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THE ANTITRUST ASSAULT ON INTELLECTUAL PROPERTY

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TABLE OF CONTENTS

I. INTRODUCTION

Before deciding a patent law question in the 1873 case of *Adams v. Burke*,[1] the Supreme Court noted that "[t]he vast pecuniary results involved in such cases, as well as the public interest, admonish us to proceed with care[.]"[2] The importance of intellectual property ("IP") and its role in promoting economic growth and consumer welfare have

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1. 84 U.S. 453 (1873).
2. *Id.* at 455.

only increased since then.[3] But despite the risks involved in tampering with a system that has served this country well since its inception, some agencies of the United States Government have become anything but careful in their approach to intellectual property issues. Abandoning antitrust law's historical deference to the exercise of core intellectual property rights,[4] these agencies have taken to using antitrust enforcement to favor intellectual property users over innovators and to reduce the value of intellectual property, threatening innovation incentives. Neither antitrust principles nor sound policy supports such measures. These agencies must stop before they do permanent damage to innovation and the national economy.

This Article first establishes the importance of intellectual property rights to future innovation and past success. Part II then discusses the differences and interactions between intellectual property and antitrust, overviewing the pattern of antitrust deference to intellectual property in the past and introducing more recent tensions that break from this trend. Part III focuses on patents and discusses hold-up, a common justification for antitrust authorities' breach of the boundary between antitrust and intellectual property, while Part IV focuses on antitrust's intrusion into IP in the context of copyrights, specifically in regard to performing rights organizations. Finally, this article cautions against prioritizing antitrust over intellectual property, and calls for a return to the deference of the past.

A. The Role of Intellectual Property Rights in Stimulating Innovation

1. Intellectual Property Rights Incentivize Innovation

Over 240 years ago, the Framers laid the foundation for the U.S. patent and copyright system by giving Congress the power "[t]o promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries[.]"[5] As the constitutional text makes clear, the goal is to encourage creativity and innovation. To that end, the

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3. As demonstrations of the importance of intellectual property in the U.S. today, the value added by IP-intensive industries accounted for over $6.5 trillion of gross domestic product in 2014 and these industries supported (whether directly or indirectly) 45.5 million jobs. JUSTIN ANTONIPILLAI ET AL., ECON. & STAT. ADMIN. & MICHELLE K. LEE ET AL., U.S. PATENT & TRADEMARK OFFICE, INTELLECTUAL PROPERTY AND THE U.S. ECONOMY: 2016 UPDATE ii (2016), https://www.uspto.gov/sites/default/files/documents/IPandtheUSEconomySept2016.pdf [https://perma.cc/87ZV-AALX].

4. *See infra*, Section II.A.

5. U.S. Const. art. I, § 8. Chief Justice Marshall highlighted the importance of the Patent and Copyright Clause in *Grant v. Raymond*. 31 U.S. 218, 241 (1832) ("To promote the progress of useful arts, is the interest and policy of every enlightened government. It entered into the views of the framers of our constitution, and the power [granted in Article I, Section 8 of the Constitution] is among those expressly given to Congress.").

Constitution prescribes but one incentive: awarding exclusive rights to the fruits of creativity and innovation. This exclusivity takes legal form in patents and copyrights.

Patents and copyrights (collectively, intellectual property rights or "IPRs") incentivize innovation on multiple levels. At base, IPRs encourage innovation by assuring that the rewards of innovation go to the innovator, whether the innovator chooses to sell the innovation or license it to others. But in many instances, IPRs do not simply reward innovation — they are an absolutely necessary prerequisite to innovation.[6] Research, development, and creativity are time-consuming and expensive, but copying the successful results of these endeavors can be quick and easy.[7] In such (all-too-common) cases, it makes no sense for an innovator to devote time and resources to developing works and inventions that are freely appropriated by competitors.[8] Moreover, in addition to enabling the innovation leading to the IPRs themselves, IPRs enable future innovation by providing an income stream that can be used to fund ongoing research and development.[9] Finally, by granting exclusivity over a product or technology to an innovator, IPRs drive competitors to come up with even better products or technologies of their own.[10]

The innovation enabled by IPRs brings benefits extending far beyond the innovator. New inventions lead to new products, new businesses, and even entirely new industries, providing employment to workers, profits to owners and shareholders, and tax revenue for the government. Consumers benefit when innovative technologies result in

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6. *See* Stephen Haber, *Patents and the Wealth of Nations,* 23 GEO. MASON. L. REV. 811, 817–20 (2016) (finding "a causal relationship between strong patents and innovation[,]" discussing studies that find "the patent system promoted the inventive activity associated with the Industrial Revolution" in Britain and that suggest "that had Great Britain not had a patent system, the growth of key industries . . . would have been stunted."). *But see* Thomas Cheng, *Putting Innovation Incentives Back in the Patent-Antitrust Interface*, 11 NW. J. TECH. & INTELL. PROP. 385, 387 (2013) (calling courts "all too willing to accept" the argument that the patent system is "crucial to attract innovators").

7. *See* Gerald F. Masoudi, Deputy Assistant Att'y Gen., Antitrust Div., U.S. Dep't of Justice, Intellectual Property and Competition: Four Principles for Encouraging Innovation, Address at the Digital Americas 2006 Meeting: Intellectual Property and Innovation in the Digital World (Apr. 11, 2006), https://www.justice.gov/atr/speech/intellectual-property-and-competition-four-principles-encouraging-innovation [https://perma.cc/636B-W3TX]; *see also* Cheng, *supra* note 6, at 387 (explaining the cited propositions as elements of the "standard argument concerning the patent-antitrust interface[,]" but arguing that courts have placed too much weight on that argument).

8. *See* David Kappos, Richard Ludwin & Marc Ehrlich, *From Efficient Licensing to Efficient Infringement*, 255 N.Y. L.J. (Apr. 4, 2016) (discussing "Efficient Infringement" and stating that "the rapid erosion of patent strength places future investment in innovation at risk").

9. *See* Cheng, *supra* note 6, at 387; Aaron S. Kesselheim, *Using Market-Exclusivity Incentives to Promote Pharmaceutical Innovation*, 363 NEW ENG. J. MED. 1855, 1855 (2010).

10. *Cf.* Kesselheim, *supra* note 9, at 1855 (noting that the profits afforded by exclusivity incent investment in the development of new drugs generally).

new, faster, better, or cheaper products. Copyrights incentivize the production of books, films, and music at a professional level, which disseminates scholarship and ideas while providing entertainment and cultural growth.[11] The public disclosure requirements for patent protection enrich the body of common knowledge and allow others to extend the creativity of innovators.[12] In short, IPRs are powerful drivers of a dynamic culture and economy.

2. Intellectual Property Is a U.S. Success Story

Historically, the U.S. IPR system has borne impressive fruit, and the resulting creativity and innovation has been a driving force in U.S. economic success. Factors linked to innovation are responsible for almost three-quarters of the U.S. growth rate after World War II, along with additional benefits such as high-paying jobs.[13] Numerous studies have found correlations between patent strength, on the one hand, and economic growth or investment in research and development, on the other hand, while surveys have found that patents incent innovation in important technology sectors.[14]

The importance of IPRs is reflected in the use of the intellectual property system. Statistics from the World Intellectual Property Organization indicate that as of 2016 the total number of patent

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11. *See* Tim Worstall, *Copyright is About Incentives to Innovation, Not Justice: What Incentive Does Naruto Need?*, FORBES (Jan. 7, 2016), https://www.forbes.com/sites/timworstall/2016/01/07/copyright-is-about-incentives-to-innovation-not-justice-what-incentive-does-naruto-need/#18d02b8e27c3 [https://perma.cc/8VML-UJBB] ("[t]he creation of . . . a work of . . . is afflicted with the public goods problem . . . This leads us to think that there will be [too little] . . . creation . . . So, we deliberately invent . . . copyright, so that the creator can be rewarded. It's all an incentive for there to be more production[.]"); *see also* Adam Mossoff, *How Copyright Drives Innovation: A Case Study of Scholarly Publishing in the Digital World*, 2015 MICH. ST. L. REV. 955, 956–57 ("copyright does incentivize the creation of new works . . . [though] this is not the sole justification for copyright[.]").

