



**ANTONIN SCALIA
LAW SCHOOL**

**THE FEDERAL TRADE COMMISSION'S HEARINGS ON
COMPETITION AND CONSUMER PROTECTION IN THE 21ST CENTURY,
INNOVATION AND INTELLECTUAL PROPERTY POLICY,
COMMENT OF THE GLOBAL ANTITRUST INSTITUTE,
ANTONIN SCALIA LAW SCHOOL, GEORGE MASON UNIVERSITY**

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**The Federal Trade Commission’s Hearings on Competition and Consumer Protection
in the 21st Century, Innovation and Intellectual Property Policy,
Comment of the Global Antitrust Institute,
Antonin Scalia Law School, George Mason University**

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This Comment is submitted in relation to the Federal Trade Commission’s (“FTC”) Hearings on Competition and Consumer Protection in the 21st Century. We submit this Comment based upon our extensive experience and expertise in antitrust law and economics.¹ As an organization committed to promoting sound economic analysis as the foundation of antitrust enforcement and competition policy, the Global Antitrust Institute commends the FTC for holding these hearings and for inviting discussion concerning a range of important topics.

In this Comment, we will discuss contemporary issues involving innovation, Standard Essential Patents (“SEPs”), and Fair, Reasonable, and Non-Discriminatory (“FRAND”) pricing commitments. As we move forward in an era marked by constant

¹ The Global Antitrust Institute (GAI), a division of the Antonin Scalia Law School at George Mason University (Scalia Law), is a leading international platform for economic education and research that focuses upon the legal and economic analysis of key antitrust issues confronting competition agencies and courts around the world. University Professor Joshua D. Wright, Ph.D. (economics), is the Executive Director of the GAI and a former U.S. Federal Trade Commissioner. John M. Yun, Ph.D. (economics), is the Director of Economic Education, Associate Professor of Law at Scalia Law, and former Acting Deputy Assistant Director in the Bureau of Economics, Antitrust Division, at the U.S. Federal Trade Commission. Professor of Law Douglas H. Ginsburg is a Senior Judge, United States Court of Appeals for the District of Columbia Circuit, Chairman of the GAI’s International Board of Advisors, and a former Assistant Attorney General in charge of the Antitrust Division of the U.S. Department of Justice. Tad Lipsky is the Director of GAI’s Competition Advocacy Program, Adjunct Professor at Scalia Law, a former Deputy Assistant Attorney General for Antitrust and a former Acting Director, Bureau of Competition, U.S. Federal Trade Commission. The GAI gratefully acknowledges substantial assistance in the preparation of this Comment provided by Scalia Law students Nicole Booth and Tyler Phelps.

innovation revolving around Intellectual Property (“IP”) rights, it is imperative that the FTC recognize that these IP rights should be treated under the same analytical framework as other property rights and upheld regardless whether the setting is private licensing or FRAND commitments. Our modern law and jurisprudence are well-developed in the area of IP rights, and the reliance on IP rights in the standard-development process should not be accompanied by a move away from this well-developed body of law. In writing this Comment, we want to emphasize the importance of strong IP rights, the lack of evidence supporting the concern over holdup issues, and the need for the FTC to recalibrate priorities in the relationship between IP and antitrust.

The Importance to Competition of Strong IP Rights

Economic learning over time has led to the conclusion that the standard-development process is generally procompetitive, subject to a couple of conditions.² One of these conditions is that IP rights be treated similarly to other property rights with respect to the protections accorded to holders. The other condition is that the breach of FRAND commitments be treated not as an antitrust violation but as a breach of contract.

² See Joshua D. Wright & Douglas H. Ginsburg, *Whither Symmetry? Antitrust Analysis of Intellectual Property Rights at the FTC and DOJ* 21 (George Mason Law & Econ. Research Paper No. 13-71, 2013), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2365577.

The involvement of innovators and implementers in the standard-development process is procompetitive for a variety of reasons. For one, standard-development organizations (“SDOs”) act to balance the objectives of patent holders and implementers in a way that mimics a dynamic marketplace through the selective inclusion of SEPs.³ As such, SDOs can be viewed as a method of bringing together various patent holders to promote innovation. SDOs are capable of combining the benefits of several potentially complementary patents into a standard that can function as a whole greater than the sum of its individual parts, thus enabling the creation of better products for the marketplace. Further, there is value for each individual patent holder in participating in a standard via the increased demand for licenses to use its patents. The benefits of inclusion in a standard include promoting *ex ante* competition amongst various inventors and patent holders. This competition often takes the form of increased efforts to innovate beyond what other patent holders have already created. Thus, the standard-development process can promote competition in both product and innovation markets.

