

**Intellectual Property Rights and Antitrust Liability in the U.S.: The 2016 Landscape**

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Perhaps the most fundamental question that arises at the intersection of intellectual property law and antitrust law in the United States is whether the exercise of rights granted by the former can result in the imposition of liability under the latter. In 2016, this issue manifests itself especially in the context of standard-essential patents (SEPs) and raises further questions concerning the terms under which a SEP holder must license its technology; whether an SEP holder seeking an injunction to stop a licensee from using its patent amounts to an antitrust violation; and to what extent antitrust law – as opposed to contract law or other market factors – is the proper tool to regulate SEP disputes.

These questions necessarily contemplate the relative scope of intellectual property and antitrust laws, the fundamental rights of property and access to courts, and from a policy perspective, how best to balance the short and long-term consumer welfare trade-offs between favoring one set of laws over the other.<sup>1</sup> The Antitrust Division of the U.S. Department of Justice (DOJ) and its sister agency, the Federal Trade Commission (FTC), have recognized that promoting consumer welfare is the common goal shared by the intellectual property and antitrust regimes.<sup>2</sup> But, the natural tension between the two is clear: pursuing social gains under intellectual property laws by offering the possibility of monopoly rents through the exclusion of competitors to the businesses willing to undertake research and innovation costs, while at the same time offering an opportunity to compete free from exclusionary conduct for other participants in the same market.<sup>3</sup>

The U.S. antitrust agencies agree that imposing liability for merely refusing to share intellectual property, or license at a particular rate, undercuts the procompetitive value that a strong system of intellectual property rights provides.<sup>4</sup> U.S. courts have reached the same result,

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<sup>1</sup> Maureen Ohlhausen, Commissioner, Federal Trade Commission, Special Address at the Standards and Patent Conference (Dec. 4, 2013), available at [https://www.ftc.gov/sites/default/files/documents/public\\_statements/pragmatists-approach-navigating-intersection-ip-antitrust/131204ukantitrust.pdf](https://www.ftc.gov/sites/default/files/documents/public_statements/pragmatists-approach-navigating-intersection-ip-antitrust/131204ukantitrust.pdf).

<sup>2</sup> *Id.*

<sup>3</sup> *Id.*

<sup>4</sup> Edith Ramirez, Chairwoman, Federal Trade Commission, Keynote Address at the Georgetown University Law Center 8<sup>th</sup> Annual Global Antitrust Enforcement Symposium (Sep. 10, 2014), available at

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generally rejecting antitrust liability for refusals to license intellectual property,<sup>5</sup> a result consistent with the general hostility in U.S. law to antitrust claims based on a refusal to assist a competitor.<sup>6</sup> But intellectual property licensing is not immune from antitrust scrutiny where there is exclusion beyond the exclusion inherent in the patent grant, and the FTC has obtained consent decrees in matters alleging breach of standard-setting obligations.<sup>7</sup>

The DOJ has not brought an enforcement action based on a standard-setting theory, but has engaged in advocacy relating to standard-setting issues. For example, Renata Hesse, who recently replaced Bill Baer as the new leader of the Antitrust Division, has urged standard-setting organizations (SSOs) to revise their policies to better define what constitutes fair, reasonable, and non-discriminatory (FRAND) licensing terms for the use of SEPs.<sup>8</sup> In 2013, the DOJ and the U.S. Patent and Trademark Office issued a joint statement that court injunctions or exclusion orders by the International Trade Commission should rarely be granted in disputes involving FRAND-encumbered SEPs.<sup>9</sup> Finally, in February 2015, Hesse signed a business review letter indicating that the DOJ would not challenge on controversial changes by the Institute of Electrical and Electronics Engineers, a prominent SSO, that limit the ability of companies whose

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[https://www.ftc.gov/system/files/documents/public\\_statements/582451/140915georgetownlaw.pdf](https://www.ftc.gov/system/files/documents/public_statements/582451/140915georgetownlaw.pdf) (henceforth “*Ramirez Georgetown Speech*”).