12. Rule 608 of the USPTO's Manual of Patent Examining Procedure covers disclosure requirements, and states: "To obtain a valid patent, a patent application as filed must contain a full and clear disclosure of the invention in the manner prescribed by 35 U.S.C. 112(a). The requirement for an adequate disclosure ensures that the public receives something in return for the exclusionary rights that are granted to the inventor by a patent." MPEP (9th ed. Rev. 08.2017, Jan. 2018), https://www.uspto.gov/web/offices/pac/mpep/s608.html [https://perma.cc/CH95-9VM4].

13. U.S. DEP'T OF COMMERCE, PATENT REFORM: UNLEASHING INNOVATION, PROMOTING ECONOMIC GROWTH & PRODUCING HIGH-PAYING JOBS (2010).

14. *See, e.g.*, Stephen Haber, *supra* note 6, at 811–35; Maureen K. Ohlhausen, *Patent Rights in a Climate of Intellectual Property Rights Skepticism*, 30 HARV. J.L. & TECH. 103, 125–31, 137–38 (2016) (collecting studies) [hereinafter Ohlhausen, *Patent Rights*]. Acting FTC Chairman Ohlhausen also analyzes contrary evidence, see, for example, *id.* at 131–34, but concludes that "patents have long been an integral part of U.S. innovation policies that have produced tremendous results. Policymakers should not take these collective considerations lightly. In my view, they counsel in favor of robust IP rights protection." *Id.* at 145–46. *See also* Maureen K. Ohlhausen, Comm'r, U.S. Fed. Trade Comm'n, *The Case for a Strong Patent System,* Remarks at "The Economic Contribution of Technology Licensing" Conference, USPTO's Global Intellectual Property Academy 6–8 (June 8, 2016).

applications in the U.S. has increased virtually every year for two decades, from approximately 212,000 applications in 1996 to over 605,000 in 2016 — an increase of more than 185%.[15] During the same period, granted patents have increased from about 110,000 per year to over 300,000 per year.[16] Major U.S. companies are well represented among the most prolific patent applicants, but, reflecting the global worth of U.S. patents, over 50% of U.S. patent applications in 2016 were of foreign origin.[17] Income from IPR licensing is a bright spot in the U.S. balance of trade. Data from the Bureau of Economic Analysis reveals that in 2015, charges for use of U.S. intellectual property in foreign countries totaled over $124.5 billion, compared with charges of only about $39.5 billion in the other direction.[18]

II. ANTITRUST LAW & INTELLECTUAL PROPERTY: HISTORICAL RECONCILIATION, ONGOING TENSION

A. The Historical Deference of Antitrust Law to IPRs

As envisioned in the Constitution,[19] the cornerstone of the IPR system's many benefits has been the granting of exclusivity to innovators. And just as the physical exclusivity conferred by real property requires effective deterrents against trespassing, the exclusivity conferred by IPRs requires effective deterrents against unauthorized, uncompensated use of those IPRs. As the Supreme Court put it, "[a] patentee has the exclusive right to manufacture, use, and sell his invention. The heart of his legal monopoly is the right to invoke the State's power to prevent others from utilizing his discovery without his consent."[20]

Exclusion and restraint — although these concepts are inherent in IPRs — excite suspicion and hostility in antitrust law. The foundation of the U.S. antitrust regime lies in the terse statutory provisions of the Sherman Act, which expressly condemn both restraints of trade and

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15. The sole exception was 2009, shortly after the beginning of the Great Recession. WORLD INTELLECTUAL PROPERTY ORGANIZATION, https://www3.wipo.int/ipstats/keyindex.htm [https://perma.cc/4CJA-YAAJ]. As reported by WIPO, these numbers include "direct and PCT national phase entries[.]"

16. *Id.*

17. *See id.* (reporting that, of the over 605,000 applications filed in 2016, there were approximately 295,000 from U.S. residents and 310,000 from non-residents); *cf.* Jeff John Roberts, *These Firms Won the Most Patents in 2016*, FORTUNE (Jan. 9, 2017), https://fortune.com/2017/01/09/most-patents-2016/. [https://perma.cc/TLF9-LDBN] (reporting on patents *granted* to U.S. companies, rather than patent applications).

18. U.S. DEP'T OF COMMERCE BUREAU OF ECON. ANALYSIS, TABLE 2.2, U.S. TRADE IN SERVICES, BY TYPE OF SERVICE AND BY COUNTRY OR AFFILIATION (2017).

19. *See* source cited *supra* note 5 and accompanying text.

20. Zenith Radio Corp. v. Hazeltine Research, Inc., 395 U.S. 100, 135 (1969) (citations omitted).

monopolization.[21] As a result, antitrust law and intellectual property law have sometimes been viewed as fundamentally contradictory or incompatible: "There is an obvious tension between the patent laws and antitrust laws. One body of law creates and protects monopoly power while the other seeks to proscribe it."[22]

Doctrinally, however, antitrust law does not forbid market power in and of itself — only unlawfully obtained market power. As the Supreme Court has made clear, "[t]o safeguard the incentive to innovate, the possession of monopoly power will not be found unlawful unless it is accompanied by an element of anticompetitive *conduct*."[23] Of course, IPRs do not inevitably lead to monopoly power — an innovator may have exclusivity over an invention, but there are nearly always competing products that place limits on the innovator's market power.[24] Even when IPRs confer market power, absent other factors, such power is deemed lawfully obtained and thus historically exempt from antitrust concerns:

> The patenting and licensing of the results of [patentee's] research is not a violation of antitrust principles, and the grant of an exclusive license is a lawful incident of the right to exclude provided by the Patent Act. The [patentee's] right to select its licensees, the decision to grant exclusive or non-exclusive licenses or to sue for infringement, and the pursuit of optimum royalty income, are not of themselves acts in restraint of trade.[25]

Simply put, "[t]he commercial advantage gained by new technology and its statutory protection by patent do not convert the possessor thereof into a prohibited monopolist."[26]

Therefore, instead of attacking the exclusivity at the heart of IPRs, antitrust regulation has historically been limited to preventing wrongful acquisition of IPRs and the misuse of IPRs. Fraud in gaining an IPR has been actionable as an antitrust violation, as has been baseless

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21. 15 U.S.C. § 1 (2012) ("Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal."); 15 U.S.C. § 2 (2012) ("Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony . . . .").

22. United States v. Westinghouse Elec. Corp., 648 F.2d 642, 646 (9th Cir. 1981).

23. Verizon Commc'ns Inc. v. Law Offices of Curtis V. Trinko, LLP, 540 U.S. 398, 407 (2004) (emphasis in original).

24. Haber, *supra* note 6, at 813.

25. Genentech, Inc. v. Eli Lilly & Co., 998 F.2d 931, 949 (Fed. Cir. 1993), *abrogated on other grounds by* Wilton v. Seven Falls Co., 515 U.S. 277 (1995).

26. Abbott Labs. v. Brennan, 952 F.2d 1346, 1354 (Fed. Cir. 1991).

assertion of IPRs.[27] Actionable, too, have been attempts to exceed the legitimate boundaries of IPRs, for example, by requiring payment of royalties on unprotected items, by attempting to enforce an IPR beyond its legal term, or by using license provisions as pretexts to achieve broader anticompetitive ends.[28] But absent such special circumstances, historically it has been clear that the basic exclusionary power of IPRs was exempt from antitrust law, regardless of whether it had undesirable market effects.[29] As the Supreme Court recognized, intellectual property law modifies antitrust law, not vice versa: "The patent laws which give a 17-year monopoly on 'making, using, or selling the invention' are *in pari materia* with the antitrust laws and modify them *pro tanto*."[30]

This deference is expansive, recognizing that antitrust and intellectual property law have similar goals. The overarching goal of U.S. antitrust law should be to protect the competitive process, which promotes consumer welfare.[31] IPRs protect the competitive process in innovation, which also benefits consumers.[32] As the courts have noted, "Congress itself made an empirical assumption that allowing copyright holders to collect license fees and exclude others from using their works creates a system of incentives that promotes consumer welfare in the long term by encouraging investment in the creation of desirable artistic and functional works of expression."[33] Similarly, patent and antitrust law "are actually complementary, as both are aimed at encouraging innovation, industry and competition."[34]

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27. *See, e.g.*, In re Indep. Serv. Orgs. Antitrust Litig., 203 F.3d 1322, 1326 (Fed. Cir. 2000).

