DEPARTMENT OF JUSTICE

Antitrust Law and Patent Licensing in the New Wild West

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Good afternoon.

Thank you Richard for that introduction, and thank you to IAM for inviting me to speak today on the important topic of patent licensing.

It is fitting that today's conference is taking place in the Bay Area, which has been the world's premier hub of innovation over the last several decades.

Though sometimes derided as the capital of the "left coast," what sets the Bay Area apart is its maverick culture of innovation and enterprise. It would be equally fitting to call it the "Wild West," although today the stagecoach has given way to the driverless car, miners of data and cryptocurrency are the new gold-rush 49ers, and the saloon is now a trendy wine bar. In San Francisco, during the gold rush, prices for real estate and basic goods and services skyrocketed as supply struggled to keep up with demand.[1] So perhaps some things do stay the same.

Just as in the Wild West days, today the Bay Area is full of inventors and entrepreneurs who dream big, seeking a payoff for their enterprise and, to quote Steve Jobs, hoping to "put a dent in the universe."

I share this passion for innovation and believe that antitrust policy should encourage dynamic competition in the face of barriers to innovation and change. As part of that effort, we at the Antitrust Division over the past year have taken a fresh look at how antitrust enforcers and the courts have sought to apply the antitrust laws in the context of intellectual property disputes. We have modernized our policy orientation with respect to the treatment of intellectual property under the antitrust laws, which we refer to as the "New Madison" approach, and have increased our

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[1] *See* Steve Boggan, "Gold Rush California Was Much More Expensive Than Today's Tech-Boom California," SmithsonianMag.com (Sept. 30, 2015), https://www.smithsonianmag.com/history/gold-rush-california-was-much-more-expensive-todays-dot-com-boom-california-180956788/.

advocacy efforts both in the United States and abroad regarding these important issues.[2] One of the central goals of our approach is, through further research and debate, to achieve a greater symmetry between dueling concerns of "hold up" by patent holders and "hold out" by patent implementers, while recognizing that both groups play a valuable role in the process of innovation that advances dynamic competition.[3]

The first prong of the "New Madison" approach is that antitrust law should not be used as a tool to police FRAND commitments that patent-holders unilaterally make to standard setting organizations.[4] I have previously spoken at length regarding why the theory and evidence of unilateral "hold-up" by patent-holders does not provide an adequate basis to condemn such conduct under the antitrust laws generally.[5]

Given the importance of this issue and a recent trend in complaints about SEP-holder conduct, today I would like to elaborate further on why an antitrust cause of action premised on a failure to abide by FRAND commitments would be inconsistent with Section 2 of the Sherman Act. In some cases, patent licensees have alleged that a patent holder's breach of a FRAND commitment, by itself, can constitute unlawful monopolization or attempted monopolization in violation of Section 2.[6] In other cases, licensees have alleged a Section 2 violation where a patent

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[2] Makan Delrahim, Assistant Attorney General – Antitrust Division, "The 'New Madison' Approach to Antitrust and Intellectual Property Law" (Mar. 16, 2018), *available at* https://www.justice.gov/opa/speech/file/1044316/download; *see, e.g.*, Makan Delrahim, Assistant Attorney General – Antitrust Division, "Take It To the Limit: Respecting Innovation Incentives in the Application of Antitrust Law" (Nov. 10, 2017), *available at* https://www.justice.gov/opa/speech/file/1010746/download; Makan Delrahim, Assistant Attorney General – Antitrust Division, "The Long Run: Maximizing Innovation Incentives Through Advocacy and Enforcement (Apr. 10, 2018), *available at* https://www.justice.gov/opa/speech/file/1050956/download.
[3] Delrahim, "Take It To The Limit," *supra* note 2, at 14.
[4] Delrahim, "New Madison," *supra* note 2, at 3-10.
[5] *Id.*; Delrahim, "Take It To The Limit," *supra* note 2, at 3-9.
[6] *E.g.*, Godo Kaisha IP Bridge 1 v. TCL Commc'n Tech. Holdings Ltd., 2017 WL 750700, at *6-7 (D. Del. Feb. 27, 2017).

holder supposedly *deceived* the standard setting body by making a commitment to license on FRAND terms when it purportedly never had any *intention* of granting such a license.[7]

It can be a serious mistake for a court to allow either type of claim to proceed under the Sherman Act. To understand why that is the case, one should consider the policies underlying Section 2 of the Sherman Act.