<sup>5</sup> See, e.g., *In re Indep. Serv. Orgs. Antitrust Litig.*, 203 F.3d 1322, 1327-28 (Fed. Cir. 2000) (“We therefore will not inquire into his subjective motivation for exerting his statutory rights, even though his refusal to sell or license his patented invention may have an anticompetitive effect, so long as that anticompetitive effect is not illegally extended beyond the statutory grant.”).

<sup>6</sup> See, e.g., *Verizon Commc’ns v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398, 407 (2004)

<sup>7</sup> See, e.g., *Motorola Mobility LLC*, FTC Docket No. C-4410 (July 24, 2013), available at <https://www.ftc.gov/enforcement/cases-proceedings/1210120/motorola-mobility-llc-google-inc-matter>; *Robert Bosch GmbH*, FTC Docket No. C-4377 (Apr. 24, 2013), available at <https://www.ftc.gov/enforcement/cases-proceedings/1210081/bosch-robert-bosch-gmbh>;

<sup>8</sup> Renata Hesse, Deputy Assistant Attorney General, U.S. Department of Justice, Remarks at the ITU-T Patent Roundtable (Oct.10, 2012), available at <https://www.justice.gov/atr/file/518951/download>.

<sup>9</sup> U.S. Department of Justice and U.S. Patent & Trademark Office, *Policy Statement on Remedies for Standards-Essential Patents Subject to Voluntary F/RAND Commitments* (Jan. 8, 2013), available at <https://www.justice.gov/sites/default/files/atr/legacy/2014/09/18/290994.pdf>.

patents are essential to IEEE standards to seek injunctions or exclusion orders for patent infringement.<sup>10</sup>

Ultimately, both the DOJ and FTC acknowledge that SEPs may be an appropriate subject for oversight by competition authorities, as the adoption of a standard will often confer market power on SEP owners. However, outside the SEP arena, regulation of patent owners' right to license – or withhold licensing – is not a proper role for antitrust enforcement.<sup>11</sup> The U.S. agencies will not require an IP owner to create competition in products using its own technology,<sup>12</sup> or use antitrust as a tool to help lower the price of a license for patents that fall outside of a technological standard.<sup>13</sup>

### ***SSOs and SEPs***

Standards can offer significant procompetitive benefits: they may facilitate product interoperability, lower costs, foster innovation and efficiency, and increase competition among

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<sup>10</sup> Renata Hesse, Deputy Assistant Attorney General, U.S. Department of Justice, Business Review Letter (Feb. 2, 2015), available at <https://www.justice.gov/atr/response-institute-electrical-and-electronics-engineers-incorporated>.

<sup>11</sup> See Bill Baer, Ass't. Atty. Gen. for Antitrust, Reflections on the Role of Competition Agencies When Patents Become Essential, Remarks Before the 19th Annual International Bar Association Competition Conference, at 10 (“If there is no bad conduct by the patent holder, no improper use of enhanced market power, but rather an assertion of lawful patent rights, competition enforcers need to stand down. Otherwise we are penalizing lawful innovation.”) (Sept. 11, 2015), [hereinafter Baer IBA Remarks], available at [www.justice.gov/opa/file/782356/download](http://www.justice.gov/opa/file/782356/download).

<sup>12</sup> U.S. Dep't of Justice & Fed. Trade Comm'n, Antitrust Guidelines for the Licensing of Intellectual Property (1995) § 3.1, [hereinafter IP Guidelines], available at <http://www.justice.gov/sites/default/files/atr/legacy/2006/04/27/0558.pdf>.