28. *Id.* at 1327–28.

29. *Id.* at 1326–27.

30. Simpson v. Union Oil Co. of Cal., 377 U.S. 13, 24 (1964); *see also* United States v. Line Materials Co., 333 U.S. 287, 308–09 (1948) ("The progress of our economy has often been said to owe much to the stimulus to invention given by the rewards allowed by patent legislation. The Sherman Act was enacted to prevent restraints of commerce but has been interpreted as recognizing that patent grants were an exception.").

31. The Federal Trade Commission recognizes this goal: "Here at the FTC, we're all about protecting consumers. One way we do this is by enforcing the antitrust laws . . . The FTC supports free and open markets by protecting competition, so that consumers reap the benefits of a vigorous marketplace: lower prices, higher quality products and services, and greater innovation." Abbot B. Lipsky, Jr., *Protecting Consumers by Promoting Competition*, FEDERAL TRADE COMMISSION: COMPETITION MATTERS (BLOG) (Mar. 6, 2017, 5:22 PM), https://www.ftc.gov/news-events/blogs/competition-matters/2017/03/protecting-consumers-promoting-competition [https://perma.cc/947U-BFR4].

32. *See supra,* Section I.A.1. There are different views on what "consumer welfare" should mean and what factors it should take into account. *See* Lina M. Khan, *Amazon's Antitrust Paradox*, 126 Yale L.J. 710, 716, 737–39 (2017).

33. Data Gen. Corp. v. Grumman Sys. Support Corp., 36 F.3d 1147, 1186–87 (1st Cir. 1994) *abrogated on other grounds by* Reed Elsevier, Inc. v. Muchnick, 559 U.S. 154 (2010); *see also* Twentieth Century Music Corp. v. Aiken, 422 U.S. 151, 156 (1975) ("The immediate effect of our copyright law is to secure a fair return for an author's creative labor. But the ultimate aim is, by this incentive, to stimulate artistic creativity for the general public good.") (citations and internal quotations omitted).

34. Atari Games Corp. v. Nintendo of Am., Inc., 897 F.2d 1572, 1576 (Fed. Cir. 1990).

B. The Ongoing Tension between Antitrust and IPRs

In sum, there is no doctrinal or philosophical reason why strong IPRs cannot be reconciled with antitrust law. Nevertheless, differences in perspective and time scale between the two bodies of law can obscure their common ground. To a predominant extent, antitrust law takes the world as it is: actions occurring in an existing marketplace with an existing array of participants are scrutinized in terms of their immediate effects, particularly on prices and market outcomes.[35] By contrast, as drivers of innovation IPRs work dynamically and gradually to create an entirely different world, one containing new products, businesses, or even industries,[36] as well as to facilitate technologies that improve the operation of existing markets.[37] Notably, the consumer benefits of new products can far outweigh the consumer benefits of lowering prices on existing products.[38] But these benefits of IPRs occur in the longer term, while the short-term costs and exclusionary power of IPRs are immediate and apparent. Crucially, the negative effects of weakening IPRs are neither immediate nor apparent: when we weaken incentives to innovate, we cannot know what innovations we have preempted and how much better off those innovations would have made us. Consequently, there is a ready temptation to seize on seemingly undesirable market outcomes and use antitrust law as an excuse to weaken IPRs, even though neither antitrust doctrine nor antitrust objectives, properly understood, support that result.

Recent antitrust developments impacting each constitutionally-based IPR system — one concerning patents and the other concerning copyrights — provide worrying evidence that the Government has succumbed to this temptation. First, in a series of actions and pronouncements, both the Department of Justice ("DOJ") and the

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35. Masoudi, *supra* note 7; *see Mission*, THE U.S. DEP'T OF JUSTICE (last updated July 20, 2015), https://www.justice.gov/atr/mission [https://perma.cc/9ZRZ-6DV2]; *but see* Lipsky, *supra* note 31 (listing "[t]rack[ing] emerging trends and innovative products" as an example of FTC antitrust actions).

36. For an example of how IPRs helped bring about a different world, *see* Haber, *supra* note 6 at 817 (reporting that the British "patent system promoted the inventive activity associated with the Industrial Revolution").

37. "[N]ew and useful improvement[s]" to "any new and useful process, machine manufacture, or composition of matter" are patentable under 35 U.S.C. § 101 (2012).

38. *See* J. Gregory Sidak, *How Commissioner Vestager's Mistaken Views on Standard-Essential Patents Illustrate Why President Trump Needs a Unified Policy on Antitrust and Innovation*, 1 CRITERION J. INNOVATION 721, 727 (2016) (citing Jerry A. Hausman, *Valuing the Effect of Regulation on New Services in Telecommunications*, 1997 BROOKINGS PAPERS ON ECON. ACTIVITY: MICROECON. 1, 2; Jerry A. Hausman, *Valuation of New Goods Under Perfect and Imperfect Competition*, *in* THE ECONOMICS OF NEW GOODS 209 (Timothy F. Bresnahan & Robert J. Gordon eds., 1996); Jerry A. Hausman & J. Gregory Sidak, *A Consumer-Welfare Approach to the Mandatory Unbundling of Telecommunications Networks*, 109 YALE L.J. 417, 417–18 (1999); Jerry A. Hausman, *Sources of Bias and Solutions to Bias in the CPI*, 17 J. ECON. PERSP., Winter 2003, at 23.

Federal Trade Commission ("FTC") have attacked a patent holder's ability to enforce "standard-essential patents" ("SEPs") — patents covering technology incorporated into standards.[39] Second, the DOJ has attempted to reinterpret decades-old consent decrees with performing-rights organizations ("PROs") to impose rules limiting the freedom of creators.[40] In each case, the Government has placed the short-term interests of those who utilize the fruits of creativity and innovation ahead of the interests of the creators and innovators, and therefore ahead of the long-term interests of the national economy.

III. ANTITRUST MEASURES AGAINST PATENT HOLD-UP: A DANGEROUS "CURE" FOR AN ILLUSORY DISEASE

A. The Patent Hold-Up Chimera

Let's start with the case of SEPs. In many areas of technology, consumers and businesses benefit from interoperability and standardization.[41] The technical standards that make this possible are set by standards-setting organizations ("SSOs"), which are groups to which industry participants belong.[42] The standards themselves aggregate numerous technical contributions of companies and individuals.[43] As might be expected, frequently the most innovative

39. This is discussed further in Section III.B of this Article.

40. This is discussed further in Section IV of this Article.

41. *See* Kirti Gupta, *Technology Standards and Competition in the Mobile Wireless Industry*, 22 GEO. MASON. L. REV. 865, 865–66 (2015) ("At the heart of th[e mobile telephony] revolution lies a series of technological innovations in wireless technology standards . . . [T]echnologies incorporated into these technology standards [have enabled] . . . [h]igher data transmission speeds and efficient communications . . . [and] have unleashed a range of new mobile data services . . . and complex products.") (footnotes omitted); Mark A. Lemley, *Intellectual Property Rights and Standard-Setting Organizations*, 90 CAL. L. REV. 1889, 1893 (2002) ("Telephones talk to each other, the Internet works, and hairdryers plug into electrical sockets because private groups have set 'interface' standards, allowing compatibility between products made by different manufacturers.").

