Antitrust & IP at the FTC

NYIPLA

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*Prepared from public materials
*The views expressed here are not necessarily those of the Commission or any Commissioner

Our Mission

“Protecting the public from deceptive or unfair business practices and from unfair methods of competition through law enforcement, advocacy, research, and education.”

- FTC Strategic Plan, 2022-26

What is the FTC?

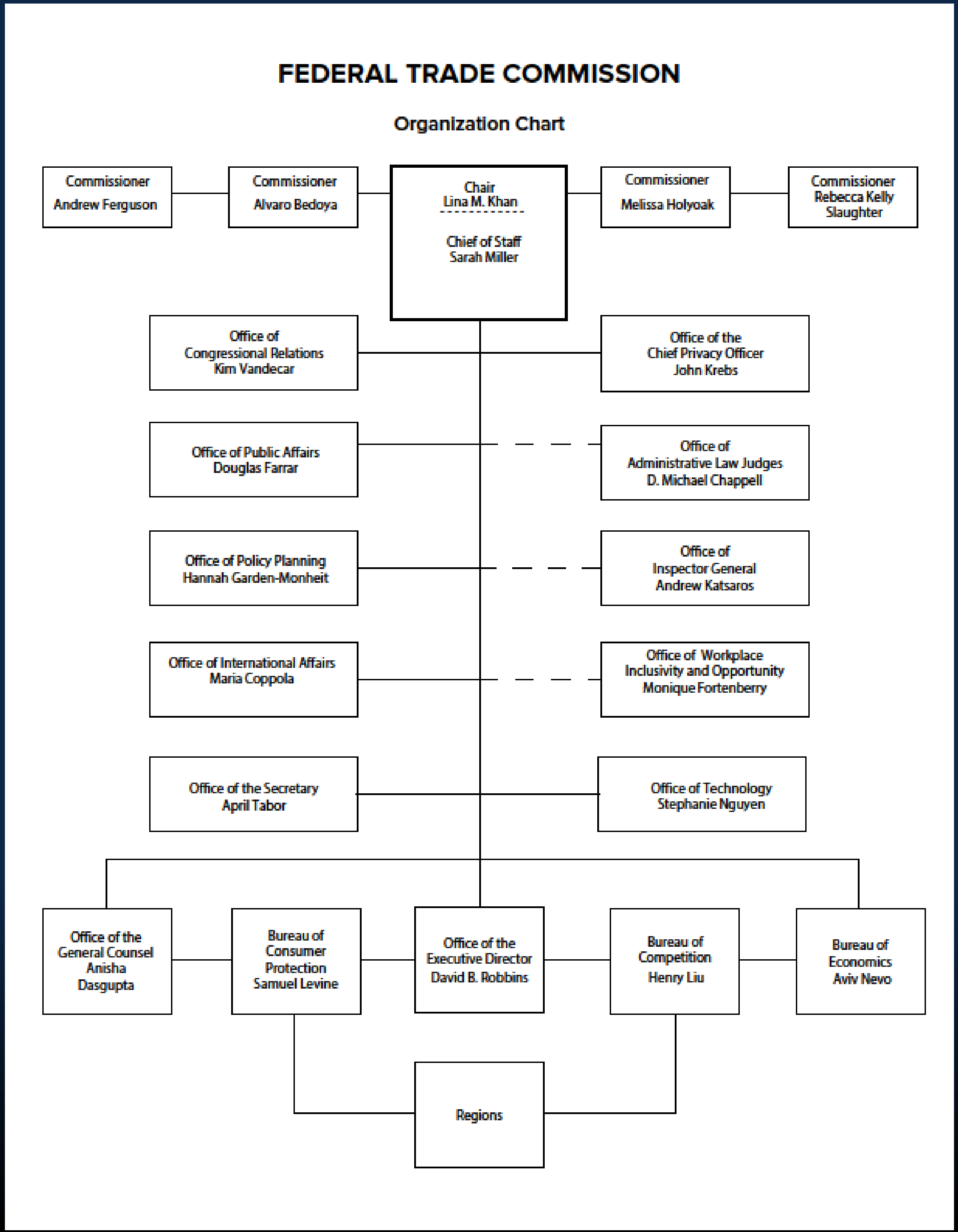
- One of two federal antitrust enforcement agencies (Antitrust Division of the DOJ)
- FTC Act of 1914 (operational in 1915)
- An “independent” administrative agency
  - Not part of Executive Branch
  - Subject to Congressional oversight
  - Administrative adjudication process
- Five Commissioners
  - Nominated by the President
  - Confirmed by the Senate
  - Seven-year terms (staggered)
  - No more than three of any political party

Commissioners

Offices

Bureaus

8 Regional Offices



Exclusive & Shared Jurisdiction with DOJ/Antitrust Division

<u>FTC Exclusive</u>:

Consumer Protection

Research/Study

<u>DOJ Exclusive</u>:

Criminal

<u>Shared</u>:

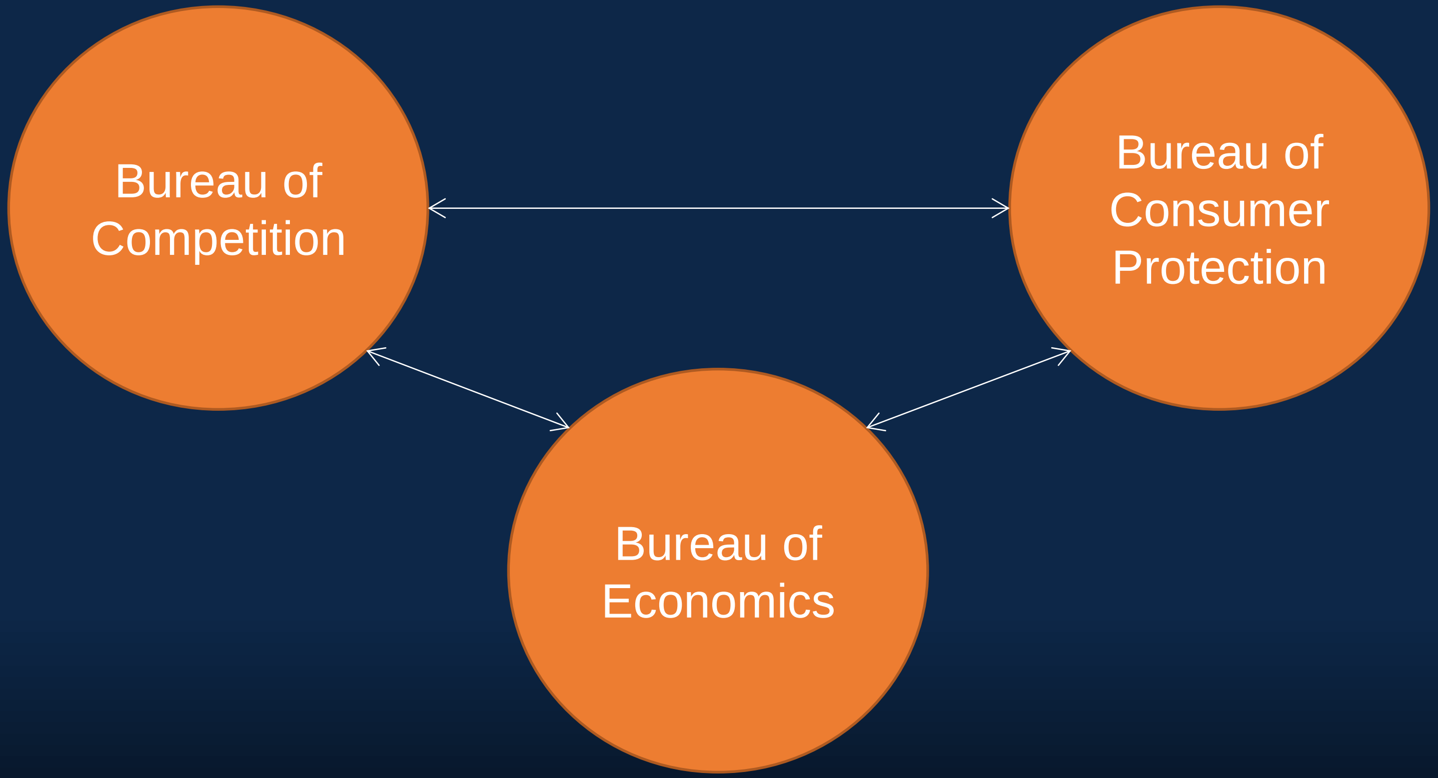
Mergers

Civil Conduct

The FTC's Dual Mission

Competition

Consumer Protection



Typical Areas of Concern

Competition

- Mergers & Acquisitions
- Collusion
  - Coordinated conduct by rivals
    - E.g., price fixing
- Anticompetitive Practices (Exclusion)
  - Monopolization
  - Distribution restraints
  - Intellectual property abuse

Consumer Protection

- Fraud
- Deception
- Privacy
- Data security
- Identity Theft

IP at the FTC

- Patents
- Copyrights
- Trademarks
- Trade secrets

- Enforcement
  - Mergers
  - Conduct
  - Remedies
- Policy and advocacy

FTC Policy and Advocacy

- Guidelines and policy statements
    - 2017 joint FTC-DOJ IP Licensing Guidelines (updating 1995 version)
- Workshops and hearings
    - 2018/2019 Hearings on Competition and Consumer Protection in the 21st Century
- Reports and market studies
    - 2002 Generic Drug Entry Report; 2003 FTC Report on the Patent System (improving patent quality to balance exclusivity and competition); 2007 joint FTC-DOJ Report on Antitrust Enforcement and IP Rights (how antitrust and IP can align with the patent system to promote innovation); 2009 FTC Report on Biologic Drug Competition; and 2011 FTC Evolving IP Marketplace Report (emphasis on notice to public of what a patent protects and remedies for patent infringement); 2016 FTC Study on Patent Assertion Entity Activity

FTC Policy and Advocacy

- Speeches
- Advocacy before courts, legislatures, regulatory bodies:
  - *Amicus curiae* briefs
  - Responses to calls for public comment
  - Congressional testimony

Antitrust Overview

Four Primary Antitrust Laws:

- Sherman Act Section 1: prohibits collusion
- Sherman Act Section 2: prohibits monopoly offenses
- Clayton Act: prohibits anticompetitive mergers (as well as certain other conduct) and provides public/private remedies for antitrust violations
- Section 5 of the FTC Act: prohibits unfair methods of competition (and unfair or deceptive acts or practices)

United States of America
Federal Trade Commission

Antitrust and Innovation: Still Not A Dynamic Duo?

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Commissioner, U.S. Federal Trade Commission

Remarks at the
Standard Essential Patents Symposium

Arlington, VA

September 10, 2019

* The views expressed in these remarks are my own and do not necessarily reflect the views of the Federal Trade Commission or any other Commissioner. Many thanks to my Attorney Advisor, Keith Klovers, for assisting in the preparation of these remarks.

I. Introduction

Good morning! Many thanks to Gene Quinn and the IPWatchdog group for having me here. I appreciate the opportunity to share my thoughts on antitrust and innovation with you today. Before I begin, though, I must give the standard disclaimer: The views I express today are my own, and do not necessarily reflect the views of the U.S. Federal Trade Commission or any other Commissioner.

During our time together this morning, I will cover three topics. First, I will discuss the recent district court opinion in *FTC v. Qualcomm*. I've commented publicly on this decision in the pages of the *Wall Street Journal*, so I apologize in advance if you've already heard my views. And if you haven't yet heard them, the bottom line is that I believe the district court ruling "is both bad law and bad policy."[1] From there I'll move to a more theoretical discussion about how the economic literature views static and dynamic effects. And I'll conclude by exploring how we have tried – and often failed – to integrate dynamic effects into the antitrust analysis.

II. The District Court Opinion

So let me start with the district court opinion in *FTC v. Qualcomm*. As most of you probably know, a divided Commission voted two to one to sue Qualcomm in January 2017, just two months after the last Presidential election and three days before the change in Administration. Commissioner Maureen Ohlhausen issued a strong dissent, an unusual step for her – or any sitting Commissioner – in the face of impending agency litigation.[2]

[1] Christine Wilson, Op-Ed, *A Court's Dangerous Antitrust Overreach*, Wall St. J., May 28, 2019, *available at* https://www.wsj.com/articles/a-courts-dangerous-antitrust-overreach-11559085055 [hereinafter Antitrust Overreach].

[2] Dissenting Statement of Commissioner Maureen K. Ohlhausen, Qualcomm Inc., File No. 141-0199, Jan. 17, 2017, *available at* https://www.ftc.gov/system/files/documents/cases/170117qualcomm_mko_dissenting_statement_17-1-17a.pdf.

As evidenced by the district court opinion, Commissioner Ohlhausen's concerns proved to be well-founded. Although there are several aspects of the district court opinion that I believe went too far, I am particularly alarmed that the judge took this opportunity to radically expand a company's legal obligation to help its competitors. Normally consumers benefit when rivals compete, and normally patents grant the patentee the right to exclude all others – and especially its competitors – from the use of the patented technology.