<sup>13</sup> *Id.* (“We have seen recent examples where companies that simply would like to pay a lower royalty or obtain access to important patented technology, look to enforcement by antitrust authorities to achieve this goal for them by whatever means necessary. As I remarked at the front end of this talk, it is hard to justify antitrust intervention in a basic commercial dispute.”).

technologies for inclusion in the final industry choice.<sup>14</sup> Standards make networks, such as the Internet and wireless telecommunications, more valuable by allowing products to interoperate.<sup>15</sup>

The process by which industry standards are set varies. Usually, businesses that may otherwise be competitors collaborate by working through standard-setting organizations, such as the IEEE, to develop a standard that all firms will use going forward, regardless of whether they participated in the process.<sup>16</sup>

A patent is considered “standard essential” when its owner declares the patent as part of a standard-setting process or otherwise consents to its incorporation by an SSO into an industry standard. Once a patent is deemed an SEP, implementers (manufacturers or competitors who want to use the patent) will need a license to practice the patent for any of their products that meet the industry standard.<sup>17</sup> For example, a manufacturer that wants its routers to interoperate with other wireless devices must license the patents essential to the relevant 802.11 WiFi standards, which were established and agreed upon by the IEEE.<sup>18</sup> Technologies as old as the electric plug and wall socket, and as new as WiFi and USB ports in mobile devices, all rely on SEPs.<sup>19</sup>

### ***Patent Hold Up***

Antitrust issues may arise when standards incorporate technologies that are protected by intellectual property rights. The primary issue is the potential for “hold up” – a refusal to license the SEP or an attempt to enjoin its use – by the SEP holder after it has consented to the

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<sup>14</sup> Joint Report, U.S. Department of Justice and Federal Trade Commission, *Antitrust Enforcement and Intellectual Property Rights*, (April 2007), available at <https://www.justice.gov/atr/chapter-2-competition-concerns-when-patents-are-incorporated-collaboratively-set-standards>.

<sup>15</sup> *Id.*

<sup>16</sup> *Id.*

<sup>17</sup> Maureen Ohlhausen, Commissioner, Federal Trade Commission, Special Address at the Standards and Patent Conference (Dec. 4, 2013), available at [https://www.ftc.gov/sites/default/files/documents/public\\_statements/pragmatists-approach-navigating-intersection-ip-antitrust/131204ukantitrust.pdf](https://www.ftc.gov/sites/default/files/documents/public_statements/pragmatists-approach-navigating-intersection-ip-antitrust/131204ukantitrust.pdf).

<sup>18</sup> *Id.*

<sup>19</sup> *Id.*

incorporation of its technology in a standard by an SSO and manufacturers have incurred sunk costs that make it difficult to switch to an alternative standard.<sup>20</sup> The owner of an SEP may have the power to extract higher royalties that reflect the absence of competitive alternatives rather than the actual market value of the technology before the standard was adopted, and consumers of standard-compliant products may be harmed if those higher royalties are passed on in the form of higher prices.<sup>21</sup> Patent hold up can further harm competition by discouraging investments by manufacturers to implement the standard, ultimately reducing competition in downstream markets for standard-compliant products.<sup>22</sup>

To reduce the risk of patent hold up, many SSOs require members to disclose the patents that may read on a proposed standard, and to state whether they are willing to license those patents on FRAND terms.<sup>23</sup> If the patent holder refuses, the SSO can select an alternate technology or change the standard before extensive switching costs accrue.<sup>24</sup> But, when an SEP holder voluntarily agrees to license its technology on FRAND terms as a condition of winning a place in the standard, a subsequent breach of that agreement may raise antitrust concerns.<sup>25</sup>

Antitrust liability in the U.S. requires more than mere breach of a FRAND commitment because “an otherwise lawful monopolist’s end-run around price constraints,” in the form of a FRAND commitment, “does not alone present a harm to competition in the monopolized market.”<sup>26</sup> Rather, antitrust liability will be imposed only where the patent holder’s standard-

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<sup>20</sup> Joint Report, U.S. Department of Justice and Federal Trade Commission, *Antitrust Enforcement and Intellectual Property Rights*, (April 2007), available at <https://www.justice.gov/atr/chapter-2-competition-concerns-when-patents-are-incorporated-collaboratively-set-standards>.