Due to the nature of the standard-development process, it is important for the FTC to incentivize further engagement of patent holders and inventors by firmly upholding and protecting IP rights. Chief among these protections is the right to

³ See Joanna Tsai & Joshua D. Wright, *Standard Setting, Intellectual Property Rights, and the Role of Antitrust in Regulating Incomplete Contracts*, 80 ANTITRUST L.J. 157 (2015).

exclude, which often comes in the form of an injunction against the unauthorized use of one's IP. The ability to charge above marginal cost is another protection afforded through IP rights in the United States. This protection allows inventors to recoup the often large upfront fixed-costs of developing their IP. The inability to recoup this investment would cause profound underinvestment in the innovative process. These two protections go hand in hand, as the ability to exclude is meaningless if the IP holder cannot profit from its IP, and the ability to charge above marginal cost is worthless if there is no threat of injunction against those using the IP without paying the IP holder.

There have been growing calls to deny SEP holders injunctive relief and to impose antitrust sanctions for the breach of a FRAND commitment. These proposals should be rejected because they would broadly discourage involvement in the procompetitive standard-development process. Making SEP infringement immune from injunction would effectively eliminate the right to exclude inherent in the notion of property rights because any unscrupulous or judgement-proof infringer could force the SEP holder to accept a below-FRAND rate.⁴ Additionally, there has been a push to treat the breach of a FRAND commitment made in the standard-development process as a violation of §2 of the Sherman Act. That would not be an economically sound

⁴ See Bernhard Ganglmair, Luke M. Froeb & Gregory J. Werden, *Patent Hold Up and Antitrust: How a Well-Intentioned Rule Could Retard Innovation*, 60 J. INDUS. ECON. 249 (2012) (finding that the innovator's and the implementer's holdup problems are not directly comparable as it is possible for negotiations to occur prior to the implementer's investment in the standard, but negotiations always occur after the innovator had made its investment in research and development).

policy.⁵ Treating a breach of promise as an antitrust violation would make it difficult, if not impossible, to charge licensing fees above marginal cost, because antitrust law is not as well equipped as contract law to deal with efficient breach; and pricing above marginal cost is necessary merely to recoup the upfront investment in IP rights and compensate for the substantial risks associated with seeking to create and commercialize intellectual property. Absent the ability to charge licensing fees above marginal cost, IP holders would be reluctant to expose themselves to the formidable cost and disruption of potential antitrust litigation, as well as the severity of antitrust remedies without the option for a competitive rate of return on investment.⁶ Effectively, these changes would greatly reduce the incentive to participate in the standard-development process, thereby diminishing competition and the efficient use and distribution of IP.⁷

In the light of these concerns, we recommend that the FTC not discourage SEP holders from suing for injunctive relief against patent infringement. Consequently, breaches of FRAND commitments should be assessed under contract law, and not

⁵ See Douglas H. Ginsburg et al., *The Troubling Use of Antitrust to Regulate FRAND Licensing*, 10 COMPETITION POL'Y INT'L ANTITRUST CHRON. NO. 1 (Oct. 2015); Benjamin Klein, *Market Power in Antitrust: Economic Analysis After Kodak*, 3 SUP. CT. ECON. REV. 43, 62-63 (1993) ("Antitrust law should not be used to prevent transactors from voluntarily making specific investments and writing contracts by which they knowingly put themselves in a position where they may face a 'hold-up' in the future [C]ontract law inherently recognizes the pervasiveness of transactor-specific investments and generally deals with 'hold-up' problems in a subtle way, not by attempting to eliminate every perceived 'hold-up' that may arise.").

⁶ See generally Benjamin Klein & John Shepard Wiley Jr., *Competitive Price Discrimination As An Antitrust Justification for Intellectual Property Refusals to Deal*, 70 ANTITRUST L.J. 599 (2003).