Here, though, the court created an exception, reviving and extending a discredited U.S. Supreme Court case called *Aspen Skiing*.[3] In that case, the justices decided that antitrust law may require a company to aid a competitor if it unilaterally terminates a pre-existing, voluntary, and profitable course of dealing to acquire or maintain monopoly power.[4] Even within these narrow parameters, courts have long disfavored this "duty to deal," and the Supreme Court has since said it is "at or near the outer boundary" of U.S. antitrust law.[5]

In the Qualcomm case, the district court judge concluded that Qualcomm had a duty to license its intellectual property to chip-making rivals,[6] even though Qualcomm did not have a pre-existing, voluntary, and profitable course of dealing with them. So she expanded the scope of *Aspen Skiing*. Peering into the distant past, she found that in 1999, Qualcomm said it was licensing some patents to some chip makers.[7] Although it has long since stopped,[8] and presumably those patents have long since expired, the judge reasoned that "Qualcomm itself has

[3] Aspen Skiing Co. v. Aspen Highlands Skiing Corp., 472 U.S. 585 (1985).
[4] *See id.* at 610-11.
[5] Verizon Commc'ns Inc. v. Law Offices of Curtis V. Trinko, 540 U.S. 398, 409 (2004).
[6] *See* FTC v. Qualcomm, Inc., No. 17-cv-00220, slip op. at 81-85 (N.D. Cal. May 21, 2019).
[7] *Id.* at 83 ("Licensing rivals was also profitable for Qualcomm, as Qualcomm received royalties on patent licenses to modem chip suppliers. In a 1999 email, Steve Altman (then a Qualcomm lawyer, later Qualcomm President) stated to Marv Blecker (QTL Senior Vice President) that Qualcomm had licensed modem chip suppliers.").
[8] *Id.* ("However, Qualcomm voluntarily stopped licensing its rivals.")

licensed its [patents] to rival" chip makers, and therefore had a duty under *Aspen Skiing* to "continue" doing so.[9]

Never mind that the judge's reference point involved licensing *different* patents, to *different* competitors, in – literally – a *different* century. By this logic, *Aspen Skiing* now means that if a company ever sells any product to any competitor, it then could have a perpetual antitrust obligation to sell every product to every competitor. That's light years beyond the "outer boundary" of antitrust law – or at least it was until this district court decision. This development is particularly concerning because, from a policy perspective, forced sharing may substantially diminish the incentive to innovate in the first place.

Many others have since echoed my concerns with the district court's *Aspen Skiing* analysis, including the U.S. Department of Justice Antitrust Division,[10] Judge Ginsburg,[11] retired Federal Circuit Judge Michel,[12] practitioners,[13] and a host of law and economics professors.[14]

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[9] *Id.* at 138.

[10] Br. of the United States of America as *Amicus Curiae* in Support of Appellant and Vacatur at 19-24, FTC v. Qualcomm Inc., No. 19-16122 (9th Cir., filed Aug. 30, 2019).

[11] Lindsey M. Edwards, Douglas H. Ginsburg & Joshua D. Wright, Section 2 Mangled: FTC v. Qualcomm on the Duty to Deal, Price Squeezes, and Exclusive Dealing, at 2, Geo. Mason Univ. L. & Econ. Res. Paper Series 19-21 (Aug. 19, 2019), *available at* https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3433564 ("We find three glaring errors in the district court opinion. First, the court expands the exception to the general rule permitting refusals to deal, as laid out in Aspen Skiing Co. v. Aspen Highlands Skiing Corp., well beyond the outer boundary of Section 2 by applying it to contracts negotiated by Qualcomm over 20 years ago and by inferring the company was willing to sacrifice profits even in the face of evidence that the change in dealing was implemented to increase short-term profits. This expansion is squarely in conflict with the Supreme Court's decision in Verizon Communications Inc. v. Law Offices of Curtis V. Trinko, LLP, which clarified and narrowed Aspen Skiing and reinforced the importance of a company's right freely to decide with whom to transact.").

[12] *Amicus Curiae* Br. of the Hon. Paul R. Michel (Ret.) in Support of Appellant Qualcomm Inc. at 30-31, FTC v. Qualcomm Inc., No. 19-16122 (9th Cir., filed Aug. 30, 2019).

[13] Lisa Kimmel et al., Crowell & Moring, District Court Decision in *FTC v. Qualcomm* Spawns Controversy: Four Issues to Watch on Appeal, June 3, 2019 https://www.crowell.com/NewsEvents/AlertsNewsletters/all/District-Court-Decision-in-FTC-v-Qualcomm-Spawns-Controversy-Four-Issues-to-Watch-on-Appeal ("[T]here are purely legal reasons to question the court's embrace of Aspen Skiing to impose a duty to license intellectual property given that the case did not involve the licensing of intellectual property. Moreover, the Federal Circuit has held that the antitrust laws do not impose any duty to share intellectual property and the relevant Ninth Circuit precedent has been widely criticized.").

[14] *See, e.g.*, Edwards et al., *supra* note 11, at 2; Jan Wolfe, *Qualcomm Has Strong Argument to Win Reversal of U.S. Antitrust Ruling: Legal Experts*, Reuters, May 31, 2019, https://www.reuters.com/article/us-qualcomm-antitrust-appeal-analysis/qualcomm-has-strong-argument-to-win-reversal-of-u-s-antitrust-ruling-legal-experts-idUSKCN1T11BV (recapping my Op-Ed and noting "Jonathan Barnett, a law professor at the University of

Given these concerns, I wrote in May, shortly after the district court issued its decision, that "Qualcomm has an excellent case for staying the judge's ruling."[15] And three weeks ago, the Ninth Circuit issued an order staying most of the district court order, including the provisions compelling Qualcomm to license its standard-essential patents to competitors at FRAND ("fair, reasonable, and non-discriminatory") rates.[16] As part of its legal analysis, the Ninth Circuit said it was "satisfied that Qualcomm has shown, at minimum, the presence of serious questions on the merits of the district court's determination that Qualcomm has an antitrust duty to license its SEPs to rival chip suppliers."[17] Briefing on the merits is now underway, and oral argument is likely to take place early next year. So stay tuned for further developments.

Before I move on, allow me to make one final note: My opposition to the district court's opinion, and particularly its *Aspen Skiing* analysis, does not stem from any desire to help or protect Qualcomm. Frankly, my position on the opinion has nothing to do with Qualcomm. Rather, I am focused on preserving and applying sound antitrust principles.

III. THE RELATIONSHIP BETWEEN STATIC AND DYNAMIC EFFECTS

The *Qualcomm* saga illustrates nicely the tension between static and dynamic effects in antitrust law. We also see this tension in everyday life. On the one hand, we often emphasize the present, like when we say "a bird in the hand is worth two in the bush" and you should

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Southern California, agreed that Koh's decision was in danger of being overturned by an appeals court" because "[t]he exception created by *Aspen Skiing* was supposed to be 'very narrow'"); *see also* Richard A. Epstein, The Hoover Institution, Judge Koh Is No 5G Wiz, HOOVER.ORG, May 28, 2019, https://www.hoover.org/research/judge-koh-no-5g-wiz ("Trinko stands for the proposition that, except in rare cases, the antitrust law does not require any firm to do business with its competitors. . . . Nonetheless, in dealing with Trinko, Judge Koh threw that caution to the wind, ignored the strong presumption and imposed the comprehensive ratemaking remedy that Justice Scalia warned about. The only case pointing [to] some duty to deal is *Aspen Skiing Co. v. Aspen Highlands Skiing Co.* (1985) . . . .").

[15] Antitrust Overreach, *supra* note 1.

[16] FTC v. Qualcomm, No. 19-16122, slip op. at 8-9 (9th Cir. Aug. 23, 2019) (per curiam) ("[W]e conclude that the requested stay is warranted. Therefore, pending the resolution of this appeal or until further order of this court, we stay the portions of the district court's injunction requiring that (1) "Qualcomm must make exhaustive SEP licenses available to modem-chip suppliers . . . .").

[17] *Id.* at 2.

"never put off till tomorrow what you can do today." Yet we just as often emphasize the future, like when we say that "an ounce of prevention is worth a pound of cure," "a penny saved is a penny earned," and "all things come to those who wait." Or, as one of my daughters learned at basketball camp, some things worth doing are "TIPI" – a "temporary inconvenience for a permanent improvement."

Many believe that antitrust law focuses primarily upon static effects, like price, output, and quality *today*.[18] And these metrics certainly are important. But the economic literature also recognizes that innovation will, over the long run, deliver very large consumer welfare gains. Joe Brodley once summarized the economic research as showing that "[i]nnovation efficiency or technological progress is the single most important factor in the growth of real output in the United States and the rest of the industrialized world."[19] For example, the giant leap from horse-drawn carriages to cars generated far more consumer surplus than many preceding innovations that slowly reduced the price of horse-drawn carriages. The same is true of other so-called "drastic innovations,"[20] like the move from the vacuum tube to the transistor, or from the courier to the telegraph.

The point is not just that innovation is important; it is also that an economic policy focused solely on static efficiency will underperform an economic policy that considers both static and dynamic effects. This is hardly news. Indeed, Joseph Schumpeter once argued that an

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[18] *See, e.g.*, *infra* notes **Error! Bookmark not defined.**-32, 45-47.

[19] Joseph F. Brodley, *The Economic Goals of Antitrust: Efficiency, Consumer Welfare, and Technological Progress*, 62 N.Y.U. L. REV. 1020, 1026 (1987) (citing Zvi Griliches, *R&D and Productivity: Measurement Issues and Econometric Results*, 237 SCI. 31, 34-35 (1987); Lester C. Thurow, *A Weakness in Process Technology*, 238 SCI. 1659, 1660-62 (1987); Robert Solow, *Technical Change and the Aggregate Production Function*, 39 Rev. Econ. & Stat. 312 (1957); F.M. SCHERER, INDUSTRIAL MARKET STRUCTURE AND ECONOMIC PERFORMANCE 407 (2d ed. 1980)); *see also, e.g.*, Edwin Mansfield, *Entry, Gibrat's Law, Innovation, and the Growth of Firms*, 52 AM. ECON. REV. 1023, 1044 (1962) (in an empirical study, finding "that on the average the successful innovators in these industries grew about twice as rapidly as other comparable firms during the relevant period").

[20] *See, e.g.*, Richard Gilbert, *Looking for Mr. Schumpeter: Where Are We in the Competition-Innovation Debate?*, 6 INNOVATION POLICY AND THE ECONOMY 159, 166 (2006) (discussing the incentives for firms to engage in "drastic innovation").

economic system "that at *every* given point of time fully utilizes its possibilities to the best advantage may yet in the long run be inferior to a system that does so at *no* point of time, because the latter's failure to do so may be a condition for [achieving] the level or speed of long-run performance."[21] And that was in 1942!

So the question is not whether dynamic effects matter. Rather, we need to be cognizant of just how *much* they matter, and in particular how we can optimize the balance between static and dynamic effects.[22] Certainly we do so through our patent system, which provides innovators with temporary legal protection. We also strike that balance in other areas of intellectual property, like copyright, trademark, and know-how protections. Farther afield, we do so through regulatory mechanisms, including both general-purpose laws like antitrust and sector-specific rules like the Hatch-Waxman framework for pharmaceuticals.

IV. APPLICATION TO ANTITRUST LAW

Considering the number of IP experts in this room, I'll stick to my comparative advantage, antitrust. On that front, I've got good news and bad news.

First, the good news: Antitrust enforcers consider dynamic effects in many cases, and occasionally concerns about preserving incentives to innovate even carry the day. I'll illustrate that point with a few examples.

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[21] JOSEPH A. SCHUMPETER, CAPITALISM, SOCIALISM AND DEMOCRACY 83 (3d. ed., 1962) (1942).

[22] This debate is not solely an academic one; the corporate world has also long struggled with the appropriate balance between short-term and long-term thinking. *Compare* Mark J. Roe, *The Imaginary Problem of Corporate Short-Termism*, WALL ST. J., Aug. 17, 2015, https://www.wsj.com/articles/the-imaginary-problem-of-corporate-short-termism-1439853276 ("Critics need to acknowledge that short-term thinking often makes sense for U.S. businesses, the economy and long-term employment. Bad short-termism is when boards and managers forgo good long-term business opportunities simply to meet quarterly earnings targets. Bad long-termism, obviously, is when they invest in businesses that have no future."), *with* Jamie Dimon & Warren E. Buffett, *Short-Termism Is Harming the Economy*, WALL ST. J., June 6, 2018, https://www.wsj.com/articles/short-termism-is-harming-the-economy-1528336801 ("Reducing or even eliminating quarterly earnings guidance won't, by itself, eliminate all short-term performance pressures that U.S. public companies currently face, but it would be a step in the right direction. Anything America—and America's public markets—can do to focus on the future and build long-term wealth and opportunity will make the country stronger, more resilient and more competitive. Over the long run this will strengthen the U.S. economy, benefit America's workers, shareholders and investors, and leave a generational legacy we can be proud of.").

On the merger front, dynamic effects – and specifically dynamic procompetitive efficiencies – convinced the FTC to clear a 1980s-era joint venture agreement between General Motors and Toyota. The parties proposed to use an idled General Motors factory in California to produce a U.S.-made version of one of Toyota's cars, using Toyota's manufacturing techniques, and marketed by General Motors as Chevrolet vehicles. Japanese firms were much more efficient at that time, enjoying a cost advantage of more than $2,000 per car even after shipping and delivery.[23]

A divided Commission allowed the transaction to proceed with some restrictions, finding that the joint venture would expand output, reduce prices, *and* allow GM to learn "more efficient Japanese manufacturing and management techniques."[24] The Commission explained that GM could use what it learned "at its other plants" to help make its other American-made cars more competitive and spur other U.S. manufacturers to make similar improvements.[25]

Although the Commission originally imposed a 12-year limit on the life of the joint venture, it lifted that restriction in 1993, noting that GM had learned much from Toyota and put that knowledge to work in its new Saturn line of cars.[26] In other words, the Commission found

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[23] Robert D. Hershey Jr., *G.M.-Toyota Plan for Joint Venture Approved by F.T.C.*, N.Y. TIMES, Dec. 23, 1983, at A1, *available at* https://www.nytimes.com/1983/12/23/business/gm-toyota-plan-for-joint-venture-approved-by-ftc.html (citing information provided by Tim Muris, then the Director of the FTC's Bureau of Competition).

[24] Statement of Chairman James C. Miller III, General Motors Corp., 103 F.T.C. 386, 387-88 (1984), *available at* https://www.ftc.gov/sites/default/files/documents/commission_decision_volumes/volume-103/ftc_volume_decision_103_january_-_june_1984pages_374-497.pdf

[25] *Id.* at 388 ("Moreover, to the extent the Fremont venture demonstrates the Japanese system can be successfully adapted to the United States, the venture should lead to the development of a more efficient and competitive U.S. industry. Evidence obtained during the Commission's investigation persuasively establishes that a successful experiment at Fremont could serve as a predicate for other domestic auto makers and their unionized employees to work out similar flexibility in work rules and practices.").