42. Edith Ramirez, Statement of Commissioner Edith Ramirez before the U.S. Senate Committee on the Judiciary (July 11, 2012), https://www.ftc.gov/public-statements/2012/07/statement-commissioner-edith-ramirez-standard-essential-patents [https://perma.cc/Z2EM-QFB3]. For examples of SSOs, see *Frequently Asked Questions*, ASTM INTERNATIONAL https://www.astm.org/ABOUT/faqs.html [https://perma.cc/WV4V-273G] ("We are a not-for-profit organization that provides a forum for the development and publication of international voluntary consensus standards for materials, products, systems and services. Our volunteer members represent producers, users, consumers, government, and academia."); *About ETSI*, ETSI https://www.etsi.org/about [https://perma.cc/8MPH-RYE8]; *About the IEEE Standards Association*, IEEE STANDARDS ASSOCIATION https://standards.ieee.org./about/ieeesa.html [https://perma.cc/2XJN-HE6P].

43. *See* Kassandra Maldonado, *Breaching RAND and Reaching for Reasonable: Microsoft v. Motorola and Standard-Essential Patent Litigation*, 29 BERKELEY TECH. L. J. 419, 425–26 (2014) (discussing SSO members' (specifically members that are businesses) incentives to "have [their patented] technolog[ies] incorporated into a standard," thus implying that standards aggregate several technologies); *Frequently Asked Questions*, *supra* note 41

technology in a given area is protected by patents. Although the precise rules vary among individual SSOs, SSOs usually request that any contribution of patented technology that is "essential" to practicing the standard be accompanied by a commitment by the patent holder to license such technology on fair, reasonable and non-discriminatory ("FRAND") or reasonable and non-discriminatory ("RAND") terms.[44]

One area of controversy concerns what the F/RAND commitment should mean in practice. Despite the wide range of potential negotiating positions and strategies between SEP owners and SEP licensees over a F/RAND license, the Government has fixated on one hypothetical scenario: so-called "patent hold-up."[45] Under this theory, a patent holder succeeds in having its patented technology incorporated into a standard by promising to offer F/RAND licensing terms, but then proceeds to demand "unreasonable" license terms from companies practicing the standard.[46] According to the theory, the patent holder backs up its demands with threats of patent litigation, including injunctions or International Trade Commission ("ITC") exclusion orders, against any company that will not submit.[47]

Such behavior might indeed be problematic — if it actually occurred. But although the hold-up scenario may sound plausible in theory, history has demonstrated that it is not a problem. There are more than a thousand SSOs worldwide, and even more individual

(providing an example of an SSO whose members include individuals, separate from companies). For an example of a standard, *see ETSI ES 201 980: V4.1.1 (2014-01)*, ETSI, https://www.etsi.org/deliver/etsi_es/201900_201999/201980/04.01.01_60/es_201980v040101p.pdf [https://perma.cc/22F3-BFUJ].

44. Maldonado, *supra* note 43, at 419. The exact meaning of FRAND is not "universally agreed upon." Anne Layne-Farrar, A. Jorge Padilla & Richard Schmalensee, *Pricing Patents for Licensing in Standard-Setting Organizations: Making Sense of FRAND Commitments*, 74 ANTITRUST L.J. 671, 671 (2009).

45. Koren W. Wong-Ervin, *The Proper Role of Antitrust in Addressing Patent Hold-Up*, 11 SEC. ANTITRUST L. 11, 11–12 (2013), https://www.ftc.gov/system/files/attachments/key-speeches-presentations/wong-ervin_-_proper_role_of_antitrust_in_addressing_patent_hold.pdf [https://perma.cc/9J38-TXQB].

46. To be clear, we are not concerned with a situation in which the SEP owner has deceived the SSO and concealed the existence of the SEP in getting patented technology incorporated into the standard. Neither are we concerned with a situation in which the SEP owner effectively refuses to grant any licenses whatsoever. We are solely concerned with a situation in which the SEP owner has proffered license terms that a company practicing the patented technology contends are "unreasonable" and therefore not F/RAND. *See* Thomas F. Cotter, *Patent Holdup, Patent Remedies, and Antitrust Responses*, 34 J. CORP. L. 1151, 1191 (2009).

47. J. Gregory Sidak, *Does the International Trade Commission Facilitate Patent Holdup?*, 1 CRITERION J. INNOVATION 601 (2016) (analyzing and critiquing the notion that threats of ITC exclusion orders facilitate holdup by SEP holders who have made FRAND commitments); *see* Cotter, *supra* note 46, at 1161–62 (noting, and also discussing critiques of, the "intuition" that "sometimes patentees use the threat of injunctive relief to extract larger royalties than would be attributable to the patented invention alone, and . . . in doing so patentees (1) obtain rents in 'excess' of what they 'deserve'").

standards.[48] Despite this large number of opportunities for SEP hold-up, there are virtually no documented instances of such hold-up.[49] To the contrary, major SSOs have reported that hold-up is not an issue.[50] The Federal Circuit upheld a district court's refusal to instruct a jury about the dangers of patent hold-up, finding that the defendant had provided no evidence of hold-up.[51] In a 2015 decision in an ITC proceeding, Judge Essex found "no evidence of holdup" in the case, noted that the testifying experts could not identify any examples of hold-up generally, and characterized DOJ and FTC positions on hold-up as entirely "speculative and unproven."[52] Indeed, when pressed for evidence of hold-up at a 2015 symposium, DOJ and FTC officials present were unable to provide any concrete examples.[53] And standards-intensive areas of technology such as smart phones that, according to the hold-up theory, should have been experiencing rising prices, are instead seeing falling prices and other characteristics of healthy competition.[54]

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48. *See Standard Setting Organizations and Standards List*, CONSORTIUMINFO.ORG, https://www.consortiuminfo.org/links/linksall.php#.WejGFNNSxaQ [https://perma.cc/YF7B-VMVQ].

49. *See, e.g.*, J. Gregory Sidak, *The Antitrust Division's Devaluation of Standard-Essential Patents*, 104 GEO. L.J. ONLINE 48, 61 n.49 (2015) (listing 21 articles which demonstrate that "more than two dozen economists and lawyers had disproved or disputed the numerous assumptions and predictions of the patent-holdup and royalty-stacking conjectures."); *see also* Bronwyn H. Hall & Rosemarie Ham Ziedonis, *An Empirical Analysis of Patent Litigation in the Semiconductor Industry* 15, 17 (Am. Econ. Ass'n Annual Meeting, Working Paper, 2007) (in an analysis not limited to SEPs, finding that patent enforcement rates have remained stable since the 1970s despite general strengthening of IPRs, and noting that firms exiting an industry may account for a significant degree of patent litigation).

50. *See* Comments of Telecomms. Indus. Ass'n, June 14, 2011, *Fed. Trade Comm'n Request for Comments and Announcement of Workshop on Standard-Setting Issues*, Project No. P11-1204, 4; Comments of Alliance for Telecomm. Indus. Solutions, June 14, 2011, *Request for Comments and Announcement of Workshop on Standard-Setting Issues*, Project No. P11-1204, 1; *see* ANSI Response to Request for Information, *Federal Agencies' Participation in Standards and Conformity Assessment Activities*, 12, (*included in* Comments of Am. Nat'l Standards Inst., June 10, 2011, *Fed. Trade Comm'n Request for Comments and Announcement of Workshop on Standard-Setting Issues*, Project No. P11-1204).

51. Ericsson, Inc. v. D-Link Sys., Inc., 773 F.3d 1201, 1234 (Fed. Cir. 2014) ("The district court need not instruct the jury on hold-up or stacking unless the accused infringer presents actual evidence of hold-up or stacking. Certainly something more than a general argument that these phenomena are possibilities is necessary.").

52. Certain 3G Mobile Handsets and Components Thereof, Inv. No. 337-TA-613, 2015 WL 6561709, *20–35, USITC (Apr. 27, 2015) (Remand). Not only did the ALJ find no evidence of patent hold-up, but he also found evidence of patent hold-out, discussed below. *See id.* at 25–26.

53. Renata Hesse, Deputy Assistant Attorney General for Criminal and Civil Operations, U.S. Dep't of Justice, Antitrust Div. & Terrell McSweeny, Commissioner, Fed. Trade Comm'n, Remarks at International Landscape — The Future Coexistence of IP and Antitrust Roundtable, LeadershIP (Mar. 13, 2015).