<sup>21</sup> *Id.*

<sup>22</sup> *Id.*

<sup>23</sup> Edith Ramirez, Chairwoman, Federal Trade Commission, Keynote Address at the Georgetown University Law Center 8<sup>th</sup> Annual Global Antitrust Enforcement Symposium (Sep. 10, 2014), available at [https://www.ftc.gov/system/files/documents/public\\_statements/582451/140915georgetownlaw.pdf](https://www.ftc.gov/system/files/documents/public_statements/582451/140915georgetownlaw.pdf).

<sup>24</sup> *Id.*

<sup>25</sup> *Id.*

<sup>26</sup> *Rambus Inc. v. FTC*, 522 F.3d 456, 466 (D.C. Cir. 2008).

setting misconduct allowed it to obtain monopoly power by virtue of its incorporation in the standard; where the standard-setting organization would have incorporated the IP in question even absent the false commitment to license on FRAND terms, there is no unlawful acquisition of monopoly power and no basis for a U.S. antitrust claim.<sup>27</sup>

### ***Injunctive Relief: An Antitrust Violation?***

Some commentators have argued that when a patent becomes part of a standard in exchange for the patent holder's promise to license the technology on FRAND terms, antitrust law should limit the SEP holder's ability to enjoin a manufacturer from selling a standardized product if that manufacturer doesn't pay whatever fees the patent holder demands.<sup>28</sup> Others however, including DC Circuit Judge Douglas Ginsburg and former FTC Commissioner Joshua Wright, have argued that the law of contracts and of injunctions are sufficient to avoid harm to consumers, without the need to invoke antitrust law.<sup>29</sup> They note that the application of antitrust law in this situation could, by undermining the ability of courts to tailor appropriate remedies, diminish the incentives for companies to innovate and for industries to adopt standards.<sup>30</sup>

Disputes regarding whether license terms offered for an SEP subject to a FRAND obligation are not uncommon because of the difficulty in determining whether fees are "reasonable." Courts have resolved such disputes as a matter of contract interpretation.<sup>31</sup>

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<sup>27</sup> *Id.*

<sup>28</sup> Douglas Ginsburg, Taylor Owings, and Joshua Wright, *Enjoining Injunctions: The Case Against Antitrust Liability for Standard Essential Patent Holders Who Seek Injunctions*, THE ANTITRUST SOURCE, (Oct. 2014), [http://www.americanbar.org/content/dam/aba/publishing/antitrust\\_source/oct14\\_ginsburg\\_10\\_21f.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/publishing/antitrust_source/oct14_ginsburg_10_21f.authcheckdam.pdf).

<sup>29</sup> *Id.*

<sup>30</sup> *Id.*

<sup>31</sup> *Id.* See, e.g., *Microsoft Corp. v. Motorola, Inc.*, No. 10-1823, WL 2111217 (W.D. Wash. Apr. 25, 2013) (Judge Robart using a modified version of the *Georgia-Pacific* factors for determining "reasonable royalty" damages to set a FRAND range for fees to license a SEP); see also *Realtek Semiconductor Corp. v. LSI Corp.*, No. C-12-3451, ECF No. 298, at 15-17 (N.D. Cal. Feb. 23, 2014) (instructing the jury specifically on FRAND agreement "not to consider LSI's advantage resulting from the standard's adoption, if any, but to consider any advantage resulting from the technology's superiority"); *In re Innovatio IP Ventures, LLC Patent Litigation*, No. 11-9308,

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Nonetheless, the question remains whether the law of contracts is sufficient to achieve a FRAND price if the SEP holder can threaten the manufacturer with an injunction (or an exclusion order from the International Trade Commission (“ITC”)).<sup>32</sup> For proponents of antitrust liability, seeking an injunction violates Section 2 of the Sherman Act because it reduces the number of competitors practicing the standard – contrary to the SEP holder’s agreement to license all comers whether they are rivals or not – and it allows the SEP holder to monopolize the market for products incorporating the standardized technology.<sup>33</sup>