[26] *See* Order Granting Pet'n to Reopen and Set Aside Order, General Motors Corp., 116 F.T.C. 1276, 1284-86 (1993), *available at* https://www.ftc.gov/sites/default/files/documents/commission_decision_volumes/volume-116/ftc_volume_decision_116_january_-_december_1993pages_1179-1296.pdf; *see also* Kathryn M. Fenton, GM/Toyota*: Twenty Years Later*, 72 ANTITRUST L.J. 1013, 1019-1021 (2005) (describing the reopening and vacatur of the consent agreement).

that GM had in fact realized the dynamic efficiencies it had expected at the outset. Others have reached the same conclusion.[27]

The Commission has also assessed the extent to which a merging party in the market today may not be an effective competitor tomorrow. For example, in 1998 the Commission cleared Boeing's acquisition of McDonnell Douglas, despite the fact that the transaction reduced the number of competitors from three to two, because "McDonnell Douglas, looking to the future, no longer constitutes a meaningful competitive force in the commercial aircraft market."[28] Although the Commission therefore had no need to consider offsetting procompetitive effects, a subsequent empirical retrospective found that Boeing also realized large cost savings that it passed on to purchasers in the form of lower aircraft prices.[29]

Antitrust law also considers dynamic effects outside the merger context. For example, antitrust law does not prohibit a monopolist from charging a monopoly price so long as it does nothing to inhibit competition. As the Supreme Court explained in the *Trinko* decision, "[t]he opportunity to charge monopoly prices—at least for a short period—is what attracts 'business acumen' in the first place; it induces risk taking that produces innovation and economic

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[27] *See, e.g.*, A.C. Inkpen, *Knowledge Transfer and International Joint Ventures: The Case of NUMMI and General Motors*, 29 STRATEGIC MGMT. J. 447, 452 (2008) (describing the NUMMI joint venture as "a successful GM outcome" despite some early hiccups); David Kiley, *Goodbye, NUMMI: How a Plant Changed the Culture of Car-Making*, POPULAR MECHANICS, Apr. 2, 2010, https://www.popularmechanics.com/cars/a5514/4350856/ ("It's worth noting that when the White House Automotive Task Force assessed GM last year during its Chapter 11 Bankruptcy, it acknowledged publicly that GM's current global production and procurement system, modeled on Toyota's, is world-class and every bit as efficient as the Japanese automaker's system.").

[28] Statement of Chairman Pitofsky and Commissioners Janet D. Steiger, Roscoe B. Starek III and Christine A. Varney in the Matter of The Boeing Company/McDonnell Douglas Corporation, July 1, 1997, *available at* https://www.ftc.gov/public-statements/1997/07/statement-chairman-robert-pitofsky-commissioners-janet-d-steiger-roscoe-b

[29] *See* Yonghong An & Wei Zhao, *Dynamic Efficiencies of the 1997 Boeing-McDonnell Douglas Merger*, 50 RAND J. ECON. 666, 668 (2019) ("Our main findings are that (i) the merger brings dynamic efficiencies, which come from accelerated learning-by-doing after the merger; these efficiencies outweigh the detrimental market power effect; we estimate that consumer surplus increases by $0.11 billion and $5.14 billion, respectively, depending on whether experience stock does not transfer or transfers completely between the MD-11 and the B777. By contrast, a static equilibrium model that ignores learning-by-doing predicts a $0.92 billion loss of consumer surplus.").

growth."[30] In other words, we may tolerate small reductions in static efficiency – consumer welfare today – in order to maximize dynamic efficiency and consumer welfare tomorrow.

Now for the bad news: Despite a few success stories like Boeing and General Motors, most believe antitrust law still focuses heavily upon static effects. For example, in 2010 then-FTC Commissioner Tom Rosch noted that although "[p]roper antitrust enforcement considers both static and dynamic effects and efficiencies," "antitrust enforcement has historically focused more on static than dynamic effects."[31] And in 2012, Judge (and former Assistant Attorney General) Douglas H. Ginsburg, from whom you'll hear later today, and future FTC Commissioner Josh Wright explained that "dynamic analysis in antitrust law" continues to be "driven largely by intuition and the unique stories told by the proponents and opponents of each merger or business practice."[32] In other words, we know dynamic effects are important, but we routinely struggle to account for them in our analysis.

There are legal, economic, and institutional reasons for this struggle. On the legal side, for example, the defendant in a merger bears the burden of identifying and demonstrating offsetting procompetitive efficiencies,[33] including claims that the transaction will lead to new

[30] Verizon Commc'ns Inc. v. Law Offices of Curtis V. Trinko, 540 U.S. 398, 407 (2004).
[31] J. Thomas Rosch, Comm'r, FTC, Remarks at the USC Gould School of Law 2010 Intellectual Property Institute: Promoting Innovation: Just How "Dynamic" Should Antitrust Law Be?, at 3, Mar. 23, 2010.
[32] Douglas H. Ginsburg & Joshua D. Wright, *Dynamic Analysis and the Limits of Antitrust Institutions*, 78 ANTITRUST L.J. 1, 5 (2012).
[33] *See, e.g.*, Saint Alphonsus Med. Ctr.-Nampa Inc. v. St. Luke's Health Sys., Ltd., 778 F.3d 775, 790-91 (9th Cir. 2015) ("Courts recognizing the defense have made clear that a Clayton Act defendant must clearly demonstrate that the proposed merger enhances rather than hinders competition because of the increased efficiencies." (internal quotations omitted)); *id.* at 792 ("The district court did not clearly err in concluding that whatever else St. Luke's proved, it did not demonstrate that efficiencies resulting from the merger would have a positive effect on competition."); *see also* Joint Statement on the Burden of Proof at Trial § 10, *United States v. AT&T Inc.*, No. 1:17-cv-02511 (filed Mar. 13, 2018), *available at* https://www.justice.gov/atr/case-document/file/1043756/download (United States position #10: "If the defendants' rebuttal case involves showing that the merger is justified as a result of the pro-competitive efficiencies or synergies it will create, then defendants have the burden to prove those efficiencies."

innovations.[34] Although the defendants may not always produce the requisite evidence, when they do, the agencies should evaluate it in good faith.

Indeed, efficiencies were a major focus of mine when I served as Chief of Staff to then-Chairman Tim Muris in the early 2000s. As part of that effort, the Commission analyzed how merging parties' efficiencies claims had been evaluated by the agency,[35] and conducted retrospective studies to determine whether claimed efficiencies had been obtained.[36] The Commission also hosted a roundtable on the topic with leading academics.[37] Or, to borrow some terms from the R&D literature, we incurred a small static cost – in the form of staff time and effort – in order to reap large dynamic benefits in the future.

On the economic side, economists agree that it can be difficult to predict the next innovation, and therefore difficult to say that a given transaction or trade practice will necessarily hasten innovation.[38] Yet as Gregory Sidak and David Teece put it, "[u]ncertainty and

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[34] *See* U.S. DEP'T OF JUSTICE & FED. TRADE COMM'N, HORIZONTAL MERGER GUIDELINES § 10 (Aug. 19, 2010), *available at* https://www.ftc.gov/sites/default/files/attachments/merger-review/100819hmg.pdf (noting that cognizable efficiencies include those that "result in lower prices, improved quality, enhanced service, or new products" and that "it is incumbent upon the merging firms to substantiate efficiency claims so that the Agencies can verify by reasonable means the likelihood and magnitude of each asserted efficiency, how and when each would be achieved (and any costs of doing so), how each would enhance the merged firm's ability and incentive to compete, and why each would be merger-specific").

[35] *See, e.g.*, Malcolm B. Coate & Andrew J. Heimert, Bureau of Economics, FTC, Merger Efficiencies at the Federal Trade Commission 1997-2007, Feb. 2009, https://www.ftc.gov/sites/default/files/documents/reports/merger-efficiencies-federal-trade-commission-1997–2007/0902mergerefficiencies.pdf.

[36] *See, e.g.*, Denis A. Breen, The Union Pacific/Southern Pacific Rail Merger: A Retrospective on Merger Benefits, Mar. 11, 2004, *available at* https://www.ftc.gov/sites/default/files/documents/reports/union-pacific/southern-pacific-rail-merger-retrospective-merger-benefits/wp269_0.pdf.

[37] *See, e.g.*, Timothy J. Muris, Opening remarks before FTC Bureau of Economics Roundtable on Understanding Mergers: Strategy and Planning, Implementation, and Outcomes, Dec. 9, 2002, *available at* https://www.ftc.gov/public-statements/2002/12/understanding-mergers-strategy-and-planning-implementation-and-outcomes.

[38] *See, e.g.*, Andrew Tepperman & Margaret Sanderson, Innovation and Dynamic Efficiencies in Merger Review, at iv, Final Report prepared by CRA International for the Canadian Competition Bureau, Apr. 9, 2007 ("[I]nnovation is highly uncertain, making it much more difficult to measure and quantify than price and output."); Kenneth J. Arrow, *Economic Welfare and the Allocation of Resources for Invention*, *in* THE RATE AND DIRECTION OF INVENTIVE ACTIVITY: ECONOMIC AND SOCIAL FACTORS 609, 616 (1962) ("The central economic fact about the processes of invention and research is that they are devoted to the production of information. By the very definition of information, invention must be a risky process, in that output (information obtained) can never be predicted perfectly from the inputs.").

complexity are hallmarks of dynamic market environments."[39] Indeed, businesses routinely estimate the expected value of potential R&D projects, considering the probability of different outcomes, the expected benefits of each outcome, and the appropriate discount rate associated with the money invested in the research.

Antitrust enforcers should have the tools to conduct the same analysis, particularly for "process" innovations that allow firms to make existing products more cheaply.[40] Product innovations may be more difficult to assess, but if the defendant produces compelling evidence, we should credit it.[41] And, as Gary Roberts and Steve Salop have said, these dynamic efficiencies "generally will diffuse at least partially to competing firms," causing "the aggregate cost savings [to] multiply" and enhancing competition.[42] Roberts and Salop therefore propose one possible way to credit both dynamic efficiencies generated by the merged entity and those diffused to competitors.[43]

Of course, our assessment of dynamic effects should be symmetric. We routinely attempt to predict, quantify, and discount the likely anticompetitive dynamic effects of a merger or business practice. To ensure a balanced approach in our analysis, we must also attempt to predict, quantify, and discount the likely procompetitive dynamic effects of that same merger or business practice.[44]

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[39] J. Gregory Sidak & David J. Teece, *Dynamic Competition in Antitrust Law*, 5 J. COMP. L. & ECON. 581, 611 (2009).
[40] *See, e.g.*, Wesley M. Cohen, *Fifty Years of Empirical Studies of Innovative Activity and Performance*, I HANDBOOKS IN ECONOMICS 129, 170 (2010) (contrasting the empirical findings regarding "gains from reducing the cost of production (process innovation)" and "gains from improvement in product quality (product innovation)").
[41] *See generally, e.g.*, Gary L. Roberts & Steven C. Salop, *Efficiencies in Dynamic Merger Analysis*, 19 WORLD COMPETITION 5 (1995); Malcolm B. Coate, *Efficiencies in Merger Analysis: An Institutionalist View*, 13 S. CT. ECON. REV. 189 (2005) (proposing a framework for evaluating both dynamic efficiencies and dynamic harms in merger review).
[42] Roberts & Salop, *supra* note 41, at 6.
[43] *See id.* at 7-13.
[44] Indeed, the Commission often has alleged harm to innovation in its recent cases. *See* Richard J. Gilbert & Hillary Greene, *Merging Innovation into Antitrust Agency Enforcement of the Clayton Act*, 83 GEO. WASH. L. REV. 1919,

Unfortunately, many treat dynamic effects asymmetrically. For example, Tim Wu wrote a lengthy article about "taking innovation seriously" in antitrust law, yet focused entirely on how we can increase innovation by increasing the number of cases we bring against large firms.[45] He specifically cited large technology firms,[46] which he has since argued impair innovation, and therefore must be restrained in order to protect innovation.[47] In neither telling does he mention, let alone emphasize, the possibility that increased enforcement in the tech sector could chill innovation or prohibit innovative conduct. Wu therefore would assess dynamic efficiency asymmetrically, crediting theories of anticompetitive effects that reduce innovation but ignoring entirely any associated procompetitive benefits that promote innovation. Or, in layman's terms, "heads I win, tails you lose."

Finally, there are institutional hurdles to fully incorporating dynamic efficiencies into the competitive analysis. To start with, there is today no robust model capable of predicting the likely path of innovation in a given market.[48] For another, information asymmetries and adverse incentives make it unlikely that the agencies will ever be able to collect anything approaching perfect information.[49] Yet another problem is what then-Chairman Muris once called the "chicken and egg" problem: If the agencies rarely credit efficiencies, the parties won't "bother

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1931-32 (2015) (finding that between 2004 and 2014, the Commission challenged 164 mergers and alleged harm to innovation in 54 of them).

[45] *See* Tim Wu, *Taking Innovation Seriously: Antitrust Enforcement If Innovation Mattered Most*, 78 ANTITRUST L.J. 313 (2012).

[46] *Id.* at 314 ("Now is a particularly important time to consider the relationship between antitrust and innovation. Within the last two years, both the Justice Department and Federal Trade Commission have accumulated an entire docket of antitrust investigations related to the Internet and other high-tech industries. The list of publicly disclosed investigations is lengthy, and includes major players like Google, Apple, Facebook, and Twitter.").