I. The Line Between Lawful and Unlawful Exclusionary Conduct Under Section 2

One crucial element in establishing any claim of unlawful monopolization under Section 2 is a showing that a defendant acquired, enhanced, or maintained monopoly power in the relevant market through anticompetitive conduct that is "exclusionary" or "predatory" in nature.[8] I will focus on so-called "exclusionary" conduct—the umbrella concept often invoked by licensees bringing Section 2 claims premised on FRAND violations.

The term *exclusionary conduct* in antitrust law is potentially misleading because there is a difference under the Sherman Act between "lawful" and "unlawful" conduct that results in exclusion of a competitive alternative.[9] In market economies, every rational business wants to exclude and defeat its competitors, and indeed antitrust law encourages fierce competition among companies aiming for as high a market share as they can achieve. That is why courts applying Section 2 are careful not to condemn "exclusionary" conduct that is driven by competition on the

[7] *E.g.*, Complaint, u-Blox AG v. Koninklijke Philips N.V., No. 18-cv-1627, ¶ 56 (S.D. Cal. filed July 18, 2018); Answer and Amended Counterclaims, Huawei Techs., Co. v. Samsung Elecs. Co., 2016 WL 8609044, ¶ 265 (N.D. Cal. filed Oct. 14, 2016); Funai Elec. Co. v. LSI Corp., 2017 WL 1133513, at *5 (N.D. Cal. Mar. 27, 2017); Microsoft Mobile Inc. v. Interdigital, Inc., 2016 WL 1464545, at *2 (D. Del. Apr. 13, 2016); Apple Inc. v. Samsung Elecs. Co., 2011 WL 4948567, at *4 (N.D. Cal. Oct. 18, 2011); Research in Motion Ltd. v. Motorola, Inc., 644 F. Supp. 2d 788, 792-98 (N.D. Tex. 2008).

[8] Aspen Skiing Co. v. Aspen Highlands Skiing Corp., 472 U.S. 585, 602 (1985).

[9] United States v. Microsoft Corp., 253 F.3d 34, 58 (D.C. Cir. 2001) (en banc) (per curiam) ("Whether any particular act of a monopolist is exclusionary, rather than merely a form of vigorous competition, can be difficult to discern: the means of illicit exclusion, like the means of legitimate competition, are myriad. The challenge for an antitrust court lies in stating a general rule for distinguishing between exclusionary acts, which reduce social welfare, and competitive acts, which increase it.").

merits such as innovation.[10] Most obviously, legitimate competition on the merits can be "exclusionary" in the sense that consumers choose a superior product or service.[11] That conduct does not violate Section 2. By comparison, conduct that "excludes" a competitor by hindering its ability to offer a superior product or service, without offering any benefit to competition, likely would constitute a Section 2 violation.[12]

When courts police the line between lawful and unlawful "exclusionary" conduct, a few themes emerge.[13]

First, courts have recognized that not every type of conduct that may enhance a business's market power is actionable, such as when the application of Section 2 would impose a duty that contravenes the policies of the antitrust laws themselves. For example, in *Verizon Communications Inc. v. Law Offices of Curtis V. Trinko*,[14] the plaintiff alleged that Verizon refused to deal with a rival in order to limit competitive entry, thereby enhancing its monopoly position.[15] The Supreme Court held that the claim did not satisfy Section 2 as a matter of law.[16] That is because the claim would condemn a monopolist's refusal to share its resources and effectively would create an antitrust duty to help a competitor.[17] Such a duty, the Court explained, is in

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[10] Ball Mem'l Hosp., Inc. v. Mut. Hosp. Ins., Inc., 784 F.2d 1325, 1338 (7th Cir. 1986) (Easterbrook, J.) ("Competition is a ruthless process. A firm that reduces cost and expands sales injures rivals—sometimes fatally.").