⁷ See Ganglmair et al., *supra* note 4.

antitrust law, as contract law is generally sufficient to provide optimal deterrence for breach of a license commitment.⁸

Holdup Should Not Be a Concern

One of the main concerns likely to be expressed about the preceding recommendations is that providing injunctive relief for infringing an SEP and antitrust redress for breach of a FRAND commitment would increase the frequency of costly holdups and holdouts on the part of IP holders and implementers.⁹ These concerns are not supported by evidence, however.¹⁰ On the contrary, incentives provided by vigorous IP protection and reliance on contract law actually serve to reduce the incentives of IP holders and implementers to engage in holdup and holdout.

Consider the role of Patent Assertion Entities (“PAEs”). These firms ostensibly acquire patents in order to engage in *ex-post* opportunism by asserting their patents at a late stage in the development of products that rely on the use of the patent, effectively

⁸ See Bruce H. Kobayashi & Joshua D. Wright, *The Limits of Antitrust and Patent Holdup: A Reply to Cary, et al.*, 78 ANTITRUST L.J. 505 (2012).

⁹ Holdout refers to the *ex-ante* underinvestment in innovation and competition, and overall lack of participation, in the SDO process by patent holders. Holdup refers to the *ex-post* opportunism on the part of patent holders.

¹⁰ See, e.g., J. Gregory Sidak, *The Antitrust Division’s Devaluation of Standard-Essential Patents*, 104 GEO. L.J. ONLINE 48, 61 (2015) (collecting studies at n. 49) (“By early 2015, more than two dozen economists and lawyers had disapproved or disputed the numerous assumptions and predictions of the patent-holdup and royalty-stacking conjectures.”), <https://www.criterioneconomics.com/docs/antitrustdivisions-devaluation-of-standard-essential-patents.pdf>; ANNE LAYNE-FARRAR, PATENT HOLDUP AND ROYALTY STACKING THEORY AND EVIDENCE: WHERE DO WE STAND AFTER 15 YEARS OF HISTORY? (Dec. 2014) (surveying the economic literature and concluding that the empirical studies conducted thus far have not shown holdup is a common problem), <http://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=DAF/COMP/WD%282014%2984&doclanguage=en>.

creating a holdup situation whereby they could charge supra-competitive licensing fees. In recent years, both the FTC and the European Commission have studied PAEs intensively.¹¹ Their research has demonstrated that PAEs are involved in only a small proportion of SEP disputes.¹²

Further, were *ex-post* opportunism in licensing SEPs a systemic problem – that is, were a market failure preventing firms from efficiently contracting to minimize their risk – one would expect to repeatedly and consistently observe one-sided SDO contracts that do not reflect the risk of opportunism and that protect primarily SEP holders rather than potential licensees. Again, however, the empirical evidence shows that SDO contract terms vary both across organizations and over time in response to changes in the perceived risk of patent holdup and other factors.¹³ The ability to protect patent rights through injunctive relief promotes efficiency in the market through contracts that effectively deter patent holdout.

The incentive structure surrounding SEPs discourages potentially opportunistic holdup. For example, in situations where there may be repeated dealings, reputational costs can deter behavior that exploits counterparties, especially when considering that

¹¹ See, e.g., FED. TRADE COMM'N, PATENT ASSERTION ENTITY ACTIVITY: AN FTC STUDY (2016), <https://www.ftc.gov/reports/patent-assertion-entity-activity-ftc-study>; Joint Research Ctr., Eur. Comm'n, JRC103321, *Patent Assertion Entities in Europe* (Nikolaus Thumm & Gary Gabison eds., 2016), <https://ec.europa.eu/jrc/en/publication/eur-scientific-and-technical-research-reports/patent-assertion-entities-europe-their-impact-innovation-and-knowledge-transfer-ict-markets>.

¹² See FED. TRADE COMM'N, PATENT ASSERTION ENTITY ACTIVITY, *supra* note 11 at 136 (Stating that less than 1% of study patents – *i.e.*, patents owned by a PAE – were subject to a FRAND commitment to an SDO).

¹³ See Tsai & Wright, *supra* note 3.