[47] *See* Tim Wu, Where New Industries Get Their Start: Rebooting the Startup Economy, Testimony before the Committee on the Judiciary, at 3, July 16, 2019, *available at* https://docs.house.gov/meetings/JU/JU05/20190716/109793/HHRG-116-JU05-Wstate-WuT-20190716.pdf. ("Unlike in 2008, the big firms seem in no danger of fading under the onslaught of smaller rivals. Instead (often in violation of the antitrust laws) most of those would-be rivals have been bought or effectively tamed.").

[48] *See* Ginsburg & Wright, *supra* note 32, at 21 (arguing that the antitrust agencies have thus far failed to identify "an extra-legal body of theory" that is "capable of yielding determinate results").

[49] *See id.* at 15-17 (describing why the incentives of the witnesses with the best information about likely future inventions may diverge from that of the enforcement agencies).

giving us good material, and without good material, we don't believe an efficiencies argument."[50] He therefore encouraged parties to present "solid, credible efficiencies evidence" and pledged to give strong arguments "detailed attention."[51]

V. Conclusion

So in closing, we have long known that dynamic effects are important, but we have also long struggled to properly account for them in our antitrust analysis. There may be good legal, economic, and institutional reasons why the agencies view dynamic effects, or at least procompetitive dynamic effects, skeptically. But that is hardly a reason to ignore them, and certainly no reason to treat them asymmetrically. Therefore, I renew then-Chairman Muris's proposal to the private bar: If you present concrete and credible evidence of dynamic effects, and especially procompetitive efficiencies, I will give them serious consideration. I likewise extend an invitation to academics and practitioners, both lawyers and economists, to help identify better ways for the Commission to incorporate dynamic effects – both procompetitive and anticompetitive – into its analysis.

[50] Muris, *supra* note 37.
[51] *Id.*

United States of America

Federal Trade Commission

SEPs and FRAND at the FTC and ITC: Current Policy Proposals and Respect for IP Rights

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Remarks for the “IP & Antitrust: Hot Issues" Conference Organized by Concurrences Review

* The views expressed in these remarks are my own and do not reflect the views of the Federal Trade Commission or any other Commissioner. Many thanks to my Attorney Advisor Adam S. Cella for his assistance in the preparation of these remarks.

Donald J. Boudreaux, former chair of the Economics Department at George Mason University, regularly asked: "What is the minimum amount of money that you would demand in exchange for your going back to live even as John D. Rockefeller lived in 1916?"[1] Take a moment to imagine the implications. Even if you were a billionaire in Rockefeller's time, it would take days to travel a distance that takes mere hours today.[2] Your riches could not buy you access to music (except for a limited selection available on a phonograph) or television (which did not exist).[3] You could build a mansion filled with the finest furniture, but your mansion likely would not benefit from air conditioning or central heating.[4] You could build your own movie theatre inside your mansion, but the selection of movies would be scarce.[5] You could even have your own chef, but you could not access the vast array of foods from around the world available to Americans today.[6] And of course, health care and dental care, even for the richest people, would be barbaric by today's standards.[7]

The 20th Century witnessed immense technological progress that John D. Rockefeller would have been hard-pressed to imagine. The significant improvements in living standards we have witnessed since 1916 are directly attributable to this technological progress. And

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[1] Donald J. Boudreaux, *The Average American Today Is Richer than John D. Rockefeller*, FOUNDATION FOR ECONOMIC EDUCATION (Feb. 23, 2016) https://fee.org/articles/average-americans-today-are-richer-than-john-rockefeller-ever-was/.

[2] *Id.* ("If you were a 1916 American billionaire you could, of course, afford prime real estate. You could afford a home on 5th Avenue or one overlooking the Pacific Ocean or one on your own tropical island somewhere (or all three). But when you traveled from your Manhattan digs to your west-coast palace, it would take a few days, and if you made that trip during the summer months, you'd likely not have air-conditioning in your private railroad car.").

[3] *Id.* ("You could neither listen to radio (the first commercial radio broadcast occurred in 1920) nor watch television. You could, however, afford the state-of-the-art phonograph of the era. (It wasn't stereo, though. And — I feel certain — even today's vinylphiles would prefer listening to music played off of a modern compact disc to listening to music played off of a 1916 phonograph record.) Obviously, you could not download music.").

[4] *Id.* ("And while you *might* have air-conditioning in your New York home, many of the friends' homes that you visit — as well as restaurants and business offices that you frequent — were not air-conditioned. In the winter, many were also poorly heated by today's standards.").

[5] *Id.* ("There really wasn't very much in the way of movies for you to watch, even though you could afford to build your own home movie theater.").

[6] *Id.* ("Even when in residence at your Manhattan home, if you had a hankering for some Thai red curry or Vindaloo chicken or Vietnamese Pho or a falafel, you were out of luck: even in the unlikely event that you even knew of such exquisite dishes, your chef likely had no idea how to prepare them, and New York's restaurant scene had yet to feature such exotic fare.").

[7] *Id.* ("You (if you are a woman) or (if you are a man) your wife and, in either case, your daughter and your sister had a much higher chance of dying as a result of giving birth than is the case today. The child herself or himself was much less likely to survive infancy than is the typical American newborn today. Dental care wasn't any better. Your money didn't buy you a toothbrush with vibrating bristles. (You could, however, afford the very finest dentures.) Despite your vanity, you couldn't have purchased contact lenses, reliable hair restoration, or modern, safe breast augmentation. And forget about liposuction to vacuum away the results of your having dined on far too many cream-sauce-covered terrapin. Birth control was primitive: it was less reliable and far more disruptive of pleasure than are any of the many inexpensive and widely available birth-control methods of today.").

innovations like air travel and air conditioning developed during the 20th Century led not only to more comfortable lives, but also to economic growth. Joseph Brodley observed that "[i]nnovation efficiency or technological progress is the single most important factor in the growth of real output in the United States and the rest of the industrialized world."[8] But we cannot take continued innovation for granted, particularly if government policies disincentivize it. For the sake of its citizens and continued economic growth, the U.S. government should refrain from adopting policies that will hinder innovation.

This principle is particularly important when intellectual property is at issue. Choices regarding patent policy, in particular, can either hinder or facilitate innovation. Patents provide holders the right to exclude others. A strong patent system incentivizes innovation by giving innovators this legal protection. On a related note, interoperability and performance standards are critical for technological development.[9] The use of standard essential patents ("SEPs") and fair, reasonable, and non-discriminatory ("FRAND") licensing assurances are an integral part of standards development. Without standardization, and therefore without SEPs and FRAND assurances, we would lack a robust framework to encourage investment into further innovation and the implementation of new technologies.

To support continued advances through standardization, SEP and FRAND policy must strike a healthy balance between the interests of those that create the innovations embodied in standards and those that implement those standards. The debate around where to strike the balance has continued for many years. Through judicial decisions, a delicate consensus has formed in some areas. But in at least one fundamental aspect, the debate is as divided and concerning as ever. I am referring to the debate about the relative dangers of patent "holdup" (when a patent holder uses market power to extract a supracompetitive royalty from an implementer) and "holdout" (when an implementer employs tactics to delay constructive licensing negotiations), and how to balance the two.

Today, I will first provide an overview of this issue, which highlights a fundamental disagreement about the importance of property rights. I will then discuss the real-world

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[8] Joseph F. Brodley, *The Economic Goals of Antitrust: Efficiency, Consumer Welfare, and Technological Progress*, 62 N.Y.U. L. REV. 1020, 1026 (1987), https://heinonline.org/HOL/Page?handle=hein.journals/nylr62&div=39&g_sent=1&casa_token=&collection=journals.

[9] Congress recognized the important role of interoperability and performance standards and has chosen to encourage these practices and organizations. *See* Standards Development Organization Advancement Act of 2004, Pub. L. No. 108–237, https://www.govinfo.gov/content/pkg/PLAW-108publ237/pdf/PLAW-108publ237.pdf (codified as 15 U.S.C. §§ 4301-4306) (passed "[t]o encourage the development and promulgation of voluntary consensus standards by providing relief under the antitrust laws to standards development organizations with respect to conduct engaged in for the purpose of developing voluntary consensus standards[.]").

application of some policy proposals. Finally, I will provide some suggestions on a balanced approach.

Intellectual Property Rights at the FTC

I am increasingly concerned that some of my colleagues on the Commission place too little emphasis on the incentives for innovation afforded by strong IP rights, which could have serious implications for the U.S. economy.[10] This trend is pronounced when SEPs are involved, and hits its stride when discussing the relative threats of holdout and holdup.

In my time as a Commissioner, I have seen evidence that both holdup and holdout strategies appear in the real world. As a result, a contract dispute between sophisticated parties negotiating over IP rights could, at times, result in litigation. While my colleagues on the Commission recognize that both holdup and holdout "may well be a problem in the licensing world," they view only holdup as an antitrust issue.[11] In other words, the actions of SEP holders may be unlawful under the antitrust laws, but the actions of patent implementers are immune from scrutiny under those same laws.

Further, my colleagues applaud the broad use of the FTC's Section 5 authority to target innovators that hold SEPs.[12] In doing so, they cite the FTC's action against Qualcomm.[13] I have made my views on that case abundantly clear.[14] But the important issue today is not whether

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[10] Richard Gilbert, *Looking for Mr. Schumpeter: Where Are We in the Competition-Innovation Debate?*, 6 INNOVATION POLICY AND THE ECONOMY 159 (2006), https://www.nber.org/system/files/chapters/c0208/c0208.pdf (surveying the economic theory of innovation and finding that exclusive rights generally lead to greater innovation incentives in more competitive markets, while nonexclusive rights generally lead to the opposite conclusion.).

[11] SEPs, Antitrust, and the FTC Remarks of Commissioner Rebecca Kelly Slaughter As Prepared for Delivery, ANSI World Standards Week: Intellectual Property Rights Policy Advisory Group Meeting at 5 (October 29, 2021), https://www.ftc.gov/system/files/documents/public_statements/1598103/commissioner_slaughter_ansi_102921_final_to_pdf.pdf [hereinafter Commissioner Slaughter SEPs Speech] ("I want to take a brief detour to address the 'holdout' problem that is often purported to be a parallel problem to holdup. Holdout refers to a licensee unilaterally refusing to take a license or unreasonably delaying doing so. While this may well be a problem in the licensing world, it does not pose the same concerns from a competition standpoint as holdup, which has the potential to exclude firms from implementing a standard.").

[12] *Id.* at 2 ("I think the FTC has been correct in bringing SEP-related enforcement actions against anticompetitive conduct using its stand-alone Section 5 authority, and it should continue to do so with an emphasis on our authority to reach conduct beyond that which violates Section 2 of the Sherman Act. This is consistent with the policy statement the Commission issued in July regarding unfair methods of competition.").

[13] *Id.* at fn. 3 (referencing *Qualcomm* footnote in FTC Statement on the Withdrawal of the Statement of Enforcement Principles Regarding "Unfair Methods of Competition" Under Section 5 of the FTC Act.).

[14] Christine S. Wilson, Opinion, *A Court's Dangerous Antitrust Overreach*, WALL ST. J. (May 28, 2019), https://www.wsj.com/articles/a-courts-dangerous-antitrust-overreach-11559085055 (suggesting this concern in the context of an expansion of *Aspen Skiing*).

Qualcomm was a good case to bring, or whether the District Court[15] or Circuit Court[16] opinions were correct. If the policy proposed by my colleagues on the Commission is followed, companies that implement patents can hang potential antitrust damages over patent holders, distorting the negotiating leverage between implementers and innovators in favor of implementers. The FTC should embrace a balanced approach that favors neither innovators nor implementers, but instead focuses on incentivizing competition and innovation.

To defend their position, proponents of a pro-implementer approach claim that implementers are small firms that need FRAND licenses to advance their own innovations[17] and that these small firms lack the legal advice to negotiate.[18] This argument is frequently made even though implementer-over-innovator advocates at times admit that "implementers are often large, well-financed companies that can handle their market disputes just fine on their own."[19] For this reason, we are assured that the FTC will intervene only "where the market power abuse harms small and medium enterprise implementers."[20]

But, as stated earlier, these proponents point to the FTC's case against Qualcomm as an example of SEP-related enforcement that the FTC should continue to bring.[21] In that case, the District Court spent the bulk of its time on anticompetitive practices in patent license negotiations involving large and sophisticated OEMs like Sony, Samsung, Huawei, Motorola,

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[15] FTC v. Qualcomm Inc., 411 F. Supp. 3d 658 (N.D. Cal. 2019), *rev'd and vacated*, 969 F.3d 974 (9th Cir. 2020).

[16] FTC v. Qualcomm Inc., 969 F.3d 974 (9th Cir. 2020).

[17] Commissioner Slaughter SEPs Speech, *supra* note 11, at 2 ("Anticompetitive distortions to the bargaining process over FRAND royalties are especially harmful to innovative small businesses and start-ups, the "little engines that could" of our economy. In order to deploy standards in ground-breaking technological development, these small businesses need FRAND licenses to the intellectual property incorporated into standards").

[18] *Id.* at 3 ("Small firms, unlike large firms, often lack the resources for technical legal advice to counter holdup. They are more likely to cave to supra-FRAND rates out of fear of exclusion, rather than put themselves in legal peril by challenging the high rates.").

[19] *Id.* at 8 ("I routinely hear complaints that implementers are often large, well-financed companies that can handle their market disputes just fine on their own. This is absolutely the case. I want to be very clear: I think the FTC should investigate antitrust violations related to SEPs, but I think we should focus our energy on cases where the market power abuse harms small and medium enterprise implementers. I'm not interested in getting us involved in extensive cross-licensing disputes between large-well financed patent holders and implementers. My focus is entirely different from an enforcement perspective.").

[20] *Id.*

[21] *Id.* at 2 & fn. 3 ("I think the FTC has been correct in bringing SEP-related enforcement actions against anticompetitive conduct using its stand-alone Section 5 authority, and it should continue to do so with an emphasis on our authority to reach conduct beyond that which violates Section 2 of the Sherman Act. This is consistent with the policy statement the Commission issued in July regarding unfair methods of competition." and referencing the *Qualcomm* footnote in FTC Statement on the Withdrawal of the Statement of Enforcement Principles Regarding "Unfair Methods of Competition" Under Section 5 of the FTC Act.).