[11] *Cf.* Harrison Aire, Inc. v. Aerostar Int'l, Inc., 423 F.3d 374, 381 (3d Cir. 2005) ("Competitive markets are characterized by both price and quality competition, and a firm's comparatively high price may simply reflect a superior product."); Blue Cross & Blue Shield United v. Marshfield Clinic, 65 F.3d 1406, 1412 (7th Cir. 1995) (Posner, J.) ("Generally you must pay more for higher quality.").

[12] *Aspen Skiing*, 472 U.S. at 605 n.32 ("Thus, 'exclusionary' comprehends at the most behavior that not only (1) tends to impair the opportunities of rivals, but also (2) either does not further competition on the merits or does so in an unnecessarily restrictive way." (quoting 3 P. AREEDA & D. TURNER, ANTITRUST LAW 78 (1978)).

[13] Novell, Inc. v. Microsoft Corp., 731 F.3d 1064, 1072 (10th Cir. 2013) (Gorsuch, J.) ("[T]he question we often find ourselves asking is whether, based on the evidence and experience derived from past cases, the conduct at issue before us has little or no value beyond the capacity to protect the monopolist's market power—bearing in mind the risk of false positives (and negatives) any determination on the question of liability might invite, and the limits on the administrative capacities of courts to police market terms and transactions.").

[14] 540 U.S. 398 (2004).

[15] *Id.* at 407.

[16] *Id.* at 410-11.

[17] *Id.* at 411.

"tension with the underlying purpose of antitrust law, since it may lessen the incentive for the monopolist, the rival, or both to invest in those economically beneficial facilities."[18] The Court applied a *legal* rule, rather than a fact-specific rule, to protect conduct that may have an exclusionary, monopoly-enhancing effect.

Second, the Supreme Court has cautioned against antitrust standards that would create an unacceptable risk of "false positives" or condemnations of lawful pro-competitive conduct. As the Court has explained, "Mistaken inferences and the resulting false condemnations 'are especially costly, because they chill the very conduct the antitrust laws are designed to protect.'"[19] Judge Robert Bork, in his famous *Antitrust Paradox*, highlighted the same risk in the application of Section 2 theories, explaining with respect to exclusive dealing that "[t]he real danger for the law is less that predation will be missed than that normal competitive behavior will be wrongly classified as predatory and suppressed."[20]

II. Alleged Violations of FRAND Commitments Do Not Constitute Unlawful Exclusionary Conduct Under the Sherman Act

This backdrop helps frame the question whether a unilateral refusal to license a lawful patent on "FRAND" terms after committing to do so constitutes a form of *unlawful* exclusionary conduct. A unilateral violation of a FRAND commitment should not give rise to a cause of action under Section 2 of the Sherman Act, even if a patent holder is alleged to have misled or deceived a standard-setting organization with respect to its licensing intentions. Applying Section 2 to this

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[18] *Id.* at 407-08; *see also Novell*, 731 F.3d at 1073 ("If the law were to make a habit of forcing monopolists to help competitors by keeping prices high, sharing their property, or declining to expand their own operations, courts would paradoxically risk encouraging collusion between rivals and dampened price competition—themselves paradigmatic antitrust wrongs, injuries to consumers and the competitive process alike. Forcing firms to help one another would also risk reducing the incentive both sides have to innovate, invest, and expand—again results inconsistent with the goals of antitrust. The monopolist might be deterred from investing, innovating, or expanding (or even entering a market in the first place) with the knowledge anything it creates it could be forced to share; the smaller company might be deterred, too, knowing it could just demand the right to piggyback on its larger rival.").

[19] *Trinko*, 540 U.S. at 414 (quoting Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 594 (1986)).

