DEPARTMENT OF JUSTICE

Protecting Free-Market Patent Bargaining, Competition, and the Right To Exclude

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I. Introduction

Good afternoon. Thank you Chief Judge Prost for that introduction, it is an honor to be here with you.

It is also an honor to share the stage with Commissioner Boswell of the Canadian Competition Bureau. He has been a great friend and great partner in our fight to protect competition and consumers.

I should also note and congratulate Commissioner Boswell, and the whole Competition Bureau, including recently retired Commissioner John Pecman, for their work and cooperation on the recently concluded United States–Mexico–Canada Agreement. We have become even closer partners as a result.

I now want to thank the Federal Circuit Bar Association and the European Patent Law Association for organizing this event.

It may seem counter-intuitive to hold a gathering of Federal Circuit practitioners here in Canada, but I believe that drawing on the wisdom and experience of Federal Circuit judges, experts, and practitioners on the international circuit serves an important goal. This Global Series stands as a recognition that intellectual property disputes are increasingly global in scope. It also serves as a reminder that the United States' laws and precedents regarding intellectual property carry significant respect and therefore weight in the global system of innovation and dynamic competition. The same is true for the antitrust laws, which I consider one of the United States' most widely adopted exports.

International observers may notice that there is a vigorous debate in the United States regarding how best to structure the rules governing the exercise of intellectual property rights in order to optimize innovation. At the Antitrust Division, we too play a role in this debate, as competition policy and intellectual property rights often go hand-in-hand. Indeed, our mission is to protect the free markets in order to allow for the dynamic competition that innovation provides. This is how consumers benefit best.

Today's debates over antitrust and intellectual property echo the concerns that animated the Framers of the U.S. Constitution and our early Republic.

The approach the Founders adopted in the Patent and Copyright Clause of the U.S. Constitution was truly revolutionary. Not only did they embrace the idea that incentives were necessary for invention, they also opted for a decentralized, market-based process for determining inventors' compensation.

This approach had its origins in the intellectual tradition that the United States and Canada share as original colonies of the British Empire.

Adam Smith, the Scottish philosopher and father of modern economic thinking, recognized the superiority of decentralized innovation policy in a free-market economy. For centuries before his time, patents were generally disfavored.[1] They were seen as creating "monopolies" that harmed the public good.[2] Governments frequently offered "prizes," rather than exclusive rights, as the means of inducing and rewarding inventions that would benefit the public.[3]

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[1] For a comprehensive history, see Adam Mosoff, *Rethinking the Development of Patents: An Intellectual History, 1550-1800*, 62 HASTINGS L.J. 1255 (2001).

[2] *See id.* at 1268, 1281. *See generally* Tyler T. Ochoa & Mark Rose, *The Anti-Monopoly Origins of the Patent and Copyright Clause*, 84 J. PAT. & TRADEMARK OFF. SOC'Y 909, 912-18 (2002).

[3] *See* B. Zorina Khan, *Premium Inventions: Patents and Prizes as Incentive Mechanisms in Britain and the United States, 1750-1930, in* UNDERSTANDING LONG-RUN ECONOMIC GROWTH: GEOGRAPHY, INSTITUTIONS, AND THE KNOWLEDGE ECONOMY 205, 207 (Dora L. Costa & Naomi R. Lamoreaux eds., Univ. of Chicago Press 2011). The debate over whether to offer prizes or exclusive rights to encourage innovation "dates back to at least the nineteenth century and may be as old as the patent system itself," and there has been a recent surge in scholarship advocating for prizes as an alternative to the U.S. intellectual property regime. Benjamin N. Roin, *Intellectual Property Versus Prizes: Reframing the Debate*, 81 U. CHI. L. REV. 999, 1003 (2014) (citation and quotation marks omitted).