The potentially anti-competitive effect of filing for an injunction depends on the likelihood of it being granted. In *eBay Inc. v. MercExchange, LLC*,<sup>34</sup> the Supreme Court established the test for granting an injunction when a manufacturer infringes a patent, a test that also applies when a manufacturer is unlicensed because it has refused to accept the proposed FRAND terms for an SEP license. The SEP holder must demonstrate that it has suffered an irreparable injury; that remedies available at law, such as monetary damages, are inadequate to compensate for that injury; that considering the balance of hardships between the plaintiff and defendant, a remedy in equity is warranted; and finally, that the public interest would not be disserved by a permanent injunction.<sup>35</sup>

The fourth factor allows judges to consider harm to consumers. For example, if the SEP holder could enjoin the sale of the end product that includes the SEP, then it could potentially exercise power in that market by raising either the price of the product or the licensing fee it

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2013 WL 5593609, at \*4-\*8 (N.D. Ill. Oct. 3, 2013) (adopting and modifying Judge Robart’s FRAND analysis).

<sup>32</sup> *Id. See e.g.*, Greg Sivinski, *Patently Obvious: Why Seeking Injunctions on Standard-Essential Patents Subject to a FRAND Commitment Can Violate Section 2 of the Sherman Act*, COMPETITION POL’Y INT’L, Oct. 2013; Am. Antitrust Inst., Request for Joint Enforcement Guidelines on the Patent Policies of Standard Setting Organizations 5-9, 14-15 (May 23, 2013).

<sup>33</sup> Douglas Ginsburg, Taylor Owings, and Joshua Wright, *Enjoining Injunctions: The Case Against Antitrust Liability for Standard Essential Patent Holders Who Seek Injunctions*, THE ANTITRUST SOURCE, (Oct. 2014), [http://www.americanbar.org/content/dam/aba/publishing/antitrust\\_source/oct14\\_ginsburg\\_10\\_21f.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/publishing/antitrust_source/oct14_ginsburg_10_21f.authcheckdam.pdf).

<sup>34</sup> 547 U.S. 388 (2006).

<sup>35</sup> *Id.* at 391.

charges other sellers.<sup>36</sup> Justice Kennedy, concurring in *eBay*, said “when the patented invention is but a small component of the product the companies seek to produce, and the threat of an injunction is employed simply for undue leverage in negotiations, legal damages may well be sufficient to compensate for the infringement and an injunction may not serve the public interest.”<sup>37</sup> Moreover, the SEP holder’s promise to license the patent on FRAND terms, is itself evidence under the first and second *eBay* factors that monetary damages are available and adequate to compensate the SEP holder, thus eliminating the need for injunctive relief.<sup>38</sup>

While the ITC is not bound by *eBay* factors in deciding whether to grant an exclusion order,<sup>39</sup> the factors it considers under Section 337 of the Tariff Act may protect competition law interests even more directly. Those factors include the public health and welfare; competitive conditions in the U.S. economy; the production of like or directly competitive products in the U.S.; and U.S. consumers.<sup>40</sup> U.S. antitrust agencies themselves agree the ITC can protect consumer welfare under these standards.<sup>41</sup>

### ***Could Antitrust Sanctions for Seeking an Injunction Harm Innovation?***

Antitrust liability comes with treble damages and therefore may over-deter SEP holders that need an injunction to recoup the value added by their patents and have no other adequate remedy against an infringing user.<sup>42</sup> Judge Ginsburg argues that an SEP holder with a credible claim may fear a contrary finding and abandon its right to an injunction to avoid the risk of being

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<sup>36</sup>Douglas Ginsburg, Taylor Owings, and Joshua Wright, *Enjoining Injunctions: The Case Against Antitrust Liability for Standard Essential Patent Holders Who Seek Injunctions*, THE ANTITRUST SOURCE, (Oct. 2014), [http://www.americanbar.org/content/dam/aba/publishing/antitrust\\_source/oct14\\_ginsburg\\_10\\_2>If.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/publishing/antitrust_source/oct14_ginsburg_10_2>If.authcheckdam.pdf).

<sup>37</sup> 547 U.S. at 396-97.

<sup>38</sup> Ginsburg, *supra* note 33.