[20] ROBERT H. BORK, THE ANTITRUST PARADOX 157 (rev. ed. 1993).

sort of unilateral conduct would contravene the underlying policies of the antitrust laws. This conduct may warrant remedies under contract law, but the important difference is that contract remedies do not involve the threat of treble damages that can deter lawful, pro-competitive conduct.[21]

A. Standard Setting Inherently Involves Contractual Exclusion

In the context of legitimate standard setting, the collective decision to incorporate a patented technology into a standard necessarily involves the "exclusion" of rival technologies. Moreover, as a result of having its technology incorporated into a standard, a patent holder may gain incremental market power beyond any power that holding a patent would already convey.[22] By voluntarily participating in the standard setting process, however, owners of rival technologies and prospective licensees assume the risk that the outcome of that process may have an exclusionary effect where there are patents covering the "winning" technology. Simply winning selection by a standard setting process does not constitute unlawful exclusionary conduct under the antitrust laws. This is because that selection, regardless the reason for it, contributes to unification around a single standard, which creates interoperability benefits for consumers that could not be achieved without unification.[23]

This form of lawful and pro-competitive exclusionary conduct should not be condemned as *unlawful* under the Sherman Act when a licensee believes that a patent-holder opportunistically has reneged on its commitment to license on "FRAND" terms and engaged in so-called "hold-up."

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[21] *See, e.g.*, 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).
[22] Courts and enforcers do *not* presume that a patent confers market power. *See* Illinois Tool Works Inc. v. Independent Ink, Inc., 547 U.S. 28, 38-42 (2006); U.S. DEPARTMENT OF JUSTICE & FEDERAL TRADE COMMISSION, ANTITRUST ENFORCEMENT AND INTELLECTUAL PROPERTY RIGHTS: PROMOTING INNOVATION AND COMPETITION 2 (2007) ("[A]ntitrust doctrine does not presume the existence of market power from the mere presence of an intellectual property right.").
[23] *See generally id.* at 33-36.

That is also true even where a patent holder never allegedly intended to license on the terms that a court ultimately determines are "FRAND." I will explain why.

B. Antitrust Law Does Not Establish a Duty To License at Terms Consistent with a FRAND Commitment

There is no duty under the antitrust laws for a patent holder to license on FRAND terms, even after having committed to do so. A FRAND commitment is a contractual representation that a patent holder will license on "fair," "reasonable," and "non-discriminatory" terms. It is not the same as a promise to pay a specific price in a final contract. Indeed, commentators have noted that by failing to specify a specific price, a FRAND commitment is an incomplete contract term.[24]

To be clear, a FRAND commitment may create a duty under contract law to fulfill that obligation, and courts may be tasked with determining the relevant FRAND rate where parties disagree over this contract term. Section 2, however, is agnostic to the price that a patent-holder seeks to charge after committing to such a term. Breaking down "FRAND" by its component terms makes clear why this is so.

First, the Sherman Act does not police "fair" prices or competition; it protects the competitive process.[25] Judge Easterbrook once asked, "Who says that competition is supposed to be fair, that we judge the behavior of the marketplace by the ethics of the courtroom? . . . When

[24] Joshua D. Wright, *SSOs, FRAND, and Antitrust: Lessons from the Economics of Incomplete Contracts*, 21 GEO. MASON L. REV. 791, 796 (2014) (explaining that "the intentionally vague F/RAND commitment common in many SSOs' IPR policies" is intentionally "made by sophisticated parties informed by a number of tradeoffs," including the fact that "there is considerable uncertainty concerning the ultimate value of the technology, if adopted, especially in dynamic and ever-changing markets"); *see generally* Joanna Tsai & Joshua D. Wright, *Standard Setting, Intellectual Property Rights, and the Role of Antitrust in Regulating Incomplete Contracts*, 80 ANTITRUST L.J. 157 (2015).

[25] *See* Brooke Group Ltd. v. Brown & Williamson Tobacco Corp., 509 U.S. 209, 225 (1993) ("Even an act of pure malice by one business competitor against another does not, without more, state a claim under the federal antitrust laws; those laws do not create a federal law of unfair competition or 'purport to afford remedies for all torts committed by or against persons engaged in interstate commerce.'" (quoting Hunt v. Crumboch, 325 U.S. 821, 826 (1945))); 1 Phillip E. Areeda & Herbert Hovenkamp, *Antitrust Law* ¶ 111d ("As a goal of antitrust policy, 'fairness' is a vagrant claim applied to any value that one happens to favor."); *see also* BORK, *supra* note 20, at 90 ("Consumer welfare, as the term is used in antitrust, has no sumptuary or ethical component . . . .").