As historian Zorina Khan explains, the rationale for offering "prizes" instead of exclusive rights was that "members of the special class of geniuses would respond more to honors and prizes rather than to mere material incentives."[4]

Adam Smith was skeptical of this approach. In his 1763 *Lectures on Jurisprudence*, he explained that a centralized system of pre-determined "prizes" to compensate inventors was inferior to incentives and awards determined by the free-market process. In Smith's words:

> [T]he inventor of a new machine or any other invention has the exclusive privilege of making and vending that invention . . . as a reward for his ingenuity . . . . [I]f *the legislature* should appoint pecuniary rewards for the inventors of new machines, etc., they would hardly ever be so precisely proportioned to the merit of the invention as this is. . . . [I]f the invention be good and such as is profitable to mankind, he will probably make a fortune by it; but if it be of no value he also will reap no benefit.[5]

Smith's rejection of centralized planning for rewarding inventors and his embrace of exclusive rights and free markets bears a striking resemblance to the constitutional framework that James Madison favored and the Founders adopted.

In *The Federalist Papers* and a series of letters with Thomas Jefferson, Madison advocated bestowing patent holders with rights to their inventions as an incentive to innovate. He wrote that "the *public good* fully coincides . . . with the claims of *individuals*."[6]

Madison subsequently helped draft Article I, Section 8, of the Constitution, which established a patent framework bestowing inventors with "exclusive Right[s]" over their "Writings and Discoveries," in order "[t]o promote the Progress of Science and useful Arts."[7]

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[4] Khan, *supra* note 3, at 207.

[5] ADAM SMITH, LECTURES ON JURISPRUDENCE 82-83 (Oxford 1978) (R. L. Meeks, D.D. Raphael & Peter Stein, eds.) (emphasis added) (spelling modified/updated).

[6] THE FEDERALIST No. 43, at 271-72 (James Madison) (Clinton Rossiter ed., 1961) (emphases added); *see* Letter from James Madison to Thomas Jefferson, Oct. 17, 1788, *available at* http://founders.archives.gov/documents/Madison/01-11-02-0218.

[7] U.S. Const. art. I, sec. 8.

The Founders did not create a system of central planning for determining rewards for inventors and innovators; they placed their trust in markets. By bestowing inventors with the "exclusive Right" over their invention once conferred by Congress,[8] the initial patent system decentralized and deregulated the system of innovation.[9] The patent right under the Constitution rests exclusively with the inventor, who can sell his or her patented technology or negotiate to license that right to others, or to no one at all.

The antitrust laws share this same underlying policy of favoring decentralized, free-market competition.[10] As Justice Robert Jackson explained during his time as Assistant Attorney General of the Antitrust Division eighty years ago, "The antitrust laws represent an effort to avoid detailed government regulation of business by keeping competition in control of prices. It was hoped to save government from the conflicts and accumulation of grievances which continuous price control would produce and to let it confine its responsibility to seeing that a true economy functions."[11]

What Adam Smith, James Madison, and Justice Jackson all shared is the understanding that innovation works best when the government protects free markets and economic liberty rather than engaging in central planning.

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[8] *Id.*

[9] *See* Anup Malani & Jonathan S. Masur, *Raising the Stakes in Patent Cases*, 101 GEO. L.J. 637, 638 (2013) ("That the United States has chosen to employ patents rather than direct rewards to encourage innovation reflects a decision to decentralize the task of picking winners. This policy choice is premised on the notion that, if inventors or the market are in a better position than the government to identify valuable innovations, the government should delegate the task by granting inventors a patent as a reward for innovation. Patents entitle inventors to monopoly profits from an innovation, and monopoly profits tend to increase as the social value of an innovation increases. Thus, the patent system generally encourages inventors to work on what they believe will be the most valuable inventions.").

[10] *See* N. Pac. Ry. Co. v. United States, 356 U.S. 1, 4 (1958) ("The Sherman Act was designed to be a comprehensive charter of economic liberty aimed at preserving free and unfettered competition as the rule of trade. It rests on the premise that the unrestrained interaction of competitive forces will yield the best allocation of our economic resources, the lowest prices, the highest quality, and the greatest material progress . . . . But even were that premise open to question, the policy unequivocally laid down by the Act is competition.").

