that allows IP to serve as a coordination beacon around which all the potential complementary users of the asset it protects can gather.

F. Scott Kieff, *IP Transactions: On the Theory & Practice of Commercializing Innovation*, 42 HOUS. L. REV. 727, 744 (2005). *But see Cont’l Paper Bag*, 210 U.S. at 430 (“Whether, however, a case cannot arise where, regarding the situation of the parties in view of the public interest, a court of equity might be justified in withholding relief by injunction we do not decide.”).

77. *W.L. Gore & Assocs., Inc. v. Garlock, Inc.*, 842 F.2d 1275, 1281 (Fed. Cir. 1988); *see also eBay Inc. v. MercExchange, LLC*, 547 U.S. 388, 393–94 (2006) (citing *MercExchange, L.L.C. v. eBay, Inc.*, 401 F.3d 1323, 1339 (Fed. Cir. 2005)); *see Richardson v. Suzuki Motor Co., Ltd.*, 868 F.2d 1226, 1247 (Fed. Cir. 1989) (holding that a permanent injunction should issue “absent a sound reason for denying it”).

78. *Windsurfing Int’l, Inc. v. AMF, Inc.*, 782 F.2d 995, 1003 n.12 (Fed. Cir. 1986).

79. *eBay*, 547 U.S. at 391–92.

80. *Id.* at 392–93.

81. *Id.* at 391; *id.* at 396–97 (Kennedy, J., concurring).

82. *Id.* at 396–97 (Kennedy, J., concurring).

83. *Id.* at 396 (Kennedy, J., concurring); *see also Transocean Offshore Deepwater Drilling, Inc. v. GlobalSantaFe Corp.*, No. H-03-2910, 2006 WL 3813778, at \*5 (S.D. Tex. Dec. 27, 2006) (citing Justice Kennedy’s instructions).

84. Lee, *supra* note 71, at 59.

compared to 84% of pre-*eBay* cases.<sup>85</sup> Another study identified thirty-six cases that interpreted *eBay* and found that twenty-eight of them issued an injunction.<sup>86</sup> While injunctions still issued in a majority of cases, the Court's transition away from a property rule and toward a liability rule is stark.<sup>87</sup>

Yet despite language supporting a liability rule in *eBay*, the Supreme Court has not entirely shifted away from a property rule. For instance, the Court instructed lower courts to examine a patent more holistically and in the context of the market in which it exists.<sup>88</sup> This instruction suggests a continued acceptance of a strong patent rights view, though the Court tempers such a view in light of the general public interest, suggesting that patent rights should yield to general principles of law more often than they do now. The importance of this instruction is supported by recent studies showing that in a significant percentage of litigated cases, patents have been invalidated or the patentee failed to prove infringement. While these studies only focus on litigated patents, these patents tend to be the most valuable.<sup>89</sup> Between 1989 and 1996, 46% of litigated patents that reached final judgment on validity were invalidated.<sup>90</sup> Looking to more recent patents, the numbers have not changed much. From 2000 to 2004, courts invalidated 43% of patents and found that 75% of those litigated were not infringed.<sup>91</sup> Such high percentages suggest that many patents currently being enforced would raise significant questions of validity and scope if examined by a court. Thus, those patents that have actually been tested in court appear to challenge the foundation for the strong presumption of patent validity.

Through its patent law decisions, the Supreme Court has signaled that patent rights do not operate in isolation from other principles and rules. This suggests that some antitrust policies, such as regulation of oligopolies, might also trump patent rights. The antitrust principle of promoting competition by regulating anti-competitive behavior is

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85. Robert M. Isackson, *After 'eBay,' Injunctions Decrease*, NAT'L L.J., Dec. 3, 2007 at S1.

86. Douglas Ellis et al., *The Economic Implications (and Uncertainties) of Obtaining Permanent Injunctive Relief After eBay v. MercExchange*, 17 FED. CIR. B.J. 437, 441 n.35 (2008).

87. See generally Guido Calabresi & A. Douglas Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089 (1972) (describing liability rule protection, which is characterized by damages, and property rule protection, which is characterized by injunctions).