economic pressure must give way to fair conduct . . . rivals will trim their sails"; introducing conceptions of "fairness" into the Sherman Act "is to turn antitrust law on its head."[26]

Second, having undertaken a contractual duty to charge "nondiscriminatory" rates, the Sherman Act does not compel a patent-holder to abide by this promise. The Sherman Act is indifferent to price discrimination[27]; indeed, in some circumstances price discrimination may be pro-competitive.[28]

Third, the Sherman Act does not authorize courts to determine "reasonable" licensing rates. The Supreme Court has emphasized repeatedly that antitrust law does not recognize a cause of action that would "require[] antitrust courts to act as central planners, identifying the proper price, quantity, and other terms of dealing—a role for which they are ill-suited."[29]

It, therefore, would be a mistake to infer that a contractual FRAND commitment somehow establishes a duty under the antitrust laws to license on terms demanded by a licensee or that violations of an ambiguous FRAND term become an antitrust violation. Transforming such a contract obligation into an antitrust duty would undermine the purpose of the antitrust laws and

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[26] Fishman v. Estate of Wirtz, 807 F.2d 520, 577 (7th Cir. 1986) (Easterbrook, J., dissenting).

[27] *See, e.g.*, USM Corp. v. SPS Techs., Inc., 694 F.2d 505, 512 (7th Cir. 1982) (Posner, J.) ("there is no antitrust prohibition against a patent owner's using price discrimination to maximize his income from the patent"); 7C Areeda & Hovenkamp, *Antitrust Law* ¶ 721 ("We conclude that price discrimination alone should not generally be considered unlawful and that, in any event, court-ordered remedies are likely to do more harm than good. . . . the type and amount of power evidenced by price discrimination in IP licensing are insufficient to require invocation of the antitrust laws unless other indicia of power are also present.").

[28] *See* James C. Cooper et al., *Does Price Discrimination Intensify Competition? Implications for Antitrust*, 72 ANTITRUST L.J. 327, 369 (2005) ("[I]n certain cases price discrimination can cause firms to compete more intensely, leading to lower prices for all consumers and lower profits for all firms."). To the extent any such "nondiscrimination" duty exists, it is under the Robinson-Patman Act, which in limited circumstances condemns price discrimination with respect to commodities—not patent licenses. 15 U.S.C. § 13(a) (declaring it unlawful "to discriminate in price between different purchasers of commodities of like grade and quality . . . and where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly"); *see, e.g.*, KMG Kanal-Muller-Gruppe Int'l, GmbH v. Inliner U.S.A., 1999 WL 1078556, at *4 (S.D. Tex. May 13, 1999) ("The [patent] license at issue is not a commodity and the Robinson-Patman Act is inapplicable.").

[29] *Trinko*, 540 U.S. at 408; *see* Pac. Bell Tel. Co. v. linkLine Commc'ns, Inc., 555 U.S. 438, 452 (2009).

the patent laws themselves, both of which serve the same goal of increasing dynamic competition by fostering greater investment in research and development, and ultimately in innovation.[30]

Making the duty to license on FRAND terms enforceable under the antitrust laws would contravene the policies of the Sherman Act. As the Supreme Court recognized in *Trinko*, a business has no antitrust duty to deal with another company, and only in limited circumstances will a refusal to deal give rise to a potential antitrust claim. As then-Tenth Circuit Judge Neil Gorsuch explained in *Novell v. Microsoft*, following *Trinko*, a monopolist's refusal to license its intellectual property is actionable under the antitrust laws only if it terminates a "presumably profitable course of dealing between the monopolist and the rival" and that termination is "irrational but for its anticompetitive effect."[31]

I would note that then-Judge Gorsuch's standard echoes what the United States and FTC advocated to the Supreme Court in its amicus brief in the *Trinko* case. The brief stated:

> Where, as here, the plaintiff asserts that the defendant was under a duty *to assist a rival*, the inquiry into whether conduct is "exclusionary" or "predatory" requires a sharper focus. In that context, conduct is not exclusionary or predatory *unless* it would make no economic sense for the defendant but for its tendency to eliminate or lessen competition.[32]