54. Alexander Galetovic, Stephen Haber & Ross Levine, *An Empirical Examination of Patent Hold-Up*, 11 J. COMPETITION L. & ECON. 549, 549–54 (2015); Roger G. Brooks, *SSO Rules, Standardization, and SEP Licensing: Economic Questions from the Trenches*, 9 J. COMPETITION L. & ECON. 859, 862–64 (2013).

B. Hold-Up as a Pretext for Attacking IPRs

Despite the notable lack of evidence that patent hold-up is a real problem, the DOJ and FTC have made combatting this hypothetical scenario an overriding objective. Thus, the FTC has initiated proceedings on the theory that an SEP owner can violate Section 5 of the FTC Act simply by threatening or seeking an injunction or ITC exclusion order.[55] In one of those proceedings, the FTC issued a decision and order barring the respondent from "initiating, or threatening to initiate, any Action demanding injunctive relief" for SEP infringement, unless a party refused in writing to take any SEP license whatsoever or unless a party essentially refused to take a license under terms previously determined to be FRAND.[56] And the FTC expressly left open the possibility that seeking an injunction could also violate the Sherman Act.[57]

Government officials have repeatedly focused on the SEP hold-up scenario as a basis for wielding antitrust law against SEP owners. The then-Chairwoman of the FTC declared that "[i]n the standard-setting context, the risk of patent hold-up creates the type of competitive harm that falls properly within the scope of antitrust enforcement."[58] At various events, the then-head of the DOJ Antitrust Division contemplated the merits of imposing Section 2 antitrust liability not only against SEP owners who practice deception during the standard-setting process but against a SEP owner that purportedly violates

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55. *See* Complaint 19–20, 23, In re Robert Bosch GmbH, FTC Docket No. C-4377 (2012); Complaint at 19, 25–27, In re Motorola Mobility LLC & Google Inc., FTC Docket No. C-4410 (2013).

56. Decision and Order §§ IV.D–E, In re Robert Bosch GmbH, FTC Docket No. C-4377 (2013). The decision was issued over the cogent dissent of Commissioner Ohlhausen. *See* Statement of Commissioner Maureen K. Ohlhausen, F.T.C. File No. 121-0081 at 1 ("Simply seeking injunctive relief on a patent subject to a fair, reasonable, and non-discriminatory ('FRAND') license, without more, even if seeking such relief could be construed as a breach of a licensing commitment, should not be deemed either an unfair method of competition or an unfair act or practice under Section 5.") (footnote omitted). Commissioner Ohlhausen (now the Acting Chairman of the FTC) pointed out that the SSO in question did not prohibit seeking injunctions, and that it was not clear that the patents at issue were SEPs. *Id.* at 3 n.13. She has since continued to warn of the FTC's dangerous tendency to invoke the broadly defined provisions of Section 5 against conduct — such as seeking an injunction — that should not be subject to antitrust regulation. *See* Maureen K. Ohlhausen, *The Elusive Role of Competition in the Standard-Setting Antitrust Debate*, 20 STAN. TECH. L. REV. 93 (2017) [hereinafter Ohlhausen, *Elusive Role*].

57. Fed. Trade Comm'n, F.T.C. File No. 121-0081, Statement of the Federal Trade Commission: In the Matter of Robert Bosch GmbH at 2 n.7 ("the Commission has reserved for another day the question whether, and under what circumstances, similar conduct might also be challenged as an unfair act or practice, or as monopolization.").

58. Edith Ramirez, Chairwoman, Fed. Trade Comm'n, Standard-Essential Patents and Licensing: An Antitrust Enforcement Perspective, Address at 8th Annual Global Antitrust Enforcement Symposium, Georgetown University Law Center 7 (Sept. 10, 2014).

F/RAND commitments, including by merely seeking an injunction.[59] She also encouraged SSOs to actively limit the power of SEP owners to seek injunctions.[60]

Such calls apparently fell on receptive ears. SEP licensees used their control of committees of the Institute of Electrical and Electronics Engineers ("IEEE") — the SSO responsible for the ubiquitous 802.11 Wi-Fi standard and others — to push through bylaws amendments that, among other things, require an SEP owner to commit not to seek an injunction against a recalcitrant infringer until first-level appellate review has been exhausted, and define SEP RAND royalty rates as necessarily excluding any value attributable to the standard.[61] There were open questions raised concerning anticompetitive licensee collusion and other improprieties in forcing through these bylaws amendments.[62] But despite the serious implications of permitting a cabal of IPR purchasers to suppress IPR prices and to weaken incentives for innovation in standardized technology, the DOJ promptly ruled that adoption of the IEEE bylaws amendments would be free of any antitrust concerns.[63] This unprecedented assault on owners' power over the licensing and enforcement of their property threatens real damage to the integrity of IPRs and to the innovation incentives they represent.[64]

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59. *See* Renata B. Hesse, Deputy Assistant Att'y Gen., Antitrust Div., U.S. Dep't of Justice, IP, Antitrust and Looking Back on the Last Four Years, Address at Global Competition Review, 2nd Annual Antitrust Law Leaders Forum 15–21 (Feb. 8, 2013); Renata Hesse, Deputy Assistant Att'y Gen., Antitrust Div., U.S. Dep't of Justice, The Art of Persuasion: Competition Advocacy at the Intersection of Antitrust and Intellectual Property, Address in Seattle, WA 9 (Nov. 8, 2013) ("We also continue to explore where there is room for liability under Section 2 of the Sherman Act in cases where holders of F/RAND-encumbered SEPs seek injunctive relief after a standard is in place. Even in cases where the patent holder did not intentionally deceive the SSO during the standards-setting process, competition and consumers can be harmed . . . .").

60. Renata Hesse, Deputy Assistant Att'y Gen., Antitrust Div., U.S. Dep't of Justice, Six "Small" Proposals for SSOs Before Lunch, Remarks as Prepared for the ITU-T Patent Roundtable 9 (Oct. 10, 2012); Renata B. Hesse, Deputy Assistant Att'y Gen. for Criminal and Civil Operations, U.S. Dep't of Justice, The Antitrust Division and SSOs: Continuing the Dialogue, Presentation Materials for ANSI Intellectual Property Rights Policy Committee Meeting 4 (Nov. 8, 2012).

61. Roy E. Hoffinger, *The 2015 DOJ IEEE Business Review Letter: The Triumph of Industrial Policy Preferences Over Law and Evidence*, CPI ANTITRUST CHRON., Mar. 2015, at 2, 6; J. Gregory Sidak, *Testing for Bias to Suppress Royalties for Standard-Essential Patents*, 1 CRITERION J. INNOVATION 301, 302 (2016); IEEE Standards Association, STANDARDS BOARD BYLAWS, § 6.1–6.2 (IEEE Standards Ass'n 2017).

62. *See, e.g.*, Hoffinger, *supra* note 61, at 6–9; Sidak, *supra* note 61.

63. Business Review Letter from Renata B. Hesse, Acting Assistant Att'y General, Antitrust Div., U.S. Dep't of Justice, to Michael A. Lindsay, Esq., Dorsey & Whitney LLP 1, 16 (Feb. 2, 2015).

64. As discussed above, strong patent rights incentivize innovation. *See infra* Section I.1. Since, as of 2014, IP-intensive industries accounted for over 38% of U.S. gross domestic product, threatened attacks on the strength of IP rights cannot be taken lightly. ANTONIPILLAI ET AL., *supra* note 3, at ii.