88. This view comports with similar instructions to lower courts in other areas of patent law. See Lee, *supra* note 71, at 42–60.

89. John R. Allison, Mark A. Lemley, Kimberly A. Moore, and R. Derek Trunkey, *Valuable Patents*, 92 GEO. L.J. 435, 435–39 (2004).

90. John R. Allison & Mark A. Lemley, *Empirical Evidence on the Validity of Litigated Patents*, 26 AIPLA Q.J. 185, 205 (1998) (survey limited to cases resulting in a final judgment of validity).

91. See Univ. of Hous. Law Ctr., *supra* note 2.

rooted in the historic tradition of regulating oligopolies, a practice that has existed since at least the founding of the Republic.<sup>92</sup> Moreover, remuneration to the patentee has always been deemed a lower priority than the benefit to the public. As Justice Story opined, the promotion of progress of science and the useful arts is the “main object”; reward of inventors is secondary and merely meant as a means to that end.<sup>93</sup> By rejecting the complete shield endorsed by some circuits, courts would be continuing the historic tradition of regulating anti-competitive behavior, as well as accepting recent changes by the Supreme Court that indicate patents do not supersede all other laws.

*C. Courts Should Examine a Patent’s Validity When an Antitrust Plaintiff Raises the Issue*

“A presumption of validity,” as scholars in a recent amicus brief colorfully analogized, “does not entitle a patentee to evade the test of patent litigation any more than a criminal defendant’s presumption of innocence entitles him to avoid trial.”<sup>94</sup> Patents should not provide cover for an antitrust violation when the patent is invalid, as such an action would not be legal without the patent. After all, a “patentee . . . may not claim protection of his grant by the courts where it is being used to subvert [public] policy.”<sup>95</sup>

Not every antitrust case involving a patent raises concerns requiring examination of the patent. In a market with many competitors, participants are incentivized to make informed decisions regarding whether a patent is worth challenging and the likelihood of a challenge’s success. However, such incentives do not exist in extremely small markets.<sup>96</sup> In these markets, the accused infringer is incentivized to settle with the patentee, which maintains the patentee’s monopolistic rents and allows for a large settlement.<sup>97</sup> If the case settles, interested third parties cannot challenge the validity of the patent directly.<sup>98</sup> Instead, they must bring a claim that the patent-related agreement violates antitrust laws.

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92. *Haw. Hous. Auth. v. Midkiff*, 467 U.S. 229, 241–42 n.5 (1984).

93. *Pennock v. Dialogue*, 27 U.S. (2 Pet.) 1, 19 (1829); *see also* *Kendall v. Winsor*, 62 U.S. (21 How.) 322, 329 (1858) (“Whilst the remuneration of genius and useful ingenuity is a duty incumbent upon the public, the rights and welfare of the community must be fairly dealt with and effectually guarded. Considerations of individual emolument can never be permitted to operate to the injury of these.”).

94. Corrected Brief Amici Curiae of 28 Professors of Law, Business, and Economics as Amici Curiae in Support of Appellants at 12, *In re Ciprofloxacin Hydrochloride Antitrust Litig.*, 544 F.3d 1323 (Fed. Cir. 2008) (No. 2008-1097), 2008 WL 644392.

95. *Morton Salt Co. v. G.S. Suppiger Co.*, 314 U.S. 488, 494 (1941).

96. Dolin, *supra* note 4, at 283.

97. *Id.*

98. *See* *Ass’n for Molecular Pathology v. USPTO*, 653 F.3d 1329, 1341–48 (Fed. Cir. 2011). *See generally* *MedImmune, Inc. v. Genentech, Inc.*, 549 U.S. 118, 127 (2007). While the America Invents Act does allow for post-grant review on a wide range of patentability

Allowing antitrust claims based on allegations of invalidity creates some risk and potentially perverse incentives. For example, such a threat could provide additional leverage for plaintiffs to force a settlement, regardless of the strength of their claims.<sup>99</sup> Similarly, defendants in these antitrust cases would be at risk of paying treble damages to a large number of interested third parties (likely their consumers).<sup>100</sup>