That narrow window for a refusal to deal claim is irreconcilable with the broader contention that Section 2 obligates an SEP-holder subject to a contractual FRAND commitment to license its technology to any comer—much less on FRAND terms.[33] An antitrust duty to license on FRAND

[30] *See* Atari Games Corp. v. Nintendo of Am., Inc., 897 F.2d 1572, 1576 (Fed. Cir. 1990) ("[T]he aims and objectives of patent and antitrust laws may seem, at first glance, wholly at odds. However, the two bodies of law are actually complementary, as both are aimed at encouraging innovation, industry and competition.").
[31] Novell, Inc. v. Microsoft Corp., 731 F.3d 1064, 1074-75 (10th Cir. 2013) (Gorsuch, J.).
[32] Br. for the United States & FTC as Amici Curiae Supporting Petitioner, Verizon Commc'ns Inc. v. Law Offices of Curtis V. Trinko, LLP, No. 02-682, at 15 (U.S. 2003), *available at* https://www.justice.gov/atr/case-document/file/515316/download.
[33] *Cf.* Pac. Bell Tel. Co. v. linkLine Commc'ns, Inc., 555 U.S. 438, 450 (2009) ("[I]f a firm has no antitrust duty to deal with its competitors at wholesale, it certainly has no duty to deal under terms and conditions that the rivals find commercially advantageous.").

terms would also contravene the patent laws' policy of promoting innovation by offering incentives for holders of valid patents to seek the greatest rewards possible for their inventions.

To be clear, contract law may very well require an SEP-holder to deal with any willing licensee, but the Sherman Act does not convert FRAND commitments into a compulsory licensing scheme.[34] It logically follows that there is no antitrust liability for *proposing* to deal at terms that are above FRAND rates.

Nor should an antitrust duty spring into being if a patent holder allegedly "deceives" an SSO when it commits to license on FRAND terms and its participants rely on that representation in deciding to adopt the technology. That is because Section 2 should not condemn a patent holder's profit-maximizing intentions or aspirations at the time it makes a FRAND commitment, particularly where remedies are already available to an unhappy licensee or SSO participant.[35]

Suppose that, hypothetically, the holder of a standard-essential patent knew upfront precisely what price would satisfy the vague definition of "FRAND" and planned to demand a much higher price after the SSO incorporated its technology into a standard. By making a legally binding commitment, a patent-holder acknowledges that it will be required under contract law to license at a rate determined by a court if a disagreement over that rate arises later. A licensee, for its part, understands that it can bring suit if a price does not fit its own subjective understanding of "FRAND." Because both patent-holders and licensees participating in a standard-setting process recognize that the proper "FRAND" rate will be determined after the fact—in court, if necessary—there is therefore no meaningful *ex ante* "deception" that should give rise to an antitrust claim.[36]

[34] *Cf.* Delrahim, "New Madison," *supra* note 2, at 16 ("A *de facto* compulsory licensing scheme turns this policy underlying the Sherman Act on its head.").
[35] *See, e.g.*, *Trinko*, 540 U.S. at 411.
[36] That is what distinguishes the circumstances in which some lower courts and enforcers have recognized a cause of action under the antitrust laws for unreasonable deception of an SSO, such as willfully failing to disclose patents that read on a technology, *see In re* Rambus, Inc., 2006 WL 2330117 (F.T.C. Aug. 2, 2006), *rev'd*, 522 F.3d 456 (D.C. Cir. 2008), or intentionally misstating the capabilities of a technology itself, *see In re* Union Oil Co. of Cal., 2004 WL

To be sure, having one's technology incorporated into a standard, in some circumstances, may increase a patent-holder's market power. The same could be said, of course, about a monopolist's refusal to deal with a rival who might gain market share if it had access to the monopolist's inputs. Even if this occurs as a result of a patent holder's so-called "deception" about its licensing obligations, this is not the sort of market-power-enhancing conduct that Section 2 should reach because a cause of action for treble damages would impede the policies underlying the Sherman Act. Even worse, such a cause of action would "require[] the court to assume the day-to-day controls characteristic of a regulatory agency."[37]