C. Existing Legal and Market Forces Constrain Hold-Up

The Government's actions are irrational not only because of the lack of actual evidence of patent hold-up, but because existing legal and market forces provide sufficient restraints and correctives. In the real world, F/RAND licensing commitments do in fact place limits both on licensing terms and on injunctive relief against bona fide willing licensees.[65]

As former FTC Commissioner Joshua Wright has noted, the multitude of different patent and F/RAND policies among SSOs reflects a competitive process that strikes a specific balance in each SSO between technology contributors and technology users in a particular technical area.[66] In such a context, there is no justification for initiating or even threatening antitrust enforcement to impose particular outcomes on what are plainly contractual disputes between sophisticated parties, let alone for placing a thumb on the scale in favor of technology users over innovators. Indeed, absent deception, courts have historically rejected the argument that a breach of an SSO agreement could constitute an antitrust violation.[67]

Furthermore, automatic injunctions against patent infringement were abolished by the Supreme Court's 2006 decision in *eBay Inc. v. MercExchange, L.L.C.*,[68] leading to a significant decline in both injunctions sought and injunctions granted.[69] As commentators have pointed out, the four-factor eBay test for injunctive relief is well-suited to weighing the equities in a F/RAND license dispute, rendering unnecessary any antitrust-based interference that effectively bans SEP injunctions.[70] To date, the circuit courts have wisely refused to

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65. *See, e.g.*, Farrah Short et al., *A New Meaning for FRAND in Korea's Qualcomm Sanctions*, LAW360 (Jan. 24, 2017, 1:14 PM) https://www.law360.com/articles/884153/a-new-meaning-for-frand-in-korea-s-qualcomm-sanctions [https://perma.cc/9GZH-92FM] (In connection with an over $850 million fine issued by the Korean Fair Trade Commission against Qualcomm, stating that "[t]he [Commission], in . . . finding Qualcomm in violation of its FRAND obligations, announced [that] . . . a FRAND encumbrance greatly limits the availability of exclusionary relief . . . [and] FRAND royalty rate[s] should reflect the number of declared standard-essential patents owned by the licensor in proportion to those declared essential writ-large, adjusted over time.").

66. *See, e.g.*, Joshua D. Wright, Comm'r, Fed. Trade Comm'n, SSOs, FRAND, and Antitrust: Lessons from the Economics of Incomplete Contracts, Remarks at the Center for the Protection of Intellectual Property Inaugural Academic Conference, George Mason University School of Law 16–19 (Sept. 12, 2013); Joanna Tsai & Joshua D. Wright, *Standard Setting, Intellectual Property Rights, and the Role of Antitrust in Regulating Incomplete Contracts*, 80 ANTITRUST L.J. 157, 165 (2015).

67. *See, e.g.*, Wright, *supra* note 66, at 23.

68. 547 U.S. 388 (2006).

69. Kirti Gupta & Jay P. Kesan, *Studying the Impact of* eBay *on Injunctive Relief in Patent Cases* 6–12, (Univ. of Ill. Coll. of Law, Research Paper No. 17–03, 2015), https://ssrn.com/abstract=2629399 [https://perma.cc/U2AL-58HV].

70. *See, e.g.*, Douglas H. Ginsburg, Taylor M. Owings & Joshua D. Wright, *Enjoining Injunctions: The Case Against Antitrust Liability for Standard Essential Patent Holders Who*

countenance any such ban.[71] Indeed, before the anti-innovator assault commenced, the Antitrust Division of the DOJ joined the USPTO in issuing a joint statement that was free of extraneous antitrust threats, but instead focused on using existing law — specifically, the public interest component of both the eBay injunction test and the ITC exclusion test — in the SEP area.[72] Finally, as Acting FTC Chairman Ohlhausen points out, the general trend in antitrust law has been away from per se bans and assumptions,[73] which makes enthusiasm for such an injunction ban even more incongruous, especially when it is difficult to see harm to competition in merely seeking an injunction.

In addition to existing legal and contractual mechanisms, practical constraints forestall SEP hold-ups. As a threshold matter, it is against the SEP owner's interests to let license fees that affect the prices of consumer products get so high that sales are adversely affected. Here, any given SEP owner is further constrained by the fact that other SEP owners are also charging royalties (and therefore also potentially affecting downstream prices of a product incorporating multiple SEPs). Indeed, far from being commonplace, so-called "royalty stacking" — the payment of multiple and excessive SEP royalties on the same item, including as the result of patent hold-up by multiple SEP owners — shows no sign of being a significant problem.[74] To the contrary, in the

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Seek Injunctions, THE ANTITRUST SOURCE, Oct. 2014, at 1, 2–4. Indeed, from 2003 to 2013, courts (excluding the ITC) denied every request for an injunction in SEP litigation involving smart phone manufacturers. *See* Kirti Gupta & Mark Snyder, *Smart Phone Litigation and Standard Essential Patents* 4, 13 (Hoover Inst. Working Grp. on Intellectual Prop., Innovation & Prosperity, Stanford Univ., Working Paper No. 14006, 2014), https://ssrn.com/abstract=2492331 [https://perma.cc/2NUZ-3GM4].

71. *See* Apple Inc. v. Motorola, Inc., 757 F.3d 1286, 1331–32 (Fed. Cir. 2014) ("To the extent that the district court applied a *per se* rule that injunctions are unavailable for SEPs, it erred . . . [W]e see no reason to create . . . a separate rule or analytical framework for addressing injunctions for FRAND-committed patents. The framework laid out by the Supreme Court in *eBay* . . . provides ample strength and flexibility for addressing the unique aspects of FRAND committed patents and industry standards in general."), *overruled on other grounds by* Williamson v. Citrix Online, LLC, 792 F.3d 1339 (Fed. Cir. 2015); Microsoft Corp. v. Motorola, Inc., 795 F.3d 1024, 1049 n.19 (9th Cir. 2015) ("We agree with the Federal Circuit that a RAND commitment does not always preclude an injunctive action to enforce the SEP.").

72. *See* U.S. DEP'T OF JUSTICE & U.S. PATENT & TRADEMARK OFFICE, POLICY STATEMENT ON REMEDIES FOR STANDARDS-ESSENTIAL PATENTS SUBJECT TO VOLUNTARY F/RAND COMMITMENTS (2013) [hereinafter *DOJ-PTO F/RAND Policy*]; *eBay*, 547 U.S. at 391.

73. *See* Maureen K. Ohlhausen, Comm'r, Fed. Trade Comm'n, Antitrust Oversight of Standard-Essential Patents: The Role of Injunctions, Address at the 2015 IP and Antitrust Forum, China Intellectual Property Law Association (Sept. 12, 2015) at 5–8, 11–15 [hereinafter Ohlhausen, *Antitrust Oversight*]; Ohlhausen, *Elusive Role*, *supra* note 56, at 136–40.

74. *See, e.g.*, Damien Geradin, Anne Layne-Farrar & A. Jorge Padilla, *The Complements Problem within Standard Setting: Assessing the Evidence on Royalty Stacking*, 14 B.U. J. SCI. & TECH. L. 144 (2008); Alexander Galetovic & Stephen Haber, *Innovation under Threat? An Assessment of the Evidence for Patent Holdup and Royalty Stacking in SEP-Intensive, IT Industries*, COMPETITION POLICY INT'L., INC., Sept. 2016, at 1, 7 (2016). "Royalty stacking"

SEP-intensive field of mobile telephony, the real average selling price of a device fell between 11.4% and 24.8% per year from 1994 to 2013.[75]

Patent hold-up scenarios also ignore the fact that standard-setting is an ongoing collaborative process, which gives SEP owners powerful incentives to act reasonably. For example, even if an SEP owner succeeded in obtaining exorbitant royalties in the short term, this would impel other participants in the standard-setting process to quickly bypass the patented technology in subsequent revisions of the standard — as well as making it far less likely that SSOs would use that company's technology in the future.[76] Abusive SEP owners face potential retaliation from other IPR holders, such as denial of cross licenses.[77] An SEP owner must also understand that exacting unreasonable license terms would give products practicing rival standards an advantage in the marketplace, or even stimulate the creation of rival standards.

Thus, far from rising to extortionate levels, royalty rates in standards-intensive technologies have generally held steady at moderate levels. For example, various studies have estimated that the total cumulative SEP royalties on mobile telephone handsets amount to only approximately 3.3 to 5.6% of the handset price.[78] More broadly, former FTC Commissioner Wright has observed "[no] reliable evidence that indicates royalty rates and final end-user prices are higher for standardized technologies."[79]

D. Tilting at Illusory Patent Hold-Up Enables Harmful Patent Hold-Out

Paradoxically, weakening IPRs to combat the hypothetical problem of patent hold-up has created a serious real-world problem: patent hold-out. In patent hold-out, it is not the SEP owner that acts unreasonably, but the companies that seek to use SEP technologies. Secure in the knowledge that the SEP owner's ability to seek injunctive

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appears to be another hypothetical phenomenon for which potentially harmful cures are being proposed despite the absence of evidence that there is actually a problem.