[11] Robert H. Jackson, AAG for the Antitrust Division, 71 U.S.L. Rev. 575, 576 (1937) (address before the Trade and Commerce Bar Association and Trade Association Executives, Sept. 17, 1937), *available at* https://www.roberthjackson.org/speech-and-writing/should-the-antitrust-lawsbe-revised/.

Against this backdrop, over the past year, the Antitrust Division has re-evaluated our U.S. policies governing the application of the antitrust laws to intellectual property disputes.[12] We are concerned specifically that there is a new, but growing perception among some in the United States and abroad that patent rights—and the exclusivity of such rights in particular—threatens harm to competition and innovation.[13] Indeed, some have taken the draconian position that, in certain circumstances, seeking an injunction against infringement of a valid patent should be deemed unlawful under the antitrust laws.[14]

Those assertions are inconsistent with the decentralized, free-market patent framework established by the Founders and Congress, and they run contrary to the policies of the antitrust laws. Antitrust policy was not designed to be an instrument for fine-tuning the incentives created by patent law. Nor does antitrust law take away any legitimate right that patent law grants.[15]

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[12] 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; Makan Delrahim, Assistant Attorney General – Antitrust Division, "Antitrust Law and Patent Licensing in the New Wild West" (Sept. 18, 2018), *available at* https://www.justice.gov/opa/speech/file/1095011/download.

[13] *See, e.g.*, Maureen Ohlhausen, *The Elusive Role of Competition in the Standard-Setting Debate*, 20 STAN. TECH. L. REV. 93, 119-21 (2017) (describing concerns among U.S. and international agencies that patent holder attempts to seek injunctive relief may harm competition); Paul H. Saint-Antoine, *IP, Antitrust, and the Limits of First Amendment Immunity: Shouting 'Injunction' In a Crowded Courthouse*, 27 ANTITRUST 41, 42 (2013).

[14] *See, e.g.*, Order, Huawei Techs., Co. v. Samsung Elecs. Co., 3:16-cv-02787-WHO, at 14, 35-36 (N.D. Cal. Sept. 25, 2018) (Dkt. # 418) (describing, and striking, expert testimony that asserted that seeking an injunction may violate Section 2 of the Sherman Act); Greg Sivinski, *Patently Obvious: Why Seeking Injunctions on Standard-Essential Patents Subject to a FRAND Commitment Can Violate Section 2 of the Sherman Act*, Competition Pol'y Int'l, Oct. 2013, https://www.competitionpolicyinternational.com/assets/Uploads/SivinskiOct-2.pdf; *cf.* Microsoft Mobile Inc. v. Interdigital, Inc., 2016 WL 1464545, at *1 (D. Del. Apr. 13, 2016) (as part of Section 2 claim, "Microsoft alleges that IDC has 'pursued baseless infringement actions and baseless demands for injunctive relief and exclusion orders designed to increase Microsoft's costs and thereby coerce Microsoft to capitulate to InterDigital's unreasonable, non-FRAND demands'").

[15] *Cf.* Walker Process Equip., Inc. v. Food Machinery & Chem. Corp., 382 U.S. 172 (1965) (recognizing antitrust liability where defendant defrauded PTO in order to obtain patent).

Patent rights function best if an owner retains a right to exclude.[16] That right ensures that any price paid for a patented product or license reflects the bargaining leverage that the patent regime bestows. Depriving a patent holder of this right would skew the bargain away from the free-market incentive scheme that the Constitution and Congress have established. Even worse, it threatens to convert the licensing bargaining process into a compulsory licensing scheme.[17]

We, at the Division, shoulder some of the blame for these developments. In 2013, for example, we issued a Policy Statement[18] that, I worry, may be misconstrued to endorse the application of antitrust law to attempts to seek injunctions.[19] I will return to the 2013 Policy Statement in a moment.