<sup>39</sup> *See Spansion, Inc. v. ITC*, 629 F.3d 1331 (Fed. Cir. 2010).

<sup>40</sup> 19 U.S.C. § 1337(d).

<sup>41</sup> U.S. Department of Justice and U.S. Patent & Trademark Office, Policy Statement, *supra* note 7.

<sup>42</sup> *Id.* *See also* Bruce Kobayashi & Joshua D. Wright, *The Limits of Antitrust and Patent Holdup: A Reply to Cary et al.*, 78 ANTITRUST L.J. 505 (2012).

held liable for treble damages for seeking that injunction in the first place.<sup>43</sup> Over-detering SEP holders from seeking an injunction may diminish the value of their patents and hence their incentive to innovate.<sup>44</sup> It also might enable a standards implementer using SEPs to negotiate in bad faith, knowing its exposure is capped at the FRAND licensing rate.<sup>45</sup> Naturally, a patent holder may not want to contribute its technology to an SSO if doing so will require it to give up the option to protect its rights by seeking an injunction against users who are not paying adequate licensing fees.<sup>46</sup> Those opposed to restricting injunctive relief say these possibilities, far from protecting the public interest in competition and innovation, actually threaten the gains from innovation and standardization.<sup>47</sup>

### *Mitigating Hold Up*

Current FTC Commissioner Maureen Ohlhausen, in joining her former colleague, has argued that that an SEP holder does not violate the antitrust law merely by seeking an injunction, without more.<sup>48</sup> She notes that other factors, besides antitrust enforcement, may mitigate hold-up. For example, as patent holders are frequent participants in standard-setting activities, they may incur reputational and business costs that could be sufficiently large to deter fraudulent behavior.<sup>49</sup> Patent holders may also enjoy a first-mover advantage if their technology is adopted as the standard.<sup>50</sup> As a result, SEP holders may find it more profitable to offer attractive licensing terms in order to promote the adoption of standard-compliant products, increasing demand for

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<sup>43</sup> *Id.*

<sup>44</sup> Bo Vesterdorf, *Antitrust Enforcement and Civil Rights: SEPs and FRAND Commitments*, COMPETITION POL'Y INT'L, Aug. 2014.

<sup>45</sup> *Id.*

<sup>46</sup> Ginsburg, *supra* note 33.

<sup>47</sup> *Id.*

<sup>48</sup> Maureen Ohlhausen, Commissioner, Federal Trade Commission, Special Address at the Standards and Patent Conference (Dec. 4, 2013), available at [https://www.ftc.gov/sites/default/files/documents/public\\_statements/pragmatists-approach-navigating-intersection-ip-antitrust/131204ukantitrust.pdf](https://www.ftc.gov/sites/default/files/documents/public_statements/pragmatists-approach-navigating-intersection-ip-antitrust/131204ukantitrust.pdf).

<sup>49</sup> *Id.*

<sup>50</sup> *Id.*

those products rather than extracting higher royalties.<sup>51</sup> Finally, competitors that have broad cross-licensing agreements with SEP holders may be protected from hold-up.<sup>52</sup>

### ***Patent Hold Out***

The FTC has also acknowledged the possibility that “hold out” – elimination of competition among potential licensees of the SEP – raises competitive issues. While SEP holders may have the incentive to leverage the switching costs associated with the adoption of a standard and breach a FRAND commitment, “potential licensees may seek to take advantage of FRAND commitments by ‘holding out’ for very low royalties or simply by not undertaking licensing negotiations in good faith.”<sup>53</sup>

Absent the risk of an injunction, the manufacturer faces only the prospect that it will be required to pay the FRAND rate at some point in the future, creating no urgency to bargain in good faith.<sup>54</sup> Limiting a SEP owner’s ability to pursue an injunction may exacerbate the risk of patent hold out, lowering incentives to innovate and contribute cutting-edge technology to standards.<sup>55</sup>