Lenovo, BlackBerry, Apple, and ZTE.[22] It spent relatively little time discussing patent license negotiations involving smaller companies, including "smaller Chinese OEMs."[23] I am concerned that if the FTC inserts itself into FRAND licensing disagreements, the cases will look a lot like *Qualcomm*, where the FTC put its thumb on the scale to benefit large and sophisticated implementers like Apple and Huawei.

<u>Intellectual Property Rights at the ITC</u>

Chair Khan and Commissioner Slaughter recently advocated for pro-implementer policies in a submission to the International Trade Commission ("ITC"). The statement was submitted in response to a request for submissions in a dispute between Phillips and Thales, but the policy proposals advanced in the statement extend beyond the facts of that case. To be clear, they did not take a position on the facts of the case in their submission,[24] and I am not taking any position on that case today. Instead, I am highlighting this recent submission as a useful vehicle for discussing the varying policy positions the U.S. government could take.

Chair Khan and Commission Slaughter clearly articulate the question their advocacy seeks to address: "Is it in the public interest to issue an ITC exclusion order based on a [SEP] where a United States district court has been asked to determine [FRAND] licensing terms?"[25] Their submission argues that "where a complainant seeks to license and can be made whole through remedies in a different U.S. forum, an exclusion order barring standardized products from the United States will harm consumers and other market participants without providing commensurate benefits."[26] Further, they assert that a "royalty negotiation that occurs under threat of an exclusion order may be weighted heavily in favor of the patentee in a way that is in tension

[22] Qualcomm, 411 F. Supp. 3d at 698 ("To provide a coherent narrative, the Court organizes its discussion of Qualcomm's anticompetitive practices in patent license negotiations around Qualcomm's conduct toward the following OEMs: (1) LGE, (2) Sony, (3) Samsung, (4) Huawei, (5) Motorola, (6) Lenovo, (7) BlackBerry, (8) Curitel, (9) BenQ, (10) Apple, (11) VIVO, (12) Wistron, (13) Pegatron, (14) ZTE, (15) Nokia, and (16) smaller Chinese OEMs.").

[23] *Id.*

[24] Written Submission on the Public Interest of Federal Trade Commission Chair Lina M. Khan and Commissioner Rebecca Kelly Slaughter, in the Matter of Certain UMTS and LTE Cellular Communication Modules and Products Containing the Same, United States International Trade Commission, Inv. No. 337-TA-1240 at fn. 1 (May 16, 2022), https://www.ftc.gov/system/files/ftc_gov/pdf/Written_Submission_on_the_Public_Interest_if_Chair_Khan_and_Commissioner_Slaughter_to_ITC.pdf [hereinafter Chair Khan and Commissioner Slaughter ITC Submission] ("We take no position on the facts of Investigation No. 1240.").

[25] *Id.* at 1.

[26] *Id.*

with the FRAND commitment because a licensee may agree to pay supra-FRAND royalties to avoid being excluded from the market[.]"[27]

Let's consider the practical implications of the proposals that Chair Khan and Commissioner Slaughter advance in their submission. For example, they are concerned that "even firms that are *willing and able* to take FRAND licenses can be excluded from the market[.]"[28] Specifically, the submission states that "where the standard implementer is a *willing* licensee—including cases where the implementer commits to be bound by terms that either the parties themselves will determine are FRAND or that will be determined by a neutral adjudication/in a court proceeding—an exclusion order would be contrary to the public interest."[29]

The characterization of these hypothetical licensees as "willing" and "able" paints these unlicensed technology users in the best possible light. But this characterization does not acknowledge that the ITC's public interest analysis already accounts for these and other concerns raised by pro-implementer advocates. Deanna Tanner Okun, who served two terms as Chair of the ITC during her 12 years as a Commissioner, has explained the ITC's statutorily required public interest analysis:

> [T]he ITC is statutorily required to conduct a public interest analysis before issuing any relief. The ITC also must determine that either the patentee or its licensee has made significant investments in plants and equipment or has employed significant labor or capital in the United States directed to its own patented products, or otherwise made in the United States substantial investments in exploiting the asserted patent.
>
> In other words, to even get to the remedy phase of the process, the ITC's investigation needs to have found an imported product is implementing another party's patented invention without permission and that party is using the patented invention itself in the United States. By this point, the adversarial process has also provided the allegedly infringing company with an opportunity to argue the inventing company broke its commitment to standards-developing organizations by not offering licensing terms that are fair and reasonable, if that is the case.[30]

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[27] *Id.* at 4.

[28] *Id.* at 5 (emphasis added).

[29] *Id.* (emphasis added).

[30] Deanna Tanner Okun, *Policy Shift Against SEP Rights Poses Risks for U.S. Innovation and Undermines Mandate of the ITC*, IPWATCHDOG (May 18, 2022), https://www.ipwatchdog.com/2022/05/18/policy-shift-sep-rights-poses-risks-u-s-innovation-undermines-mandate-itc/id=149116/.

As Chair Khan and Commissioner Slaughter make clear near the end of their submission, their policy proposal extends beyond "willing licensees" and a faithful application of the ITC's public interest analysis. Instead, as the submission states, they support a per se proposition that "[a]s a general matter, exclusionary relief is incongruent and against the public interest where a court has been *asked* to resolve FRAND terms and can make the SEP holder whole."[31] But precluding exclusionary relief where a court has simply "been *asked* to resolve FRAND terms" again tips the balance heavily in favor of implementers over innovators.

An ongoing dispute between Apple and Ericsson provides a handy vehicle for us to consider the consequences of this approach.

<u>Application of an Anti-Innovator Approach</u>

Apple and Ericsson are embroiled in litigation regarding SEP and FRAND issues in U.S. and international courts. In a recent motion in front of the District Court for the Eastern District of Texas, Ericsson requested that Apple be ordered to confirm that "Apple has committed to accept and perform under the terms of Ericsson's offer if it is found to be FRAND."[32] Ericsson argued that this order would be appropriate because, after Apple rejected Ericsson's licensing offer and both parties filed infringement suits in jurisdictions around the world, "Apple asked various courts worldwide to stay or dismiss Ericsson's patent infringement cases by pointing to the [Texas litigation] and representing that Apple's agreement to be 'bound' effectively mooted the other cases."[33]

In response, Apple asserted that the case is "not a one-sided proceeding" and noted the inclusion of "several claims related to FRAND commitments and contractual disputes."[34] Among those varied claims, Apple has requested the "determination of FRAND terms for a global license between Apple and Ericson."[35] Apple also made its own licensing offer, but Ericsson has argued that the offer is irrelevant because it includes non-SEP patents of Ericsson while excluding the non-SEP patents of Apple.[36]

I lay out these facts not to suggest that either party is right or wrong, but for two specific reasons. First, I seek to underscore the complexity of these SEP and FRAND disagreements. While one party or the other may have relatively stronger or weaker claims in any given suit,

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[31] Chair Khan and Commissioner Slaughter ITC Submission, *supra* note 24, at 5 (emphasis added).

[32] Order, Ericsson Inc. v. Apple Inc., No. 2:21-CV-00376-JRG at 1 (E.D. Tex. May 3, 2022).

[33] *Id.* at 2.

[34] *Id.* at 3.

[35] *Id.* at 4.

[36] *Id.* at 2-3.

there is no side that the government should unequivocally favor in these disagreements. And note that my summary of this disagreement is only the tip of the iceberg because, as I noted, Apple and Ericsson are fighting this battle in jurisdictions across the globe.

Second, I highlight this case because of the conclusion that Judge Rodney Gilstrap reached in response to Apple and Ericsson's arguments. Specifically, Judge Gilstrap found "no justification for requiring Apple to accept the terms of Ericsson's … offer [even] if it is determined to be FRAND."[37] His Order explained that:

> if Ericsson's offer is found to be FRAND, then Apple may accept it and create a binding contract; Apple may reject it and not implement Ericsson's patented technology; or Apple may reject the FRAND offer, implement Ericsson's technology without the benefit of a license and subject itself to actions for infringement. The Court knows of nothing unique to the SEP scenario that alters these principles of black letter contract law.[38]

This ruling is noteworthy. According to this Order from Judge Gilstrap, even if a U.S. court finds that a SEP holder's offer is FRAND, an implementer does not need to accept that offer and take a license.[39] This ruling seems to provide support for innovators and commentators concerned about the ability of implementers to use lengthy negotiations and then litigation to advance a holdout strategy. A FRAND offer can be made, litigation can determine the offer is FRAND, and an implementer can still refuse to accept the offer.

Allow me to underscore: I am not drawing conclusions about Apple's conduct or its motives, but instead highlighting the implications of this ruling. Recall that Chair Khan and Commissioner Slaughter argued that an injunction at the ITC should be unavailable if "a court has been asked to resolve FRAND terms and can make the SEP holder whole."[40] In light of Judge Gilstrap's ruling, one might be tempted to ask how long it will take for the SEP holder to be made whole, and to inquire about the consequences in the interim. This approach interferes with timely royalty payments, which fund future research and further innovation. It compromises procompetitive standards development.[41] It also harms the implementers that paid FRAND rates

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[37] *Id.* at 4.

[38] *Id.*

[39] While I question the implications of the ruling, it does appropriately point to the outcomes one would expect under contract law. A defendant in an antitrust case would not be characterized as free to continue the unlawful conduct.

[40] Chair Khan and Commissioner Slaughter ITC Submission, *supra* note 24, at 5.

[41] *See* Letter from Makan Delrahim, Assistant Att'y Gen., Antitrust Div., U.S. Dep't of Justice to Sophia A. Muirhead, General Counsel and Chief Compliance Officer Institute of Electrical and Electronics Engineers,

on a timely basis and must compete with implementers that engage in holdout. If the companies that engage in holdout are large companies like Apple that can fund ongoing litigation, then favoring implementers in FRAND disputes will help large companies over small competitors.

At bottom, I am concerned that an approach prohibiting injunctions if a court has simply been *asked* to resolve FRAND terms will, in the long run, disincentivize innovation.

A Balanced Approach

Competition law and patent law share the same goal of fostering competition and innovation. I had the honor of serving as Chief of Staff to FTC Chairman Tim Muris when we launched the Hearings on Competition and Intellectual Property Law and Policy in the Knowledge-Based Economy. In announcing the hearings, Chairman Muris explained a fundamental principle: properly understood, "IP law and antitrust law both seek to promote innovation and enhance consumer welfare."[42] "IP law, properly applied, preserves incentives for … innovation" – and innovation (i) "benefits consumers through the development of new and improved goods and services" and (ii) "spurs economic growth."[43] "Similarly, antitrust law, properly applied, promotes innovation and economic growth by combatting … anticompetitive arrangements and monopolization" that deter vigorous economic activity.[44]

To achieve these goals, policymakers must focus on both the short-term and long-term implications of their proposals. One important element of the analysis requires striking a balance between static and dynamic considerations – essentially, between instant and delayed gratification.[45] Short term competition arising from a disregard for patent rights will undermine long term innovation – which benefits neither consumers nor the economy. In addition, policymakers should acknowledge the potential for opportunistic behavior by both innovators and implementers. And finally, policymakers should exercise restraint, acknowledging the sound

Incorporated at 9 (Sept. 10, 2020), www.justice.gov/atr/page/file/1315291/download (explaining the harm to innovation and the standards development process as a result of a standards development organization policy that tipped the balance away from innovators).

[42] Timothy J. Muris, Competition and Intellectual Property Policy: The Way Ahead, Prepared Remarks of before American Bar Association, Antitrust Section Fall Forum (Nov. 15, 2001), https://www.ftc.gov/public-statements/2001/11/competition-and-intellectual-property-policy-way-ahead.

[43] *Id.*

[44] *Id.*

[45] *See* Thomas O. Barnett, Maximizing Welfare Through Technological Innovation, Presentation to the George Mason University Law Review 11th Annual Symposium on Antitrust (Oct. 31, 2007), https://www.justice.gov/atr/file/519216/download.

limits of antitrust and avoiding the injection of competition law into purely contractual matters.[46] Taken together, these principles suggest that a mere request for an injunction, absent sham litigation, should not trigger antitrust liability. Contract law and patent law are better-suited to resolving those disputes.

To find a balanced approach, examine past judicial decisions. The European Court of Justice's (ECJ) opinion in *Huawei v. ZTE* provides a framework that imposes obligations on both innovators and implementers and addresses the injunction concern.[47] For SEP holders, the ECJ established a safe harbor from antitrust liability. Under this approach, the holder of a SEP does not violate antitrust law by requesting an injunction if, before bringing that action, the SEP holder: (1) alerts the alleged infringer of the infringement by designating the patent and specifying how it has been infringed; and (2) presents to that infringer a written offer for a license specifying the royalty and how it is calculated.[48] The alleged infringer is obligated to respond in good faith to a SEP holder's offer and (1) accept the offer; (2) make a FRAND counter-offer; or (3) provide appropriate security if its counter-offer is rejected.[49] If a patent holder follows the framework, it can seek an injunction without risking antitrust liability. I believe this is a balanced approach that is more likely to facilitate both short-term competition and long-term innovation.[50]

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In considering the debate regarding the role of antitrust in SEP and FRAND disputes and the balance that must be struck, it may be helpful to consider an analogue: the essential facilities doctrine. The essential facilities doctrine identifies an asset created or controlled by one competitor and concludes that access would be helpful for other competitors. This doctrine has long been dormant in the U.S., given that it creates disincentives for rivals themselves to innovate. Why would a company spend money on its own R&D if the antitrust laws can be used

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[46] *See* Commissioner Slaughter SEPs Speech, *supra* note 11, at 5 ("I want to take a brief detour to address the 'holdout' problem that is often purported to be a parallel problem to holdup. Holdout refers to a licensee unilaterally refusing to take a license or unreasonably delaying doing so. While this may well be a problem in the licensing world, it does not pose the same concerns from a competition standpoint as holdup, which has the potential to exclude firms from implementing a standard.").