IP holders benefit from a first-mover advantage if their technology is incorporated into a standard, as implementers may be wary of incorporating IP held by a party that has previously engaged in exploitative conduct. Additionally, any incentives to holdup actually run in both directions,¹⁴ which serves as a check on either side engaging in opportunism. Finally, given the dynamic nature of competition and the repeated nature of interactions, we should not discount the incentive the IP holders have to promote widespread incorporation of their IP into various products – which can be achieved through more competitive pricing.

Prohibiting injunctive relief in hope of addressing potential holdup problems could actually encourage holdout on the part of implementers, which would put SEP holders at a disadvantage. Without the potential availability of injunctive relief, holdout by implementers may actually reduce both innovation and competition.¹⁵ In fact, the Institute of Electrical and Electronics Engineers’ (“IEEE”) recent experiences confirm this risk of holdout reducing innovation and competition.¹⁶

¹⁴ See Ginsburg *et al.*, *supra* note 5.

¹⁵ See Tsai & Wright, *supra* note 3 (finding SDO bylaws generally do not prohibit SEP holders from seeking injunctions).

¹⁶ Ron D. Katznelson, Presentation at IEEE GLOBECOM 2015: Decline in Non-Duplicate Licensing Letters of Assurance (LOAs) from Product/System Companies for IEEE Standards (updated Mar. 30, 2016), <https://works.bepress.com/rkatznelson/80/> (noting the decline in letters of assurance under new IEEE patent policy); Letter from Lawrence F. Shay, Exec. Vice President of Intellectual Prop., InterDigital, Inc., to David Law, Patent Comm. Chair, IEEE-SA Standards Bd. (Mar. 24, 2015), <http://wpuploads.interdigital.com.s3.amazonaws.com/uploads/2015/03/Letter-to-IEEE-SA-PatCom.pdf> (“InterDigital will not make licensing assurances under the new policy; and will instead make alternative licensing assurances, on a case-by-case basis, that are consistent with the goals of driving technology adoption while ensuring fair compensation for research success.”); Letter from Gustav Brismark, Vice President, Strategy & Portfolio Mgmt., Ericsson AB, to Eileen M. Lach, Gen. Counsel & Chief Compliance

As shown by the empirical evidence and the incentive structure of the system, the concern over potential problems involving holdup or holdout are overstated and should not serve as an obstacle to protecting IP rights in the same way that other forms of property are protected from appropriation.

Recalibration of Enforcement Priorities in IP and Antitrust

The FTC should reject the presumption that SEPs entail antitrust market power and instead focus its analysis on consumer welfare effects and the incentives to innovate. The presumption of market power can only lead the agency away from its goal of promoting competition and innovation.¹⁷

Prominent officials in the antitrust community have already voiced their concern that agencies have begun to stray from best practices. For example, former FTC Acting Chairman Maureen Ohlhausen criticized the *Google v. Motorola* decree as inconsistent with U.S. antitrust law because it seems to punish an SEP holder for seeking an injunction for infringement.¹⁸ Additionally, the Assistant Attorney General for

Officer, IEEE (Oct. 21, 2014), http://www.mlex.com//Attachments/2015-10-26_5P338037F7HPVP5L/randterms.pdf (“Consequently, it appears that, moving forward, Ericsson would not be able to submit any [Letters of Assurance] under the terms of the proposed new IEEE-SA policy.”); Letter from Irwin Mark Jacobs, Founding Chairman & CEO Emeritus, Qualcomm, to Dr. Roberto Boisson de Marca, President & CEO, IEEE (Nov. 19, 2014), <http://www.advancingengineering.org/irwin-jacobs>.

¹⁷ See, e.g., Complaint, *In re Motorola Mobility LLC & Google Inc.*, No. C-4410, 2013 WL 3944149 (July 23, 2013); Complaint, *In re Robert Bosch GmbH*, No. C-4377 (Nov. 21, 2012), <https://www.ftc.gov/sites/default/files/documents/cases/2012/11/121126boschcmpt.pdf>; Complaint, *In re Negotiated Data Sols. LLC*, No. C-4234, 2008 WL 4407246 (Sept. 22, 2008).

¹⁸ See Maureen K. Ohlhausen, *The Elusive Role of Competition in the Standard-Setting Antitrust Debate*, 20 STAN. TECH. L. REV. 93 (2017), https://www.ftc.gov/system/files/documents/public_statements/1229923/20-1-3-ohlhausen-antitrust-debate.pdf.