C. An Antitrust Remedy for Breaches of FRAND Commitments or "Deception" with Respect to FRAND Creates an Unacceptable Risk of False Positives

More fundamentally, recognizing a Section 2 cause of action for violations of a FRAND commitment would create an unacceptable risk of "false positive" condemnations of pro-competitive conduct by licensees.[38] The prospect of antitrust liability and treble damages for breaching a potentially vague FRAND term—or allegedly "misrepresenting" one's intentions to offer some FRAND rate—threatens to chill incentives for innovators to develop new technologies that fuel dynamic competition.[39]

5662245 (F.T.C. July 6, 2004). To the extent such claims are cognizable under Section 2, they would require, at minimum, a showing that the misrepresentation or omission caused the SSO to select a different technology, increased the patent-holder's market power, and caused harm to competition. Deception with respect to FRAND commitments, by contrast, would require a court to weigh a vague commitment against the subjective licensing intentions of a profit-maximizing holder of a lawful patent—a task that it cannot "adequately and reasonably supervise." *linkLine*, 555 U.S. at 453.

[37] *Id.*; *cf.* Novell, Inc. v. Microsoft Corp., 731 F.3d 1064, 1074-75 (10th Cir. 2013) (Gorsuch, J.) ("Administrability considerations are also at play here. If forced sharing were the order of the day, courts would have to pick and choose the applicable terms and conditions. That would not only risk judicial complicity in collusion and dampened price competition. It would also require us to become 'central planners,' a role for which we judges lack many comparative advantages and a role in which we haven't always excelled in the past.").

[38] *See generally* Thomas C. Arthur, *The Costly Quest for Perfect Competition:* Kodak *and Nonstructural Market Power*, 69 N.Y.U. L. REV. 1, 15-20 (1994); Frank H. Easterbrook, *The Limits of Antitrust*, 63 TEX. L. REV. 1, 15-17 (1984).

[39] *Cf.* Edward D. Cavanagh, *Detrebling Antitrust Damages in Monopolization Cases*, 76 ANTITRUST L.J. 97, 115 (2009) ("Treble damages encourage questionable Section 2 suits, magnify the cost of error, chill procompetitive behavior, and may stifle innovation.").

Where contract law remedies exist to remedy and deter breaches of a FRAND commitment, the *additional* deterrence that Sherman Act remedies offer could deter lawful, pro-competitive conduct[40]—that is, research and development by innovators who make careful cost-benefit calculations as to how much to invest in technologies that may not pay off. Demanding a high price for one's patented technology is permissible, and expected, conduct in a free market negotiation. A Section 2 cause of action would skew the patent licensing bargain away from the bargaining outcome that a free market dictates.

In particular, where the parties have a subjective disagreement over the meaning of an incomplete contract term, a Section 2 remedy threatens the patent holder with the risk of enormously costly litigation and a possible treble damages award. Bargaining in the shadow of litigation, a patent holder would be wary that a high license demand could be penalized by a significant damages award, whereas a prospective licensee's low-ball offer would do no such thing. Such a remedy would bestow any putative licensee with disproportionate negotiating power. In turn, the cost-benefit calculation for innovators would change and the prospect of additional dynamic competition likely would decline.[41]

The same is true with respect to assertions that a patent holder "deceived" other members of an SSO by making a FRAND commitment. As a string of recent cases demonstrates, plaintiffs are often creative in trying to convert a garden-variety FRAND contract claim into a "deception" claim when a licensee merely asserts, sometimes in conclusory terms, that a patent-holder made a

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[40] *Cf.* Verizon Commc'ns Inc. v. Law Offices of Curtis V. Trinko, LLP, 540 U.S. 398, 411 (2004) ("One factor of particular importance is the existence of a regulatory structure designed to deter and remedy anticompetitive harm. Where such a structure exists, the additional benefit to competition provided by antitrust enforcement will tend to be small, and it will be less plausible that the antitrust laws contemplate such additional scrutiny.").