[47] Case C-170/13 Huawei Technologies Co. Limited v. ZTE Corp. (Fifth Chamber, 16 July 2015), https://curia.europa.eu/juris/document/document.jsf?text=&docid=165911&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=4251024.

[48] *Id.* at ¶ 71.

[49] *Id.* at ¶¶ 65-67.

[50] *See also* MLEX, *Top EU enforcer questions antitrust law's role in solving patent-licensing disputes* (Oct. 8, 2021) (quoting Olivier Guersent, Director-General of the European Commission's Directorate General for Competition, saying he does not "believe competition law or policy should be used to solve every problem under the sun" and while "there is a tendency to do that — to instrumentalize, to weaponize competition [law], [he is] not sure this is right").

to commandeer its competitors' innovations? Unfortunately, recent (and ill-advised) proposals would resuscitate the essential facilities doctrine.[51] I have previously expressed concerns about how the essential facilities doctrine may be used to help competitors rather than foster competition, and I reiterate those concerns here. But my point is a broader one: forced sharing substantially diminishes the incentive to innovate.

One closing thought. The submission that Chair Khan and Commissioner Slaughter filed at the ITC was not subject to a Commission vote and therefore did not represent the views of the Federal Trade Commission. The document departed from tradition by omitting the standard disclaimer that "[t]he views reflected in [the] statement are [their] own and do not necessarily reflect the views of the Commission or of any other Commissioner."[52] So for the sake of clarity, I would like to state explicitly here that I disagree with the policy positions advanced by my colleagues. As I have explained, I am concerned that putting a thumb on the scale for implementers will undermine incentives to innovate. I applaud the ITC's history of protecting U.S. intellectual property rights. And I encourage my colleagues on the Commission to have the same regard for those rights, which – if respected and protected – will lead to further improvements in living standards that we can only begin to imagine now.

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[51] MAJORITY STAFF OF H. COMM. ON THE JUDICIARY, 116TH CONG., INVESTIGATION OF COMPETITION IN DIGIT. MKTS. 397-398 (2020), https://judiciary.house.gov/uploadedfiles/competition_in_digital_markets.pdf ("[T]he Subcommittee recommends that Congress consider revitalizing the 'essential facilities' doctrine, the legal requirement that dominant firms provide access to their infrastructural services or facilities on a nondiscriminatory basis. To clarify the law, Congress should consider overriding judicial decisions that have treated unfavorably essential facilities- and refusal to deal-based theories of harm.").

[52] *See, e.g.*, Statement on the Public Interest, Fed. Trade Comm'n Chairwoman Edith Ramirez, In re Certain 3G Mobile Handsets and Components Thereof, Inv. No. 337-TA-613 at fn. 1 (July 10, 2015), https://www.ftc.gov/system/files/documents/public_statements/682011/150714publicinterestftc1.pdf.

SEPs, FRAND, and the Power of Section 5

Gail Levine[1]

Carmen Longoria-Green[2]

In the modern Internet of Things, our cars, our televisions, and even our door locks and home thermostats rely on internet connectivity standards.[3] As a result, our interconnected world is ever more reliant on standard-essential patents (SEPs), the key patented technologies that underpin critical connectivity standards. That has put some implementers in a bind, as they face patent royalty claims that they feel far exceed a reasonable royalty – and feel compelled by lock-in to pay those royalties.

The Federal Trade Commission has long been a leader in enforcement and advocacy in this space, a role that it proudly continues. Its involvement started with the Commission's seminal decision in 1996 to bring an enforcement action against Dell for seeking to collect royalties on a standardized patent in a manner that the Commission found harmful to competition.[4] Other enforcement actions followed,[5] as well as major reports addressing competition in high-tech and often-standardized industries.[6] FTC Commissioners also have issued statements on the topic, both together and individually,[7] and the Commission has submitted comments to the International Trade Commission to explain how the analysis for exclusion orders should change when the infringement of a standardized patent is at issue.[8] Notably, the FTC hasn't invoked only

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1 Partner, Mayer Brown. Gail Levine represents ACT/The App Association, but her views here are her own and do not necessarily reflect those of Mayer Brown or its clients.

2 Associate, Mayer Brown.

3 *See, e.g.,* Bonnie Cha, *A Beginner's Guide to Understanding the Internet of Things*, VOX (Jan. 15, 2015), https://bit.ly/3Fx14GX.

4 *In re Dell Computer Corp.*, 121 F.T.C. 616, 616-17 (1996).

5 *See, e.g.*, *In re Union Oil Co. of Cal.*, 138 F.T.C. 1, 2 (2004); *In re Negotiated Data Sols. LLC*, 2008 WL 258308, at *2 (F.T.C. Jan. 22, 2008); *In re Motorola Mobility LLC and Google Inc.*, 2013 WL 124100, at *4 (F.T.C. Jan. 3, 2013).

6 *See, e.g.*, FTC, *To Promote Innovation: The Proper Balance of Competition and Patent Law and Policy* (Oct. 2003), https://bit.ly/3fmoT9O (author Gail Levine contributed to this report while she was in the FTC's Office of the General Counsel); DOJ & FTC, *Antitrust Enforcement and Intellectual Property Rights: Promoting Innovation and Competition* (Apr. 2007), https://bit.ly/3Nt3Q2c [hereinafter 2007 FTC Report]; FTC, *Patent Assertion Entity Activity* (Oct. 2016), https://bit.ly/3zYHvUE.

7 *See, e.g.*, Remarks of Chairman Deborah Platt Majoras (Sept. 23, 2005), https://bit.ly/3NqZCbl; Rebecca Kelly Slaughter, *SEPs, Antitrust, and the FTC* (Oct. 29, 2021), https://bit.ly/3UbtOt2; Written Submission on the Public Interest of Federal Trade Commission Chair Lina M. Khan and Commissioner Rebecca Kelly Slaughter (May 16, 2022), https://bit.ly/3KN5tpS.

8 *See, e.g.,* Third Party U.S. FTC's Statement on the Public Interest, *In the Matter of Certain Wireless Communication Devices, Portable Music & Data Processing Devices, Computers & Components Thereof*, Inv. No. 337-TA-745 (ITC June 6, 2012), https://bit.ly/3h7bh2F; Third Party U.S. FTC's Statement on the Public Interest, *In the Matter of Certain Gaming & Entertainment Consoles, Related Software & Components Thereof*, Inv. No. 337-TA-752 (ITC June 6, 2012), http://bit.ly/3todxp4; Written Submission on the Public Interest of FTC Chairwoman Edith

the Sherman Act in its work here. Instead, it has long taken the position that Section 5's so-called "standalone" provision gives it the power to act in this space where others – including private parties – cannot.

In light of this history of enforcement and advocacy, we believe the FTC may continue to see itself as the steward of this area of the law. To illustrate our point, we look at a recent patent pool price hike and extrapolate a based-on-a-true-story hypothetical: Suppose an SEP holder burdened with obligations to charge only a reasonable royalty for its patents suddenly and without explanation raised the royalty significantly and threatened to seek injunctions against those who do not pay the new rate. We ask whether the FTC may conclude that this would violate the FTC's standalone Section 5 provision. Based on precedents like the FTC's *N-Data* case from 2008, we think it very well could.

BACKGROUND

Standardized technologies – particularly the ability to connect to standardized telecommunication networks – are increasingly part of our everyday lives. Industry players, working through standard-setting organizations, can set these standards so that technological capabilities are compatible across devices and therefore will be more widely adopted and successful. To create a standard, standard-setting organizations select technologies that will effectuate a particular capability, such as WiFi or 4G; in doing so, they sometimes must choose between substitute technologies. Having a given technology incorporated into a standard can therefore elevate its value above that of otherwise comparable technologies. The chosen patents that become critical to a standard are called standard-essential patents.

As the FTC and Department of Justice noted years ago, once a patented technology has been incorporated into a widely adopted standard – and once implementing manufacturers sink costs into complying with that standard – implementers may be willing to pay up to the switching costs to use that SEP.[9] Those switching costs can be quite high and may be independent of the intrinsic value of the patent. SEP owners may see that market reality as an opportunity to raise royalties beyond what manufacturers would have paid before the patent was incorporated into a standard.[10] According to the FTC, any resulting loss of competition may harm consumers, who could end up paying higher prices.[11]

Ramirez, *Certain 3G Mobile Handsets and Components Thereof*, Inv. No. 337-TA-613 (ITC July 10, 2015), https://bit.ly/3DVPKmF.

9 2007 FTC Report, *supra* note 6, at 37-40; *see also Ericsson, Inc. v. D-Link Sys., Inc.*, 773 F.3d 1201, 1209 (Fed. Cir. 2014).

10 *See* 2007 FTC Report, *supra* note 6, at 34-35 ("Thus, agreement among competitors about which standard is best suited for them replaces consumer choice and the competition that otherwise would have occurred in the market to make their product the consumer-chosen standard."); Steven M. Amundson, *Recent Decision Provide Some Clarity On How Courts And Government Agencies Will Likely Resolve Issues Involving Standard-Essential Patents*, 13 CHI.-KENT J. INTELLECTUAL PROP. 91, 92 (2013).

11 2007 FTC Report, *supra* note 6, at 36.

In response to this problem – termed "patent hold-up"[12] – some standard-setting organizations ask members to commit that, if their patent is selected as part of a standard, they will license the patent under reasonable and non-discriminatory (RAND) or fair, reasonable and non-discriminatory (FRAND) terms.[13]

But both patent owners and manufacturers have found it expensive, time-consuming, and difficult to determine their rights under this contractual commitment.[14] Much ink has been spilled on SEPs, on patent hold-up, and on whether patent hold-up involving SEPs violates the Sherman Act.[15]

This article asks a different question. We ask whether the FTC is likely to challenge SEP owners' demands for greater-than-F/RAND royalties as a violation of the "standalone" authority

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[12] *See, e.g.*, *id.* at 5, 33-35.

[13] *Id.* at 36; *Apple, Inc. v. Motorola Mobility, Inc.*, 886 F. Supp. 2d 1061, 1067 (W.D. Wis. 2012); Mark A. Lemley & Carl Shapiro, *A Simple Approach to Setting Reasonable Royalties for Standard-Essential Patents*, 28 BERKELEY TECH. L.J. 1135, 1140-41 (2013) ("the FRAND commitment is at its base an agreement not to exercise the full scope of the patentee's rights in exchange for having its technology adopted as an industry standard, likely resulting in increased licensing opportunities"). Standard-setting organizations' intellectual property policies can vary. Some are voluntary, and under some policies, a patent holder can choose to have its patent expressly excluded from a standard.

[14] *See* Lemley & Shapiro, *supra* note 13, at 1160-61 ("Parties have spent a great deal of time litigating the question of whether one or both sides have breached a FRAND commitment. Implementers argue that patentees' offers to license are not really reasonable, and thus breach the patentees' commitment to license on FRAND terms. Patentees argue that implementers are not negotiating in good faith and therefore are infringers rather than putative licensees working to figure out the right royalty payment."); A. Douglas Melamed & Carl Shapiro, *How Antitrust Law Can Make FRAND Commitments More Effective*, 127 YALE L.J. 2110, 2122-23 (2018).

[15] *See, e.g.*, Herbert Hovenkamp, *FRAND and Antitrust*, 105 CORNELL L. REV. 1683 (2020); Benjamin Hendricks & Brian P. Quinn, *The Hold-Up Tug-Of-War—Paradigm Shifts In The Application Of Antitrust To Industry Standards*, 28 NO. 1 COMPETITION: J. ANTI., UCL & PRIVACY SEC. CAL. L. ASSOC. 35 (2018); Melamed & Shapiro, *supra* note 14. There has also been vigorous debate around what has been called "patent hold-*out*." *See, e.g.*, Letter from Makan Delrahim, Assistant Att'y Gen., Antitrust Div., DOJ, to Sophia A. Muirhead, Gen. Counsel & Chief Compliance Officer, Institute of Electrical & Electronics Engineers, Inc., at 8-9 (Sept. 10. 2020), https://bit.ly/3DtFwsk ("Hold out can significantly undermine innovation incentives and deserves consideration in [standards development organizations'] licensing policies.") (internal footnote omitted); Makan Delrahim, Assistant Att'y Gen., Antitrust Div., DOJ, Keynote Address at University of Pennsylvania Law School: *The "New Madison" Approach to Antitrust and Intellectual Property Law*, at 9 (Mar. 16, 2018), https://bit.ly/3fnW4K7; Makan Delrahim, Assistant Att'y Gen., Antitrust Div., DOJ, *"Telegraph Road": Incentivizing Innovation at the Intersection of Patent and Antitrust Law*, at 7 (Dec. 7, 2018), https://bit.ly/3NnoiS1. Those concerns contributed to a 2019 joint policy statement stating that owners of SEPs should be able to obtain injunctions against certain manufacturers that incorporate standardized technologies without paying royalties. *See* U.S. Patent & Trademark Office, Nat'l Institute of Standards & Tech., & U.S. DOJ, *Policy Statement on Remedies for Standards-Essential Patents Subject to Voluntary F/RAND Commitments* (Dec. 19, 2019), https://bit.ly/3UJ4Tgy. That policy statement was later rescinded. *See* U.S. Patent & Trademark Office, Nat'l Institute of Standards & Tech., & U.S. DOJ, *Withdrawal of 2019 Policy Statement on Remedies for Standards-Essentials Patents Subject to Voluntary F/RAND Commitments* (June 8, 2022), http://bit.ly/3DQw7Lr. Although the agencies issued a draft policy statement to replace the 2019 statement, no replacement has been adopted. *See* U.S. Patent & Trademark Office, Nat'l Institute of Standards & Tech., & U.S. DOJ, *Draft Policy Statement on Licensing Negotiations & Remedies for Standards-Essential Patents Subject to Voluntary F/RAND Commitments* (Dec. 6, 2021), https://bit.ly/3ThwaWx.

of Section 5 of the FTC Act, which the FTC has long understood to condemn "behavior beyond conduct prohibited by the other federal antitrust statutes."[16]

To address this question, we pose a hypothetical, based on real-world events, in which SEP licensees face increased royalty demands without justification and threats of injunctions if they not pay the new rate. The article will then explore whether such conduct falls within the FTC's views of its power to bring standalone Section 5 actions. Finally, the article will describe several limiting principles that the Commission is likely to cite in support of its argument that only oppressive and coercive conduct relating to a FRAND-encumbered SEP can be targeted under Section 5.