II. Patent Licensing as Bargaining

Before I do that, I'd like to explain what I mean by the "free market" bargaining outcome in the context of patent licensing. That process ordinarily involves bargaining between

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[16] *See* Robert P. Merges, *Of Property Rules, Coase, and Intellectual Property*, 94 COLUM. L. REV. 2655, 2667 (1994) ("Without the right to obtain an injunction, the right to exclude granted to the patentee would have only a fraction of the value it was intended to have, and would no longer be as great an incentive to engage in the toils of scientific and technological research." (*quoting* Smith Int'l, Inc. v. Hughes Tool Co., 718 F.2d 1573, 1578 (Fed. Cir. 1983)).

[17] One of the four premises of the Division's "New Madison" approach to the application of antitrust law to intellectual property rights is that, "because a key feature of patent rights is the right to exclude, standard setting organizations and courts should have a very high burden before they adopt rules that severely restrict that right or—even worse—amount to a de facto compulsory licensing scheme." Delrahim, "New Madison," *supra* note 12, at 5.

[18] 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" (Jan. 8, 2013), *available at* https://www.justice.gov/sites/default/files/atr/legacy/2014/09/18/290994.pdf [hereinafter "DOJ-PTO Joint Policy Statement"].

[19] Perhaps fueling this misperception, the Division has suggested that curbing the right to seek an injunction against infringement of standard-essential patents "could significantly reduce the possibility of a hold up or use of an injunction as a threat to inhibit or preclude innovation and competition." Dep't of Justice, "Statement of the Department of Justice's Antitrust Division on Its Decision to Close Its Investigations of Google Inc.'s Acquisition of Motorola Mobility Holdings Inc. and the Acquisitions of Certain Patents by Apple Inc., Microsoft Corp. and Research in Motion Ltd." (Feb. 13, 2012), https://www.justice.gov/opa/pr/statement-department-justice-s-antitrust-division-its-decision-close-its-investigations. *See also* Saint-Antoine, *supra* note 13, at 43-44 (explaining how the Antitrust Division "extracted commitments from a number of SEP owners not to seek injunctive relief, as part of its 2011 investigation of Google's acquisition of Motorola and the Rockstar consortium's acquisition of the Nortel patent portfolio").

sophisticated parties over how to divide the gains from commercializing an invention.[20] Our economic tools help us understand how that process works. The economics of bargaining was pioneered by Nobel Prize winner John Nash—more popularly known as the character portrayed by Russell Crowe in the movie *A Beautiful Mind*.[21] That theory begins with the insight that trade is voluntary, and the terms negotiated depend on each party's alternative position if they do not reach a deal.[22]

For example, suppose an innovative start-up company develops and patents a technology but lacks the means of manufacturing and commercializing it. It needs to license that technology to stay afloat. A large manufacturer of thousands of commercial products might take an interest in the new technology, but that manufacturer hardly needs to sell the start-up's product in order to be profitable. If the innovator and manufacturer come together to bargain, each has an alternative to no deal. Without a deal, the start-up would need to find a different manufacturer; if it failed to do so, it could risk collapse. Without a license, the manufacturer would pursue other profitable activities and suffer little downside, except for a lost opportunity.

The insight of bargaining economics is that these alternatives determine each commercial party's *negotiating leverage*.[23] Different alternatives can improve or weaken a party's leverage. If the innovative start-up attracts interest from a second manufacturer, then it will suffer little from

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[20] *See* William Choi & Roy Weinstein, 41 IDEA 49, 55-60 (2001) (applying this principle to reasonable royalty calculations for patent infringement cases).

[21] John Nash, *The Bargaining Problem*, 18 ECONOMETRICA 155 (1950); *see* MARTIN J. OSBORNE & ARIEL RUBINSTEIN, BARGAINING AND MARKETS 9 (1990) ("Nash . . . established the framework that we use to study bargaining.").

[22] John Nash, *Two-Person Cooperative Games*, 21 ECONOMETRICA 128 (1953); *see* David Sally, *Game Theory Behaves*, 87 MARQ. L. REV. 783, 784 (2004).