[41] *Cf.* Bruce H. Kobayashi & Joshua D. Wright, *The Limits of Antitrust and Patent Holdup: A Reply to Cary et al.*, 78 ANTITRUST L.J. 505, 510 (2012) ("The implications of the optimal deterrence literature for the antitrust treatment of patent holdup are clear. The case for imposition of antitrust sanctions that exceed damages is weak so long as the probability of detection is sufficiently high.").

misrepresentation about its intention to license on FRAND terms.[42] Whatever merit such a claim might have under state law, it is a mistake to recognize a cause of action under the Sherman Act for a purported misrepresentation regarding a necessarily vague and incomplete contract term.[43]

Consider how indefinite a promise to license on FRAND terms is. Parties regularly dispute: (1) how high royalties can be consistent with FRAND; (2) whether FRAND-encumbered patent holders must license component manufacturers or just end-device manufacturers; and (3) to what extent prices may differ for different licensees consistent with the "non-discriminatory" aspect of FRAND.

For purposes of Section 2, "FRAND" is not sufficiently clear to allow courts to distinguish between lawful, pro-competitive bargaining conduct that patent rights allow and *unlawful*, anticompetitive licensing conduct that harms consumers without offering pro-competitive benefits. Application of the Sherman Act to such claims would create an unacceptable risk of false positives, threatening innovation and dynamic competition itself.

Some commentators may object that refusing to recognize a cause of action under Section 2 for this type of conduct would raise the risk of false *negatives* or under-enforcement, particularly where deception regarding a FRAND commitment is clear and causes a technology to be incorporated into a standard that would not have succeeded but-for a FRAND commitment. Though such a situation may occur on rare occasions, I remain skeptical that it does so with regularity, given that the principal goal of standard setting is to select the superior technology

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[42] *See supra* note 7.

[43] *Cf.* Benjamin Klein, *Market Power in Antitrust: Economic Analysis After* Kodak, 3 S. CT. ECON. REV. 43, 62 (1993) ("Instead of finding 'monopolies' everywhere, 'hold-up' problems should be left to contract law. Antitrust law should not be used to prevent transactors from voluntarily making specific investments in writing contracts by which they knowingly put themselves in a position where they may face a 'hold-up' in the future . . . . Transactors know they cannot eliminate such 'hold-up' risks and, instead, voluntarily decide to adopt contractual arrangements they believe optimally protect themselves against the risk of 'hold up.' . . . [C]ontract law inherently recognizes the pervasiveness of transactor-specific investments and generally deals with the 'hold-up' problems in a subtle way, not by attempting to eliminate every perceived 'hold-up' that may arise.").

among competing alternatives. To quote then-Judge Gorsuch again, "most every [antitrust] rule proves over- or under-inclusive in some way. We often accept a degree of over- and under-inclusion as the price that must be paid for the benefits associated with a clear rule of law."[44]

III. Conclusion

Since we articulated the "New Madison" approach earlier this year, I have been encouraged to see the voluminous commentary—receptive and some critical—that it has generated both in the United States and abroad. We have endeavored to take all of those views into account as we formulate the policies of the United States with respect to antitrust law and intellectual property disputes. Statements of policy alone, however, do not change the law immediately. Courts themselves will be called upon to do the hard work of applying the principles of the Sherman Act in the context of genuine legal disputes.

We, accordingly, encourage the private bar, district courts, courts of appeals, or foreign enforcement bodies to invite our views where a private party asserts that a patent holder has violated the antitrust laws by failing to license a standard-essential patent on FRAND terms, or by making a "deceptive" FRAND commitment in order to win incorporation into a standard.

Thank you.

[44] Novell, Inc. v. Microsoft Corp., 731 F.3d 1064, 1073 (10th Cir. 2013) (Gorsuch, J.). Moreover, common law courts have imposed a very high pleading burden for promissory fraud, of which a claim premised upon an allegedly deceitful FRAND commitment is essentially a species. *See* Wigod v. Wells Fargo Bank, N.A., 673 F.3d 547, 570 (7th Cir. 2012); Ian Ayres & Gregory Klass, *Promissory Fraud*, N.Y. St. B.J., May 2006, at 26, 28.