Also, examining the validity of patents in antitrust-patent cases would place a significant time-consuming burden on courts. But in certain cases, courts may be able to quickly dispose of patent invalidity claims without closely examining the patent. Courts can easily resolve situations where the validity of the patent does not affect the validity of the agreement.<sup>101</sup> Cases where the agreement would be valid irrespective of patent validity would not require any examination of the patent — for example, a settlement without significantly anti-competitive terms would raise no concern.<sup>102</sup> Similarly, cases where the agreement would be illegal irrespective of the patent, such as a per se violation of antitrust law, would not require courts to address validity.<sup>103</sup> Instead, courts should focus their resources on cases where the lawfulness of the agreement turns on whether the patent is valid and infringed.<sup>104</sup> How many cases fall into this middle ground is unknown. However, an article whose authors include one of patent law's most published empirical researchers and one of antitrust law's most seasoned academics predicts the number would be “relatively small.”<sup>105</sup> Moreover, overturning the presumption of patent validity would not result in a dramatic increase of antitrust cases challenging an agreement on grounds of patent validity or scope.<sup>106</sup>

Courts could also apply one of two approaches to limit the scope of their inquiries. First, courts could consider patent validity only in cases where regulatory or judicial intervention is necessary to correct the anti-competitive conduct. This approach is based on the belief in

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issues, it only allows the review within nine months of the patent's issuance or reissue. Leahy-Smith America Invents Act of 2011, Pub. L. No. 112-29, § 321, 125 Stat. 284, 306. It is a reasonable assumption that an antitrust violation due to settlement for an infringement action would not occur within nine months of the patent's issuance.

99. See Howard A. Shelanski, *Unilateral Refusals to Deal in Intellectual and Other Property*, 76 ANTITRUST L.J. 369, 388 (2009).

100. 15 U.S.C. § 15(a) (2006).

101. Herbert Hovenkamp, Mark Janis & Mark A. Lemley, *Anticompetitive Settlement of Intellectual Property Disputes*, 87 MINN. L. REV. 1719, 1725–28 (2003).

102. Such a settlement might grant each firm an unrestricted, non-exclusive license to the party's technology. *Id.* at 1725.

103. *Id.* at 1726.

104. *Id.*

105. *Id.* at 1765.

106. As with any change in law, there would likely be an initial surge in cases. This comment refers to the expected flow of cases after courts develop techniques to distinguish plausible cases from implausible cases.

antitrust law that false negatives are less harmful than false positives because markets can solve antitrust problems where regulators do not.<sup>107</sup> For example, when substitutes for a patented item exist, the market will cure competition problems so courts need not examine the patent.<sup>108</sup> In contrast, where no substitute exists, or where the agreement is between the only two producers, then the market cannot solve the problem. Courts could restrict themselves to only these latter cases, thereby reducing the quantity of cases brought before them. Nonetheless, each inquiry would still be complex and require an examination of both the market and the patent.

Second, courts could simply look at the patent and not the agreement. After all, an agreement of some kind is required for any section 1 violation. Any sort of patent licensing deal would typically include an agreement and would thus require little additional proof. Thus, a court would need only to examine whether the patent is valid and whether the agreement is within its scope. While this would not limit the number of cases brought before the court, each case would be considerably less complicated than those adjudicated under the former method, which requires courts to examine both the patent and the agreement.

At least one court has chosen to more closely examine the validity and scope of a patent in an antitrust case. In the case *In re Abbott Labs*, the court noted that a “[d]efendant must do more than name a few of its patents, quote a couple of lines from each patent, and assert that each patent clearly covers” the allegedly anticompetitive behavior.<sup>109</sup> The district court then proceeded to allow discovery regarding the patent’s validity.<sup>110</sup> More courts should follow *In re Abbott Labs*’ lead in focusing on analyzing the underlying patent when adjudicating antitrust cases.

#### IV. CONCLUSION

Antitrust is an important area of law that protects consumers from collusion in restraint of trade between market competitors. Such agreements are void and illegal. However, courts have become reluctant to examine potentially collusive agreements that involve patents.