I. The Hypothetical: Increasing Royalties On FRAND-Burdened SEPs Without Justification

Avanci operates a patent pool that offers to license in bulk many of the SEPs needed to establish cellular connectivity in cars, a feature that is now included in about half of new vehicles.[17] In July 2022, Avanci announced that it would increase the licensing rate for its 4G automotive program from $15 to $20 per vehicle for new licensees.[18] It said that the move would "ensure that the marketplace can continue to flourish for both licensors and licensees."[19] Its critics charge that "[t]here has been no change to the decades-old standards to which Avanci's license pertains that could justify any fee increase, let alone such a significant one."[20]

We lack enough information about Avanci's royalty increase or its original royalty to know whether the increase would constitute a Section 5 violation, and we take no position on that question. But Avanci's unexpected price change does inspire a hypothetical.

Consider an SEP holder that owns the rights to license the critical SEPs needed for a standard. In other words, the standard could not be practiced without a licensing agreement with

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16 FTC Commissioner William E. Kovacic & Marc Winerman, *Competition Policy and the Application of Section 5 of the Federal Trade Commission Act*, 76 ANTITRUST L.J. 929, 929-30 (2010) ("Congress intended Section 5 to be a mechanism for upgrading the U.S. system of competition law by permitting the FTC to reach behavior not necessarily proscribed by the other U.S. competition statutes, including the 1890 Sherman Act and the Clayton Act."); *see also FTC v. Sperry Hutchinson Co*., 405 U.S. 233, 239-40, 244 (1972) ("[L]egislative and judicial authorities alike convince us that the Federal Trade Commission does not arrogate excessive power to itself if, in measuring a practice against the elusive, but congressionally mandated standard of fairness, it, like a court of equity, considers public values beyond simply those enshrined in the letter or encompassed in the spirit of the antitrust laws."); *FTC v. Brown Shoe Co*., 384 U.S. 316, 321-22 (1966).

17 *See Cont'l Auto. Sys., Inc. v. Avanci, LLC*, 27 F.4th 326, 329-30 (5th Cir. 2022) ("Avanci acts as the licensing agent for a pool of SEPs incorporated into cellular standards for connected devices—namely, vehicles. For a flat fee per device, it offers a 'one-stop license' for connected cars."); Avanci, *Avanci 4G Rate for New Licenses to Increase from September 1, 2022* (July 12, 2022), https://bit.ly/3TIKNDu.

18 *Avanci 4G Rate for New Licenses, supra* note 17.

19 *Id.*

20 Letter from 28 Former Government Enforcement Officials, Professors, and Public Interest Advocates to Jonathan Kanter, Assistant Att'y Gen., Antitrust Division, at 7 (Oct. 17, 2022), http://bit.ly/3Eu2P78.

that SEP holder. Further, suppose that the SEPs are encumbered with a RAND or FRAND commitment, and that the SEP holder has previously agreed that $15 per device is a fair and reasonable royalty.

What if the SEP holder suddenly announced that it would begin charging a royalty rate of $20 per device? Hypothesize that the SEP holder did not add a new tranche of patents to the licensing agreement. It did not start offering an additional service to licensees. It did not even cite inflation. It simply announced a new, higher price for the same intellectual property.

Imagine further that the manufacturers of any product incorporating the standard face strong pressure to pay the higher royalty. They have received threats that, if they do not pay the higher royalty, the patent owner will seek injunctions against them.[21] The manufacturers have already incorporated the standard into their products, and changing the standard now would be prohibitively expensive and would take time that the manufacturers do not have, given the realities of the market. Hypothesize further that manufacturers would face the possible loss of hundreds of thousands, if not millions, of dollars if they do not pay the higher royalty. The manufacturers, under economic duress and without viable alternatives, pay the higher royalty under protest. What then?

II. The FTC's Section 5 Power and SEP/FRAND Cases

To know the answer to that, it helps to know that the leadership of the FTC has been emphasizing that the agency's Section 5 powers reach further than the Sherman or Clayton Acts.

Section 5 prohibits "unfair methods of competition,"[22] including violations of the antitrust laws like the Sherman and Clayton Acts. But the FTC has long understood Section 5 to give it limited powers to challenge conduct beyond the reach of the other antitrust laws.[23] Supporting such a view were Supreme Court decisions stating that "[t]he standard of 'unfairness' under the FTC Act is, by necessity, an elusive one, encompassing not only practices that violate the Sherman

[21] For instance, Avanci, whose recent price hike inspired this hypothetical, reimburses the litigation costs incurred by those whose SEPs are in Avanci's patent pool, if the costs were incurred in an action where the SEP holder was attempting to stop someone from exercising the patent without paying the current royalty. *See* Letter from Makan Delrahim, Assistant Att'y Gen., to Mark H. Hamer, Baker & McKenzie, at 6 (July 28, 2020), https://bit.ly/3JjBt6n.

[22] 15 U.S.C. § 45.

[23] *See, e.g.,* FTC, *Statement of Enforcement Principles Regarding "Unfair Methods of Competition" Under Section 5 of the FTC Act* (Aug. 13, 2015), https://bit.ly/3h4kVmU ("Section 5's ban on unfair methods of competition encompasses not only those acts and practices that violate the Sherman or Clayton Act but also those that contravene the spirit of the antitrust laws and those that, if allowed to mature or complete, could violate the Sherman or Clayton Act."). (The FTC's 2022 statement, *see infra* note 26, superseded the 2015 *Statement of Enforcement Principles*.)

Act and the other antitrust laws, but also practices that the Commission determines are against public policy for other reasons."[24]

Historically, some Commissioners believed that the FTC had failed to use its Section 5 power to its full extent.[25] But in November 2022, the FTC issued a new policy statement on Section 5. It stated that "Section 5 reaches beyond the Sherman and Clayton Acts" to cover "unfair conduct that tend[s] to negatively affect competitive conditions," and it made clear that the FTC is now "committed to … enforcing and administering [Section 5's] prohibition against 'unfair methods of competition' on a standalone basis" through enforcement actions.[26] In particular, the FTC highlighted that "fraudulent and inequitable practices that undermine the standard-setting process" may warrant FTC intervention under Section 5.[27]

It's hardly clear that the FTC's Section 5 initiative will be without challenges. The FTC's standalone Section 5 authority has been criticized as having "inherent ambiguity."[28] In dissent to the November 2022 policy statement, FTC Commissioner Christine Wilson criticized the Commission's new approach to Section 5 as "unbounded" and as "depend[ent] on the whims and political worldviews of three sitting Commissioners."[29] Further, under the "major questions" doctrine, today's Supreme Court looks askance at statutory interpretation that purports to find

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[24] *FTC v. Ind. Fed'n of Dentists*, 476 U.S. 447, 454-55 (1986) (internal citation omitted); *see also Sperry & Hutchinson Co.*, 405 U.S. at 244 ("[L]egislative and judicial authorities alike convince us that the Federal Trade Commission does not arrogate excessive power to itself if, in measuring a practice against the elusive, but congressionally mandated standard of fairness, it, like a court of equity, considers public values beyond simply those enshrined in the letter or encompassed in the spirit of the antitrust laws."); *FTC v. Brown Shoe Co.*, 384 U.S. 316, 321-22 (1966).

[25] *See* Kovacic & Winerman, *supra* note 16, at 933.

[26] FTC, *Policy Statement Regarding the Scope of Unfair Methods of Competition Under Section 5 of the Federal Trade Commission Act* at 1, 16 (Nov. 10, 2022), http://bit.ly/3UUmiD1 [hereinafter November 2022 Statement]; *see also* Remarks of Chair Lina M. Khan as Prepared for Delivery, Fordham Annual Conference on International Antitrust Law & Policy at 4 (Sept. 16, 2022), https://bit.ly/3reUEUF (expressing support for the FTC using its Section 5 powers); Prepared Remarks of Commissioner Alvaro M. Bedoya, *Returning to Fairness* (Sept. 22, 2022), https://bit.ly/3DXas65 (same). The 2022 statement was not unexpected. In 2021, the FTC had made clear that it intended "to recommit to its mandate to police unfair methods of competition even if they are outside the ambit of the Sherman or Clayton Acts." *See* Statement of Chair Lina M. Khan Joined by Commissioner Rohit Chopra and Commissioner Rebecca Kelly Slaughter on the Withdrawal of the Statement of Enforcement Principles Regarding "Unfair Methods of Competition" Under Section 5 of the FTC Act (July 1, 2021), https://bit.ly/3KKKxzZ. In doing so, the FTC withdrew earlier guidance that it felt had cabined its use of Section 5. *Id*. at 1. FTC Chair Lina Khan, joined by former Commissioner Rohit Chopra and Commissioner Rebecca Kelly Slaughter, explained their intent to "restore the agency to [the] critical mission" of combatting unfair methods of competition "even if they do not violate a separate antitrust statute." *Id*.

[27] November 2022 Statement, *supra* note 26, at 14.

[28] A. Douglas Melamed, *Prepared Statement for the Senate Committee on the Judiciary, Subcommittee on Antitrust, Competition Policy, & Consumer Rights*, at 6 (Apr. 5, 2016), https://bit.ly/3gWPzhT.

[29] Commissioner Christine S. Wilson, *Dissenting Statement Regarding the "Policy Statement Regarding the Scope of Unfair Methods of Competition Under Section 5 of the Federal Trade Commission Act,"* at 7, 13 (November 2022), http://bit.ly/3i9uIbI.

extensive power in general statements: "We expect," the Court has explained, "Congress to speak clearly when authorizing an agency to exercise powers of vast economic and political significance."[30] The Court may well doubt that a statutory prescription that generally prohibits "unfair methods of competition" reaches quite as far as the FTC's current majority states that it does.[31] Not only that, the FTC has not successfully litigated a standalone Section 5 case in decades – its recent successes ended in consent decrees.[32] But let's assume for present purposes that – as seems certain – the FTC is more prepared now to bring a standalone Section 5 case than in the past.

III. SECTION 5 AND STANDARD-ESSENTIAL PATENTS WITH F/RAND OBLIGATIONS

So, how would an FTC with a more expansive view of Section 5 view the facts of our hypothetical? It's likely that our facts would bring the FTC's landmark Section 5 standards cases to mind.

The FTC has condemned certain SEP/FRAND behavior under its standalone Section 5 powers in the past. One such case is similar to the hypothetical described above. In *In re Negotiated Data Solutions LLC* (*N-Data*), N-Data's predecessor in interest publicly announced during a standard-setting process that if its patents were selected for an Ethernet standard, it would license the patents "for a one-time fee of one thousand dollars."[33] The standard-setting organization subsequently chose N-Data's patents, and the standard was incorporated into hundreds of millions of devices.[34] Later, according to the FTC, N-Data's predecessor in interest experienced financial difficulties and sought to increase the royalties it could receive for the patents; it sent demand letters to multiple companies demanding royalties that "represent[ed] a substantial increase over [the] commitment to license the [Ethernet] technology for a one-time fee of one thousand dollars."[35] After it got the patents, N-Data maintained the position that it was entitled to higher royalties, and the FTC – on a bipartisan vote – asserted that the refusal to comply with the earlier commitment to the standard-setting organization violated Section 5.[36]

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30 *Ala. Ass'n of Realtors v. Dep't of Health & Human Servs.*, 141 S. Ct. 2485, 2489 (2021) (internal quotation marks omitted); *see also Nat'l Fed'n of Indep.Bus. v. Dep't of Labor*, 142 S. Ct. 661, 667 (2022) (Gorsuch, J., concurring).

31 *See, e.g.,* Commissioners Noah Joshua Phillips & Christine S. Wilson, *Dissenting Statement on the "Statement of the Commission on the Withdrawal of the Statement of Enforcement Principles Regarding 'Unfair Methods of Competition' Under Section 5 of the FTC Act*," at 3 (July 9, 2021), https://bit.ly/3Ds5FI2 (arguing that Congress did not "vest the Commission with broad authority to regular the economy without an intelligible principle" and citing Justice Gorsuch's discussion of the non-delegation doctrine in *Gundy v. United States*, 139 S. Ct. 2116, 2133-35 (2019) (Gorsuch, J., dissenting)).

32 *Id.* at 8-9 ("Since the Supreme Court last articulated the scope of Section 5, the Commission has failed successfully to litigate a standalone Section 5 case.").

33 2008 WL 258308, at *2 (F.T.C. Jan. 22, 2008).

34 *Id.* at *3.

35 *Id.* at *4.

36 *Id.* at *5-6.

According to the FTC, N-Data's conduct both raised prices on the production of Ethernet-enabled devices and decreased manufacturers' willingness to incorporate standardized technologies into their products, results that harmed both competition and consumers.[37] N-Data eventually agreed to a consent order in which it agreed to once again license the patent for a one-time $1000 fee.[38]

As in our hypothetical case, the *N-Data* patents were burdened by a pricing commitment that their owner later exceeded. As in our hypothetical case, there was no apparent reason for the price hike. Indeed, our hypothetical presents a precipitous price hike, coming shortly after the SEP holder had set a lower rate that it had held out as reasonable. A challenger to such a price hike could argue that the shorter the time frame, the less time is available for an intervening event to justify the raised price – and therefore, the harder the price hike is to justify.