Despite this recognition, U.S. antitrust agencies have focused far more on the risk of hold up than the risk of hold out in both policy goals and enforcement activity. Some argue that focus is natural because hold out is not always an exercise of market power.<sup>56</sup> However, even in cases where the party engaging in hold out does not possess market power on the technology buyer side, the risk of hold out is relevant to whether there is a procompetitive justification for the SEP holder seeking an injunction.<sup>57</sup>

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<sup>51</sup> *Id.*

<sup>52</sup> *Id.*

<sup>53</sup> Lisa Kimmel, *Injunctive Relief for Infringement of FRAND-Assured Standard-Essential Patents: Japan and Canada Propose New Antitrust Guidance*, COMPETITION POL’Y INT’L, Oct. 2015, available at <https://www.crowell.com/files/Injunctive-Relief-for-Infringement-of-FRAND-Assured-Standard-Essential-Patents-Japan-and-Canada-Propose-New-Antitrust-Guidance.pdf>.

<sup>54</sup> *Id.*

<sup>55</sup> *Id.*

<sup>56</sup> *Id.*

<sup>57</sup> *Id.*

### ***Agency Enforcement***

When the FTC has challenged patent hold up, it has done so under Section 5 of the FTC Act, which prohibits “unfair methods of competition.”<sup>58</sup> In 2013, the agency investigated a proposed acquisition by Robert Bosch GmbH that raised competitive concerns in the market for certain automotive air conditioning repair equipment.<sup>59</sup> During the course of the investigation, FTC staff learned that the acquired company, SPX Service Solutions (SPX), had sought injunctive relief against manufacturers that were interested in licensing certain SPX patents that may have been standard-essential and that SPX allegedly had committed to license on FRAND terms.<sup>60</sup> The FTC ultimately alleged that SPX harmed competition when it reneged on its obligation to license on FRAND terms by seeking injunctions against willing licensees of those patents.<sup>61</sup> To address the patent allegations, the FTC required Bosch, first, to agree not to seek injunctions on its SEPs against parties that are willing to license such patents, and, second, to license the relevant air conditioning patents to the defendant manufacturers on a royalty-free basis.<sup>62</sup>

The same year, the FTC investigated and ultimately entered a settlement with Google and its recently acquired subsidiary, Motorola Mobility.<sup>63</sup> As in Bosch, the FTC alleged that Google and Motorola violated Section 5 of the FTC Act – but not the antitrust laws – when they too reneged on commitments to license patents essential to cellular, video, and WiFi standards on FRAND terms, instead seeking injunctions and exclusion orders against manufacturers willing to

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<sup>58</sup> Federal Trade Commission Act, 15 U.S.C. §§ 41-58 (1950).

<sup>59</sup> Robert Bosch GmbH, FTC Docket No. C-4377 (Apr. 24, 2013), available at <https://www.ftc.gov/enforcement/cases-proceedings/1210081/bosch-robert-bosch-gmbh>.

<sup>60</sup> *Id.*

<sup>61</sup> *Id.*

<sup>62</sup> *Id.*

<sup>63</sup> Motorola Mobility LLC, FTC Docket No. C-4410 (July 24, 2013), available at <https://www.ftc.gov/enforcement/cases-proceedings/1210120/motorola-mobility-llc-google-inc-matter>

accept a FRAND license.<sup>64</sup> The commission alleged that Google continued the same conduct after acquiring MMI.<sup>65</sup>

### ***Conclusion***

While a consensus appears to be emerging between the DOJ and the FTC regarding the possible role of antitrust in restricting SEP holder conduct, it is not without opposition. Many contend that not only does contract law provide a superior alternative to antitrust law in this area, but that application of the antitrust laws to SEP holders who seek injunctions may cause more harm than good – especially because the competitive harm from injunctions may be more theoretical than real to this point. Nonetheless, the FTC has since 2013 directly addressed cases of patent hold up under its Section 5 authority, and the DOJ, while not getting directly involved in private lawsuits, has vowed to keep a close watch on developments involving SEPs.

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<sup>64</sup> *Id.*

<sup>65</sup> *Id.*