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107. Frank H. Easterbrook, *On Identifying Exclusionary Conduct*, 61 NOTRE DAME L. REV. 972, 977 (1986).

108. The violation that would occur from using an invalid patent to form an anticompetitive agreement with another company would be a Section 1 violation. While Section 1 violations do not distinguish between markets with substitutes and those without — that is a Section 2 analysis — courts may wish to impose such a limiting factor on these cases.

109. *In re Abbott Labs. Norvir Anti-Trust Litig.*, 442 F. Supp. 2d 800, 810 (N.D. Cal. 2006), *rev’d on other grounds*, 571 F.3d 930 (9th Cir. 2009).

110. *Id.* at 813; *cf. Schor v. Abbott Labs.*, 378 F. Supp. 2d 850, 856 (N.D. Ill. 2005) (noting that the plaintiffs did not contest the patent’s validity).



Instead, they rely on the statutory presumption of validity and limit themselves to looking for sham patent litigation and conducting a cursory examination to determine whether the agreement is apparently within the patent's scope. Such lack of examination of a patent's validity and scope provides fertile ground for parties seeking to enforce anticompetitive agreements under the guise of a patent settlement or license.

The presumption of validity is meant as a procedural presumption and should not outweigh the significant policy concerns that support allowing antitrust plaintiffs to challenge a patent's validity and scope. Rather than use the presumption of validity to elide independent analysis of validity and scope, which results in courts taking a patentee at its word on potential validity and scope issues, courts should instead let parties that are incentivized by the market challenge a patent's validity and scope, weighing the merits of each party's competing claims. The concern over ignoring patent validity and scope issues in antitrust cases is heightened by recent reports indicating that a significant percentage of patents are either invalidated or are enforced against non-infringing defendants. The courts' over-reliance on the presumption of validity runs a serious risk of allowing unjustified rents to be conferred upon collusive patentees and their partners.<sup>111</sup> Meanwhile, the individuals with the most incentive to challenge the patent — third parties paying for the eventual invention — are denied standing to contest the patent's validity.

Patent law has never been an easy topic for the courts to handle.<sup>112</sup> Judges may not always be best suited for weighing the policy pros and cons of strengthening or weakening a patent's validity,<sup>113</sup> nor for making scientific determinations.<sup>114</sup> However, courts can reduce the risk of error by either examining a patent's validity and scope only

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111. Reverse payments are estimated to cost consumers \$3.5 billion per year. FED. TRADE COMM'N., PAY-FOR-DELAY: HOW DRUG COMPANY PAY-OFFS COST CONSUMERS BILLIONS 2 (2010), available at <http://www.ftc.gov/os/2010/01/100112payfordelayrpt.pdf>.

112. Reflecting on Justice Story's experience, William Story explains:

[N]ew rules and modifications were demanded. The questions were often so novel, that counsel were forced to argue, and the Court to decide, without chart and upon general principles. I have often heard my father relate, that in several of the early cases tried before him, the gentleman engaged in them apologized for the mode in which they had been conducted, saying, that the law was so without precedent and forms, that they knew not how to proceed.

1 WILLIAM W. STORY, LIFE AND LETTERS OF JOSEPH STORY 236–37 (William W. Story ed., 1851).

113. See *Microsoft Corp. v. i4i Ltd. P'ship*, 131 S. Ct. 2238, 2251–52 (2011).

114. CARNEGIE COMM'N ON SCI., TECH. & GOV'T, SCIENCE AND TECHNOLOGY IN JUDICIAL DECISION MAKING: CREATING OPPORTUNITIES AND MEETING CHALLENGES 19 (1993) ("At the moment, the parallel paths of scientists and lawyers usually obey the rules of Euclidean geometry — they do not intersect — even though both disciplines not infrequently ponder the same subjects. And when their paths do cross, the result is often misunderstanding, rather than constructive communication.")

in cases where the market cannot solve the problem, or by looking only at the patent's validity and scope and not the agreement. For cases that meet these limitations, courts should allow antitrust plaintiffs to challenge the validity and scope of patents involved in the allegedly collusive conduct.