75. Alexander Galetovic & Kirti Gupta, *Royalty Stacking and Standard Essential Patents: Theory and Evidence from the World Mobile Wireless Industry* 1 (2017), https://ssrn.com/abstract=2790347 [https://perma.cc/4TKG-UBVR].

76. *See, e.g.*, Wright, *supra* note 66, at 20–21.

77. *Id.* at 21.

78. *See* J. Gregory Sidak, *What Aggregate Royalty Do Manufacturers of Mobile Phones Pay to License Standard-Essential Patents?*, 1 CRITERION J. INNOVATION 701, 719 (2016); Keith Mallinson, *Cumulative Mobile-SEP Royalty Payments No More Than Around 5% of Mobile Handset Revenues*, WiseHarbor (Aug. 19, 2015); Alexander Galetovic, Stephen H. Haber & Lew Zaretski, *A New Dataset on Mobile Phone Patent License Royalties* (Hoover Inst. Working Grp. on Intellectual Prop., Innovation & Prosperity, Stanford Univ., Working Paper No. 16011, 2016).

79. Wright, *supra* note 66, at 22.

relief, damages and royalties have been curtailed by the misapplication of antitrust law, the hold-out licensee refuses to take a license at all, or purports to engage in negotiations but refuses to pay a reasonable price for licensing the SEP.[80] Even as he found no evidence of patent hold-up in the ITC proceeding discussed earlier, Judge Essex did find evidence of patent hold-out and specifically noted the harm it causes to the patent owner: "[e]ach day that the respondents use the patents without taking a license, [the patent owner] loses money that it will not be able to recover."[81] Judge Essex also noted that successful hold-out can put "downward pressure" on an SEP owner's royalties generally.[82] The result is that companies that have substantially invested in research, development and innovation are deprived of a fair return on that investment, which makes future investment less likely or makes innovator companies reluctant to contribute cutting-edge technology to standards.[83] In contrast to patent hold-up, which (should it occur) can be mitigated by existing legal remedies and market forces, the loss of innovation in the standards context is potentially irreparable and thus far more serious in its potential impact on industry and consumers alike.[84]

The Government's anti-IPR attitude is worrying enough for its domestic effects, but these damaging effects extend far beyond the United States. By siding with technology users against innovators, the Government's actions amount to wielding antitrust law to project a misguided industrial policy exemplar globally. As Acting FTC Chairman Ohlhausen notes, "what we say and do here to our patent system reverberates around the world."[85] The principle that IPRs can be overridden using antitrust grounds as a pretext to achieve policy

80. Letter from Ambassador Michael B. G. Froman, U.S. Tr. Rep., to Honorable Irving A. Williamson, Chairman, USITC, at 2 (Aug. 3, 2013); *see* Certain Wireless Devices with 3G and/or 4G Capabilities and Components Thereof, Inv. No. 337-TA-868, USITC (June 13, 2014) (Initial Determination).

81. *In the Matter of Certain 3G Mobile Handsets*, USITC Inv. No. 337-TA-613 (Remand), 2015 WL 6561709, at *26.

82. *Id.*

83. *See, e.g.*, Ohlhausen, *Antitrust Oversight*, *supra* note 73, at 5–6, 8–10, 16; 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); Wright, *supra* note 66, at 26–31.

84. *See, e.g.*, Ohlhausen, *Antitrust Oversight*, *supra* note 73, at 5, 8–11; Wright, *supra* note 66, at 32–33. In contrast to various extreme pronouncements by DOJ officials, the joint DOJ-USPTO statement on F/RAND remedies correctly emphasized the need to preserve innovation incentives in the SSO context. *See DOJ-PTO F/RAND Policy*, *supra* note 72, at 8 ("DOJ and USPTO strongly support the protection of intellectual property rights and believe that a patent holder who makes such a F/RAND commitment should receive appropriate compensation that reflects the value of the technology contributed to the standard. It is important for innovators to continue to have incentives to participate in standards-setting activities and for technological breakthroughs in standardized technologies to be fairly rewarded.").

85. Ohlhausen, *Patent Rights*, *supra* note 14, at 106.

results encourages competition authorities in other countries to also use antitrust law against IPRs, whether as a pretext for protectionism or for attacks on IPRs in the form of compulsory licensing or state-imposed limits on royalties.[86] No good to long-term global welfare can come from antitrust authorities far and wide following the United States in a race to the bottom against innovation incentives.

IV. Weakening Copyright IPRs: Performing Rights Organizations Thwarted From Well-Settled Licensing Models

The disturbing pattern of U.S. antitrust regulators siding with those who utilize creativity and innovation over creators and innovators is also evident in the copyright context through the DOJ's attempts to impose restrictions on creators belonging to performing-rights organizations ("PROs"). PROs aggregate the IPRs of thousands of individual contributors, such as songwriters and publishers, which can then be licensed by television and radio shows, or by bars, restaurants, and other venues.[87] By offering "blanket licenses" to the works of their members, PROs make it easy for licensees to obtain the rights they need without having to negotiate many individual licenses.[88]

Two of the largest PROs — the American Society of Composers, Authors and Publishers ("ASCAP") and Broadcast Music, Inc. ("BMI") — have operated under consent decrees dating from 1941.[89] In 2016, the DOJ unexpectedly took the position that these consent decrees prohibit fractional licensing: licensing by a PRO of precisely the share of a co-owned work it has received from the work's creator.[90] Under U.S. copyright law, the default rule is that each creator of a co-owned work, such as a song with multiple songwriters, has the right to grant a non-exclusive license to the work, provided that there is an

86. *Id.* at 106–07; Ohlhausen, *Elusive Role*, *supra* note 56, at 96–97. Paradoxically, in the same speech in which she stated that mere risk of hold-up justifies antitrust intervention, former FTC Chairwoman Edith Ramirez recognized that "enforcement activity that deprives patent owners of a reasonable reward in one country can depress incentives to create technology for next-generation standards that will benefit consumers around the world" and that "consumers are best served when competition enforcement is based solely on sound economic analysis of competitive effects[.]" Ramirez, *supra* note 58, at 2, 7, 9.

87. Brief of the American Society of Composers, Authors and Publishers as *Amicus Curiae* Supporting Defendant-Appellee Broadcast Music, Inc. at *1, United States v. Broad. Music, Inc., No. 16-3830-cv (2d Cir. Aug. 24, 2017) [hereinafter ASCAP Br.].

88. *See, e.g.*, Statement of the Department of Justice on the Closing of the Antitrust Division's Review of the ASCAP and BMI Consent Decrees, Aug. 4, 2016, 2, 5–6 [hereinafter DOJ Closing Statement].

89. *See id.* at 2, 5–6; ASCAP Br., *supra* note 87, at 1.

90. *See* DOJ Closing Statement, *supra* note 88, at 3, 11–16; ASCAP Br., *supra* note 86, at 4, 6–7.

accounting for royalties between the co-owners.[91] However, this co-ownership rule can be (and often is) overridden by contracts between creators.[92] In addition, the default rule is not recognized in many other countries, such as the United Kingdom, Japan and Canada.[93] In such situations, each creator can license only her fractional interest in the co-owned work, including in a license to a PRO.[94] Because a PRO operates as an aggregator of the individual rights of its members, PROs have long operated on the basis that if less than all of the co-creators of a work belong to a given PRO, that PRO can license only a fractional share of that work.[95] Because the remaining co-creators frequently belong to other PROs, media outlets or performance venues receive 100% of the performing rights to a work by taking licenses from all of the major PROs.[96]

Ignoring this longstanding consensus, in 2016 the DOJ began contending that a PRO should be able to license only works to which it can offer a complete license, in other words, works created entirely by parties who are members of that PRO.[97] A work co-created by members of different PROs could not be licensed by any PRO having only a partial interest in the work.[98] The DOJ's position — which had been soundly rejected by the Copyright Office in a comprehensive 2014 review of the issue[99] — threatens to massively upend settled expectations in the industry, hurt creators of copyrighted works, and devalue their IPRs. The gravest threat is to co-creators of works who belong to different PROs because their works become effectively unlicensable, unfairly depriving them of royalty income and unfairly depriving the public of access to those works.[100] The DOJ's position also threatens the historical principle that, especially in situations where the IPR owner is not discriminating between downstream users, an IPR owner is free to exploit the fruits of her creativity as she sees fit, including determining whether or not to license her work and, if so, to which PRO.[101] The DOJ's position would, in the words of the Copyright Office, "work against the fundamental goal of the copyright

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91. *See, e.g.*, ASCAP Br. at 13; Letter from Maria A. Pallante, Register of Copyrights, U.S. Copyright Office, to Doug Collins, Vice Chairman Subcommittee on Courts, Intellectual Property and the Internet, U.S. House Concerning PRO Licensing of Representatives (Jan. 29, 2016) [hereinafter Copyright Office Views].