[23] *See, e.g.*, FTC v. ProMedica Health Sys., Inc., 2011 WL 1219281, at *6 (N.D. Ohio Mar. 29, 2011) ("The respective degrees of bargaining leverage are determined by how each party would fare if no agreement were reached."); Jonathan B. Baker, *Comcast/NBCU: The FCC Provides a Roadmap for Vertical Merger Analysis*, 25 ANTITRUST 36, 40 (2011).

failing to reach a deal with the first manufacturer, and it therefore will have greater leverage to demand a higher license fee.

Licensing negotiations of this sort play out every day around the world as inventors and technological implementers come together to create value. It is the free market at its best, with licensing rates for new technologies determined by the forces of supply and demand, not by central planners. Rewarding innovation at free-market rates offers incentives for each generation of inventors deciding whether to invest in research and development.

A patent holder's right to seek an injunction against infringement gives it necessary leverage in a free market negotiation.[24] Expanding the hypothetical, the first manufacturer could also threaten to infringe the start-up's patent. This threat changes the two parties' alternatives should a deal not be reached. The precise impact of the threat on negotiations will depend on whether the start-up can obtain an injunction against that infringement, or whether it will be forced to seek damages after a long, costly fight in court.

In the United States, the patent framework established in the Constitution and by Congress defines the parameters of the free market negotiation for patent licenses. Under that free market system, patent holders may go to court to seek to exclude rivals from using their technology without obtaining a license.

The right to exclude is not unqualified, of course. To obtain an injunction against infringement of a valid patent, a patent holder must meet the equitable test for obtaining injunctive

[24] *See* Nathaniel C. Love, Comment, *Nominal Reasonable Royalties for Patent Infringement*, 75 U. CHI. L. REV. 1749, 1769 (2008) ("Where a party's product falls under the claims of another's patent and a noninfringing alternative is not available, the patentee's source of leverage in a pre-suit negotiation comes from two sources: (1) the likelihood of obtaining damages in the form of a reasonable royalty; and (2) the likelihood of obtaining an injunction."); *cf.* Joanna Tsai & Joshua D. Wright, *Standard Setting, Intellectual Property Rights, and the Role of Antitrust in Regulating Incomplete Contracts*, 80 ANTITRUST L.J. 157, 182 (2015) ("The threat of injunction can be a very important part of the bargaining process and is likely part of the benefit of the bargain understood by a contributing member of the SSO at the time it decided to participate in the standard.").

relief.[25] The right *to seek* an injunction, however, is enshrined in the Constitution as a foundation of free market negotiations for patented inventions.

III. Ensuring Free-Market Competitive Outcomes in the Context of Standard Setting

From the perspective of *competition*, the animating principle behind the antitrust laws, patent licensing works best where royalty rates reflect the outcome of free-market competitive bargaining. Using antitrust law to police the unilateral conduct of patent holders threatens to disrupt the foundation of free market bargaining.

To understand why that is the case, let's examine from a high level how standard setting functions. In one context, by bringing innovators and implementers together, standard setting creates interoperability benefits that could not be achieved without unification.[26] At its best, standard setting can eliminate some of the inefficiencies and friction costs associated with competition for the standard.[27]

Some have advocated that, in certain circumstances, the antitrust laws should condemn a patent holder's efforts to obtain injunctive relief for patents that are part of a standard.[28] In particular, they argue that the standard setting process can cause the owner of a standard-essential patent to obtain market power over its technology.[29] With greater leverage from being the chosen