That said, unlike our hypothetical, the patent holder in *N-Data* did not agree to a FRAND or RAND royalty. Rather, it had agreed to a fixed $1,000 royalty. But the underlying commitment in both cases is the same: in exchange for placement in the standard, the patent holders in both cases agreed to limit what they could charge for the use of their patents. That limit is defined in general terms in our hypothetical (a "reasonable" royalty) and in specific terms in *N-Data* ($1,000). But how tightly the royalty commitment was defined seems hardly critical to the FTC's logic in *N-Data*.[39]

The *N-Data* case is not without its critics. Then-Chairman Deborah Majoras raised concerns that *N-Data* represented little more than the FTC enforcing contractual commitments, which lacks a limiting principle.[40] Critics also charge that the Commission treated "sophisticated computer manufacturers" as consumers; some believe that it is "unlikely" that Congress meant for the FTC Act to protect "large, sophisticated intermediate buyers" who could "avoid the injury through either the [standard-setting organization's] IP rules, or by operation of contract law and negotiation."[41] Further, although the Commission determined that consumers would be harmed by the raised royalty, some have questioned that premise, asserting that "the extent to which an input cost like patent licensing fees affects downstream prices is a complex determination" and therefore should not be assumed.[42] But the current leadership of the FTC may give less weight

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[37] *Id.* at *5.

[38] *Id.* at *14.

[39] *Id.* at *5.

[40] 2008 WL 258308, at *27 (Majoras, Chairman, dissenting) ("If the majority's theory is that the evasion of contractual price constraints triggers liability under Section 5 without a concurrent determination that the conduct violates the Sherman Act, then we are headed down a slippery slope, and I take no comfort from the majority's representation to the contrary.").

[41] Joshua D. Wright & Aubrey N. Stuempfle, *Patent Holdup, Antitrust, and Innovation: Harness or Noose?*, 61 ALA. L. REV. 559, 566 (2010) (internal quotation marks omitted). *But see* November 2022 Statement, *supra* note 26, at 9 (asserting that Section 5 allows FTC to intervene when conduct "negatively affect[s] competitive conditions—whether by affecting consumers, workers, or *other market participants*." (emphasis added)).

[42] Anne Layne-Farrar, *Patents in Motion: The Troubling Implications of the N-Data Settlement*, at 4-5, GCP: The Online Mag. for Glob. Competition Pol'y (Mar. 2009).

to those objections. In the view of the FTC leadership, when Congress created the FTC, it did so to "create[] an administrative body that could police unlawful business practices with greater expertise and democratic accountability than courts provided," and the text and structure of the FTC Act confirm this purpose.[43] Section 5 is thus viewed as "a critical tool that the agency can and must utilize in fulfilling its congressional mandate."[44]

N-Data isn't the only case that the FTC has brought under its Section 5 power to address SEP/FRAND conduct. Other cases involve allegations that the SEP holder deceived the standards body; still others involve SEP injunction demands out of sync with the F/RAND commitment.[45] All illustrate the FTC's historic willingness to find standalone Section 5 violations when it believes that SEP owners are leveraging the standard-setting process to charge royalties that reflect market power gained through standardization, rather than the pre-standardization value of the patent.

The FTC's jurisprudence in this area began with a deception case. In *In re Dell Computer Corp*., the Commission alleged that Dell had failed to disclose to the relevant standard-setting organization – of which Dell was a member – that one of its patents had been included as part of a standard for video-based technology.[46] After the standard had become quite successful and was "included in over 1.4 million computers sold in the eight months immediately following [the standard's] adoption," Dell announced that the standard practiced its patent and demanded payment from computer manufacturers.[47] The Commission filed a complaint against Dell, asserting that it had engaged in an unfair method of competition in violation of Section 5 by, among other things, "rais[ing] the costs of implementing" the standard and chilling industry's "[w]illingness to participate in industry standard-setting efforts."[48] Dell agreed to a consent order prohibiting it from enforcing its patent against anyone using the patent to implement the standard.[49]

Similarly, in *In re Union Oil Company of California (Unocal)*, the FTC brought an action against Unocal under Section 5 after it allegedly misrepresented the extent of its intellectual-property rights to a government body setting gasoline standards.[50] After the government body issued standards that overlapped with Unocal's patents, Unocal sought to enforce its patents against the refineries that were now required to follow the government standards, seeking

43 Statement of Chair Lina M. Khan, *supra* note 26, at 2-3.

44 *Id*. at 7; *see also* November 2022 Statement, *supra* note 26, at 9-10 (the role of Section 5 is to stop "incipient threats to competitive conditions").

45 *See, e.g.*, *In re Dell Computer*, 121 F.T.C. 616, 616-18 (1996); *In re Union Oil Co. of Cal. (Unocal)*, 138 F.T.C. 1, 2, 6 (2004); *In re Motorola Mobility LLC and Google Inc.*, 2013 WL 124100, at *4 (F.T.C. Jan. 3, 2013).

46 121 F.T.C. at 616-17.

47 *Id.* at 617-18.

48 *Id.* at 618.

49 *Id.* at 619, 621.

50 138 F.T.C. at 2.

millions of dollars in the process.[51] The Commission later described the *Unocal* case as part of its "longstanding commitment to safeguard the integrity of the standard-setting process."[52]

The Commission also brought cases against SEP holders that allegedly threatened to seek or actually sought injunctions against manufacturers practicing a patent that was part of a standard. An example of this type of case is *In re Motorola Mobility LLC and Google Inc.*, where the Commission alleged that the patent holder sought injunctions against manufacturers practicing its FRAND-encumbered SEPs.[53] The Commission asserted that the SEP holder "breached [its] FRAND obligations" because the manufacturers would have to negotiate for a FRAND rate with the threat of injunctions in mind, and "[a] licensing negotiation that occurs under threat of an injunction or exclusion order ... is weighted toward the patentee in a fashion inconsistent with the FRAND commitment."[54] This is because when a SEP holder has sought an injunction, "the negotiation between a patentee and the implementer is linked to the implementer's potential lost revenues from the sales of the enjoined products, rather than to the market value of the patent as compared to alternatives."[55] The Commission asserted that the refusal to comply with the FRAND commitment "[i]ncreas[ed] costs to produce" devices using the standard, an increase that manufacturers would "likely pass through to consumers," and "[u]ndermin[ed] the integrity and efficiency of the standard-setting process."[56]

The key factors that underlay the agency's willingness to challenge the conduct in these cases appear in our hypothetical, too. For example, in each of these cases, the Commission was concerned that the SEP holders in question earned their market power via standardization. For instance, in *Motorola,* the Commission explained that "[i]nclusion of a patented technology into a standard can confer substantial market power on the holder of that patent," which allows the SEP holder to extract higher royalties than it would have received for the same technology prior to standardization.[57] This disproportionate market power also appears in our hypothetical. Because there is no viable alternative for the hypothesized technology at issue, our hypothetical SEP holder has the upper hand in any negotiation with manufacturers.

Similarly, in each of these cases, the Commission highlighted the problems of industry lock-in. In *Dell*, the Commission noted that the technology at issue already had been included in "1.4 million computers,"[58] and in *Motorola*, the Commission explained that the high cost of switching to a new technology after the standardized technology already had been implemented

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51 *Id.* at 6.

52 *In re Robert Bosch GmbH*, 2012 WL 5995560, at *1 (F.T.C. Jan. 1, 2012).

53 2013 WL 124100, at *4 (F.T.C. Jan. 3, 2013).

54 *Id.* at *3-4.

55 *Id.* at *3.

56 *Id.* at *5.

57 *Id.* at *2.

58 121 F.T.C. 616, 617 (1996).

may cause “an entire industry” to “become ‘locked in’ to” using the SEPs at issue.[59] The same lock-in occurs in our hypothetical. Because the manufacturers expected to pay a FRAND royalty rate and in fact negotiated such a rate with the SEP holder, they committed to using the standard and cannot now easily change their production over to a different technology. In fact, Chair Khan and Commissioner Slaughter have submitted a statement of public interest that highlights lock-in as a particular problem for manufacturers that adopt technology standards.[60]

Finally, as in *Motorola*, our hypothetical involves a SEP owner’s threats to seek injunctions against manufacturers already practicing its SEPs. This is a key aspect of the SEP owner’s power over locked-in manufacturers. As the Commission explained in *Motorola*, a threatened injunction has such force that it “raises the maximum royalty rate [that] the potential licensee is willing to pay” to use the patented technology, which in turn “tend[s] to push that rate upwards and out of the FRAND range.”[61]

In sum, it seems plain that, based upon past Section 5 cases and the FTC’s views of its Section 5 power, our hypothetical presents a scenario where the FTC could well bring an enforcement action.

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To be sure, the FTC’s powers, even under an expansive reading of Section 5, are not unlimited. Garden-variety patent-licensing negotiations might not be likely to provoke an FTC challenge, even when SEPs burdened by F/RAND commitments are at issue. As the FTC explained in the *N-Data* case, the SEP owner violating Section 5 must be engaged in conduct that is “coercive” and “oppressive,” and it must have engaged in conduct that has an “adverse effect” on competition.[62] Indeed, the FTC affirmed those two limitations in its recent policy statement on the Section 5 power. When determining whether to bring a Section 5 action, the Commission explained, it will evaluate (1) whether the conduct is “coercive, exploitative, collusive, abusive, deceptive, predatory, or involve[s] the use of economic power of a similar nature,” and

[59] 2013 WL 124100, at *2 (F.T.C. Jan. 3, 2013).

[60] Written Submission On The Public Interest Of Federal Trade Commission Chair Lina M. Khan And Commissioner Rebecca Kelly Slaughter, at 2, *In re Certain UMTs and LTE Cellular Communication Modules and Products Containing the Same*, Inv. No. 337-TA-1240 (ITC May 16, 2022), https://bit.ly/3KN5tpS (“After standard setting organizations (SSOs) and implementers have invested substantial resources into developing the standard and products that implement the standard, it can become very expensive to either revise the standard or switch to a new standard. Once an industry is ‘locked in’ to a standard, implementers (including those who helped develop the standard) can no longer design around standardized technologies and need SEP licenses to remain in the market.”).

[61] 2013 WL 124100, at *3.

[62] 2008 WL 258308, at *37 (F.T.C. Jan. 22, 2008); *see also* Statement of Chair Lina M. Khan, *supra* note 26, at 4 (confirming that the Commission must “clearly explain[] why the practice is illegitimate and base[] that ruling on substantial evidence”).

(2) whether the conduct "tend[s] to negatively affect competitive conditions," by, for example, "reduc[ing] competition between rivals, limit[ing] choice, or otherwise harm[ing] consumers."[63]

Not every price hike meets those criteria. For example, our hypothetical SEP holder could argue that the price hike reflects nothing more than an adjustment for inflation. Or it could argue that both its early, low rate and its new, higher rate are both in the range of a reasonable rate, and that neither injures competition. Likewise, if the SEP holder increased the value of its collective license in a way that advanced some procompetitive end, raising the price to reflect that change isn't likely to shape a strong case for FTC intervention. The same reasoning applies to other legitimate business justifications for a price hike.

That said, the FTC is not likely to simply accept those justifications at face value. The FTC has made clear that in a Section 5 action, "[i]t is the [respondent's] burden to show that the asserted justification for the conduct is legally cognizable, non-pretextual," and "narrowly tailored to limit any adverse impact on competitive conditions."[64] If, therefore, the SEP owner in our hypothetical were to argue that the higher royalty reflects a fair valuation of the intellectual property at issue, the FTC would likely assess that justification.

Finally, it bears mentioning that Section 5 is not meant to create the foundation for a private right of action. This means that when an entity is found to have committed a standalone Section 5 violation, the entity is not susceptible to a "follow-on treble damages claim" by private litigants claiming an antitrust violation.[65] The FTC has emphasized that using Section 5 to stop anticompetitive price hikes on SEPs is therefore a way to correct for injuries to competition without opening patent holders to potentially burdensome private damages awards.[66]

Conclusion

The FTC has long affirmed that voluntary standard setting by industries can "deliver substantial benefits to American consumers" by "promoting innovation, competition, and

63 November 2022 Statement, *supra* note 26, at 9; *see also id*. (explaining that "[t]hese two principles are weighed according to a sliding scale," such that "[w]here the indicia of unfairness are clear, less may be necessary to show a tendency to negatively affect competitive conditions.").

64 *Id*. at 11-12 (internal footnote omitted). Testing the procompetitive justifications for seemingly anticompetitive conduct is standard in antitrust cases, including Section 5 cases. *See, e.g.*, *In re N. Tex. Specialty Physicians*, 2005 WL 3366980, at *22-23 (F.T.C. Dec. 1, 2005) (looking behind purportedly procompetitive justification offered by respondent in Section 5 case); *In re Ind. Fed'n of Dentists*, 101 F.T.C. 57, 79 (1983) (same); *cf*. *United States v. Microsoft Corp*., 253 F.3d 34, 59 (D.C. Cir. 2001); *McWane, Inc. v. FTC*, 783 F.3d 814, 841-42 (11th Cir. 2015) (conducting "pretextual" analysis).

65 *See In re Robert Bosch GmbH*, 2012 WL 5995560, at *2 (F.T.C. Jan. 1, 2012) ("[S]topping ... conduct using a stand-alone Section 5 unfair methods of competition claim, rather than one based on the Sherman Act, minimizes the possibility of follow-on treble damages claims. Violations of Section 5 that are not also violations of the antitrust laws do not support valid federal antitrust claims for treble damages. There is also no private right of action under Section 5, and a Section 5 action has no preclusive effect in subsequent federal court cases.").

66 *Id*.

consumer choice."[67] Where, however, the owners of F/RAND-burdened SEPs charging a reasonable royalty suddenly demand an unjustified and unreasonable price hike and threaten to seek injunctive relief against those who do not pay the higher rate, the modern FTC – particularly with its recently expanded reading of its enforcement authority – may well bring a case under its standalone Section 5 authority.

[67] *Id*. at *1.