92. *See* Copyright Office Views, *supra* note 90, at 6–7, 9–12.

93. *See* Brief for the International Confederation of Societies of Authors and Composers (CISAC) as *Amicus Curiae* in Support of Broadcast Music, Inc., at 7–8, United States v. Broad. Music, Inc., No. 16-3830-cv (2d Cir. Aug. 24, 2017).

94. *See, e.g.*, ASCAP Br., *supra* note 87, at 13.

95. *See* Copyright Office Views, *supra* note 91, at 1–2, 13–17.

96. *See id.* at 17–18.; ASCAP Br., *supra* note 87, at 22–23.

97. *See* DOJ Closing Statement, *supra* note 88, at 3, 11–16.

98. *See id.* at 3.

99. Copyright Office Views, *supra* note 91, at 1–3.

100. *See, e.g.*, *id.* at 23–24, 27–29.

101. *See, e.g.*, *id.* at 19–20, 23–24.

system — to encourage creativity by ensuring that creators are paid for use of their works."[102]

The DOJ's radical reinterpretation was flatly rejected by the Southern District of New York in 2016, which declared that "[n]othing in the Consent Decree gives support to the [Antitrust] Division's views."[103] Regrettably, the DOJ continues to press its position on appeal.[104] As with SEPs, the DOJ's position benefits users of IPRs at the expense of creators. For example, forcing all rights to a co-owned work to be licensed from a single PRO may be convenient for users (who can obtain all of the rights to a particular work from just one PRO license), but deprives creators of the freedom to work with the PRO of their choice since all co-creators must agree on a single PRO in order for their works to be licensable.[105] Unsurprisingly, entities representing licensee interests have filed *amicus* briefs in support of the DOJ's position.[106] Some of those entities resort to "hold-up" arguments even more dubious than the hold-up arguments asserted in the SEP context. For example, one amicus complains that "[i]f fractional licensing is permitted, then fractional rights holders will have the power to hold up the use of songs for any reason — including demanding higher fees."[107] But setting one's own fee for the use of an IPR is the basic prerogative of an IPR owner, especially where no advance commitment has been made to license on any particular terms, and exercising this prerogative is in no way a "hold-up." IPR owners should not be forced to license their works for lower fees simply because that would be advantageous to IPR users. As with SEPs, licensee arguments in the PRO context ignore the long-term damage that interfering with IPRs can cause to an innovation economy that rests on those IPRs.

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102. *Id.* at 23.

103. United States v. Broad. Music, Inc., 207 F. Supp. 3d 374, 376 (S.D.N.Y. 2016).

104. *See*, Brief of Appellant United States of America at 5, Broad. Music, No. 16-3830-cv (2d Cir. May 18, 2017). Since this article was drafted, the Second Circuit Court of Appeals affirmed the decision of the District Court for the Southern District of New York, "that the consent decree neither requires full work licensing nor prohibits fractional licensing of BMI's affiliates' compositions." United States v. Broad. Music, Inc., No. 16-3830-cv, 2017 U.S. App. LEXIS 25545 (2d Cir. Dec. 19, 2017).

105. *See* Copyright Office Views, *supra* note 91, at 14, 17–20, 26–27.

106. *See* Brief of Television Music License Committee, LLC as *Amicus Curiae* in Support of the United States of America and Reversal of the District Court, Broad. Music (May 25, 2017) (representing local television broadcasters); Brief of Industry Participants as *Amici Curiae* in Support of the United States of America, Broad. Music (May 25, 2017) (representing licensees and licensee interests such as Netflix, Pandora, Spotify, Google, American Beverage Licensees and the National Association of Broadcasters); Brief for Consumer Action and Public Knowledge in Support of Plaintiff-Appellant, Broad. Music (June 2, 2017) [hereinafter Consumer Action Br.].

107. Consumer Action Br., *supra* note 106, at 3.

V. THE WAY FORWARD IS A RETURN TO PRUDENCE AND DEFERENCE

The Government's assault on IPRs must stop before it does serious harm to innovation and the innovation economy that has served our country so well. Instead of being used as a pretext to favor those who benefit from innovation over the innovators themselves, antitrust law should resume its historical deference to IPRs. As the Ninth Circuit put it in beating back an earlier attempt at antitrust overreach, "[t]he antitrust laws do not grant the government a roving commission to reform the economy at will."[108] Indeed, the DOJ and the FTC would do well to respect to the basic principles they themselves set forth in the latest revision of "Antitrust Guidelines for the Licensing of Intellectual Property," issued in January 2017:

(1) "The intellectual property laws and the antitrust laws share the common purpose of promoting innovation and enhancing consumer welfare."

(2) "[T]he Agencies apply the same [antitrust] analysis to conduct involving intellectual property as to conduct involving other forms of property, taking into account the specific characteristics of a particular property right[.]"

(3) "[T]he Agencies do not presume that intellectual property creates market power in the antitrust context[.]"

(4) "If an intellectual property right does confer market power, that market power does not by itself offend the antitrust laws."[109]

But merely paying lip service to these important principles does not mitigate the harmful overreach of the Government's recent actions.

As it has historically, antitrust law can and should patrol instances in which IPRs are wrongfully obtained, wrongfully exercised, or used as a pretext to impose costs or controls on subject matter that is not validly protected by IPRs. But antitrust authorities should not challenge the exercise of IPRs, even if that exercise leads in the short term to higher prices or to purportedly negative market outcomes. As we have seen, IPR issues have legal and market solutions outside of antitrust enforcement. The DOJ and FTC would do well to heed Commissioner

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108. United States v. Westinghouse Elec. Corp., 648 F.2d 642, 648 (9th Cir. 1981).

109. U.S. DEP'T OF JUSTICE AND F.T.C., ANTITRUST GUIDELINES FOR THE LICENSING OF INTELLECTUAL PROPERTY 2, 4 (2017).

Ohlhausen's emphasis on "regulatory humility"[110] and her advice that "responsible policymakers should be reluctant to diminish IP rights,"[111] but instead "approach questions of reform cautiously, and . . . insist upon evidentiary showings of harm before allowing anecdotal, but quantitatively deficient, claims of patent abuse to drive policy."[112] For even if an IPR results in high profits to its owner, that is precisely what the patent and copyright systems are designed to accomplish: reward innovators and creators for the long-term benefit of our country. We disrupt the rewards for innovation and creativity enshrined in our Constitution at our peril.

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110. Fed. Trade Comm'n, F.T.C. File No. 121-0081, Statement of Commissioner Maureen K. Ohlhausen: In the Matter of Robert Bosch GmbH at 2 ("this enforcement policy [barring injunctions for SEP patents] appears to lack regulatory humility"). J. Gregory Sidak is notably pessimistic about the incentives for such humility, pointing out that DOJ officials function in the relatively short-term context of electoral cycles, while the harm they cause to innovation incentives manifests itself in the longer term. *See* Sidak, *supra* note 49, at 72. This dynamic makes advocacy by the IPR community even more important.

111. Ohlhausen, *Patent Right*s, *supra* note 14, at 148.

112. *Id.* at 146.