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[25] 35 U.S.C. § 283 ("The several courts having jurisdiction of cases under this title may grant injunctions in accordance with the principles of equity to prevent the violation of any right secured by patent, on such terms as the court deems reasonable."); eBay Inc. v. MercExchange, L.L.C., 547 U.S. 388, 391-93 (2006).
[26] U.S. DEP'T OF JUSTICE & FED. TRADE COMM'N, ANTITRUST ENFORCEMENT AND INTELLECTUAL PROPERTY RIGHTS: PROMOTING INNOVATION AND COMPETITION 33-36 (2007).
[27] *Id.* at 34 ("By agreeing on an industry standard, firms may be able to avoid many of the costs and delays of a standards war, thus substantially reducing transaction costs to both consumers and firms.").
[28] *See supra* note 14.
[29] Order, Huawei Techs., Co. v. Samsung Elecs. Co., 3:16-cv-02787-WHO, at 36 (N.D. Cal. Sept. 25, 2018) (Dkt. # 418) (quoting Samsung expert assertion that "companies with SEPs should not be able to seek an injunction . . . because they permit the SEP patent owner to exercise monopoly power beyond what is permitted under FRAND obligations").

technology, the argument goes, the SEP-owner would be able to "hold up" implementers and charge "excessive royalties" if it were able to obtain an injunction against infringement.[30]

This concern is misplaced, and should not warrant the application of the antitrust laws where more appropriate remedies are available.

Consider the alternative: a free market in which no standard-setting body existed at all. If a group of patent owners emerged as the *de facto* winner of a standard because consumers deemed their technologies superior, they likely would enjoy market power.[31] The patent holders would not violate the antitrust laws if one unilaterally sought to enjoin an infringer.[32] Quite the contrary—the right to seek an injunction would be *consistent* with the policies of the antitrust laws and patent laws. That is because it would allow innovators to monetize their technology in a free market, offering incentives to the next generation of inventors to do the same, therefore generating dynamic competition for the benefit of consumers.[33]

Substituting a formal standard-setting process for the free-market process of choosing technological winners and losers does not turn the technology winner's constitutional right to exclude into a suspicious exercise of unlawful market power. Moreover, recognizing a cause of action for treble damages where the patent owner seeks an injunction would transform standard

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[30] *Id.* at 35-36 (quoting Samsung expert assertion that "[t]hese higher royalties are equivalent to higher prices than would have occurred in the absence of the injunction and are thus a violation of Section 2").

[31] To be clear, a patent right does not in itself confer market power. U.S. DEP'T OF JUSTICE & FED. TRADE COMM'N, ANTITRUST GUIDELINES FOR THE LICENSING OF INTELLECTUAL PROPERTY § 2.2 (2017) ("The Agencies will not presume that a patent, copyright, or trade secret necessarily confers market power upon its owner.").

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

[33] *See* Douglas H. Ginsburg, Taylor M. Owings & Joshua D. Wright, *Enjoining Injunctions: The Case Against Antitrust Liability for Standard Essential Patent Holders Who Seek Injunctions*, ANTITRUST SOURCE, at 6 (2014) ("[O]verdeterrence of SEP holders seeking injunctions would be harmful to the public interest in competition and innovation."); *cf.* Richard A. Epstein & Kayvan B. Noroozi, *Why Incentives for 'Patent Holdout' Threaten to Dismantle FRAND, and Why it Matters*, 32 BERKELEY TECH. L.J. 1381, 1408 ("It is the very threat of the injunction right—and its associated high transaction costs—that brings the parties to the negotiating table and motivates them to draw upon the full scope of their knowledge and creativity in forming contractual and institutional solutions to the perceived holdup problem. Indeed the FRAND architecture—and all of its attendant benefits and externalities—has arisen *because of* the presumption of injunctive relief, not despite it.").

setting into a compulsory licensing scheme and depress licensing rates below levels that a free market would dictate.[34]

The Nash bargaining model helps us understand why that is the case. In a free market, when a patent holder and implementer negotiate, the implementer's alternative to no deal is either to avoid using the patented technology at all, or to infringe on the patent and risk a lawsuit. If the implementer chooses the latter option and infringes, the patent holder must decide whether to sue for damages or seek to stop the infringement entirely. The threat of an injunction provides leverage to the patent holder. It creates a risk that an infringer may incur a cost greater than merely having to pay damages.

Subjecting a patent holder to the threat of antitrust liability would disrupt the free market framework, because the prospect of treble damages likely would deter the innovator even from exercising its right to seek an injunction. As a result, unless a patent holder can meet the high standard for demonstrating willful infringement,[35] the most a patent holder would be able obtain is a reasonable royalty after years of litigation.[36]

In turn, such a cause of action would depress license rates below the but-for competitive level and thereby harm the incentive for innovation and ultimately harm consumers.[37]

IV. The 2013 DOJ-PTO Policy Statement

Now I would like to turn to the joint statement issued by the Department of Justice and the U.S. Patent & Trademark Office in early 2013, entitled "Policy Statement on Remedies for

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[34] If a patent holder voluntarily negotiates away his or her right to an injunction for a particular patent, and then subsequently seeks an injunction for that same patent, then that action could give rise to a potential breach of contract claim or arbitration process under the Federal Arbitration Act (should the underlying SSO rules require).
[35] *See* 35 U.S.C. § 284; Halo Elecs., Inc. v. Pulse Elecs., Inc., 136 S. Ct. 1923 (2016).
[36] In most cases, of course, the result would be a settlement limited by the upside recovery that the patent holder might be able to retain if the case proceeded to trial.
[37] Ginsburg et al., *supra* note 33, at 5 (explaining that explaining that an antitrust remedy for seeking an injunction "would be harmful" to consumer welfare and that "[o]verdeterring SEP holders from seeking an injunction effectively diminishes the value of their patents and hence their incentive to innovate").

Standards-Essential Patents Subject to Voluntary F/RAND Commitments."[38] That Policy Statement purports to offer the agencies' perspectives on the propriety of issuing an injunction "when a patent holder seeking such a remedy asserts standards-essential patents that are encumbered by a RAND or FRAND licensing commitment."[39]

It asserts that an injunction or ITC exclusion order "may be inconsistent with the public interest," particularly when such relief "appears to be incompatible with the terms of a patent holder's existing F/RAND licensing commitment."[40] Without explicitly stating that injunctions pose an *antitrust* problem, the Policy Statement claims that a SEP-holder's injunction "may harm competition and consumers."[41]

The Policy Statement's analysis runs contrary to the free-market principles that align the policies of the patent laws and antitrust laws. It also is difficult, if not impossible, to square with the constitutional patent framework.

Moreover, I worry that some have overread the Policy Statement as endorsing a special set of FRAND-specific rules for injunctions. To be clear, any such reading of our Policy Statement is wrong. There is one standard for obtaining injunctive relief against the infringement of patents, which the Supreme Court articulated in *eBay v. MercExchange*.[42] That ruling does not create any FRAND-specific rules.

The equitable test for an injunction does, however, require a court to consider whether injunctive relief is in the public interest.[43] Contrary to how some have read the 2013 Policy Statement, I maintain that injunctions against infringement frequently *do* serve the public interest

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[38] DOJ-PTO Joint Policy Statement, *supra* note 18. The express focus of the Policy Statement is on ITC exclusion orders. *Id.* at 1.
[39] *Id.*
[40] *Id.* at 6.
[41] *Id.*
[42] eBay Inc. v. MercExchange, L.L.C., 547 U.S. 388 (2006).
[43] *Id.* at 391.

in maintaining a patent system that incentivizes and rewards successful inventors in accordance with the free market.

V. Conclusion

Over the past year, the Antitrust Division has engaged in extensive advocacy and welcomed debate regarding the role of antitrust law in the context of intellectual property disputes. Our goal is to achieve greater symmetry between competing concerns over so-called “hold-up” by innovators and “hold-out” by implementers. We have dubbed this effort the “*New* Madison” approach, but by calling it “new” we do not mean to suggest that our approach is novel; rather, it is a new effort to draw on well-established, constitutional principles to curb any recent misapplications of antitrust in a manner that would undermine dynamic competition and innovation itself.