Antitrust, Makan Delrahim, has rejected antitrust attacks on SEP holders for seeking injunctive relief:

[A] violation by a patent holder of an SDO rule that restricts a patent-holder's right to seek injunctive relief should be appropriately the subject of a contract or fraud action, and rarely if ever should be an antitrust violation. Patents are a form of property, and the right to exclude is one of the most fundamental bargaining rights a property owner possesses. Rules that deprive a patent holder from exercising this right – whether imposed by an SDO or by a court – undermine the incentive to innovate and worsen the problem of hold-out. After all, without the threat of an injunction, the implementer can proceed to infringe without a license, knowing that it is only on the hook only for reasonable royalties.¹⁹

In the previous administration, the FTC showed a willingness to allege that breach of a FRAND commitment violated Section 5's prohibition on unfair methods of competition.²⁰ The view that contractual opportunism on its own gives rise to an antitrust violation, rather than a contract breach, is in tension with substantial economic literature on the subject.²¹

Prior Section 5 challenges to breaches of FRAND commitments resulted in consent agreements in which the FTC extracted commitments not to seek injunctive

¹⁹ Makan Delrahim, Assistant Att'y Gen., Antitrust Div., U.S. Dep't. of Justice, *Take It to the Limit: Respecting Innovation Incentives in the Application of Antitrust Law*, Remarks as Prepared for Delivery at the USC Gould School of Law's Center for Transnational Law and Business Conference (Nov. 10, 2017) at 3, <https://www.justice.gov/opa/speech/file/1010746/download>.

²⁰ See Statement of the Fed. Trade Comm'n, *In re Negotiated Data Sols. LLC*, No. C-4234 (Jan. 23, 2008), <https://www.ftc.gov/sites/default/files/documents/cases/2008/01/080122statement.pdf>.

²¹ See Anne Layne-Farrar, *Why Patent Holdout is Not Just a Fancy Name for Plain Old Patent Infringement*, COMPETITION POL'Y INT'L (Feb. 2016); Ginsburg *et al.*, *supra* note 5; Kobayashi & Wright, *supra* note 8; Benjamin Klein *et al.*, *Vertical Integration, Appropriable Rents, and the Competitive Contracting Process*, 21 J.L. & ECON. 297 (1978).

relief. For example, the FTC entered into a consent agreement with Motorola Mobility and its parent, Google, prohibiting the companies, except in limited circumstances, from seeking injunctive relief against infringers of their FRAND-assured SEPs *worldwide*.²² That remedy conflicts not only with sound economics but with principles of international comity—principles that it is critical the United States respect given the proliferation of antitrust laws to over 130 jurisdictions across the globe today.²³

Following the FTC’s consent agreements in *Bosch*,²⁴ *Motorola*,²⁵ *N-Data*,²⁶ and the like, antitrust agencies around the world—including Canada, China, Korea, Taiwan, and Japan—adopted similar approaches, creating competition law sanctions for seeking or enforcing injunctive relief against a “willing licensee.”²⁷

²² See Decision and Order, *In re Motorola Mobility LLC & Google Inc.*, No. C-4410 (July 24, 2013), <https://www.ftc.gov/sites/default/files/documents/cases/2013/07/130724googlemotorolado.pdf>; Agreement Containing Consent Order, *In re Motorola Mobility LLC & Google Inc.*, No. C-4410 (Jan. 3, 2013), <https://www.ftc.gov/sites/default/files/documents/cases/2013/01/130103googlemotorolaagree.pdf>.

²³ See Douglas H. Ginsburg & John M. Taladay, *The Enduring Vitality of Comity in a Globalized World*, 24 GEO. MASON L. REV. 1069 (2017); See generally Paul B. Stephan, *Against International Cooperation*, in COMPETITION LAWS IN CONFLICT: ANTITRUST JURISDICTION IN THE GLOBAL ECONOMY (Richard A. Epstein & Michael S. Greve eds., 2004).

²⁴ Decision and Order, *In re Robert Bosch GmbH*, No. C-4377, 2013 WL 1911293 (Apr. 24, 2013).

²⁵ Decision and Order, *In re Motorola Mobility LLC & Google Inc.*, No. C-4410 (July 23, 2013), <https://www.ftc.gov/sites/default/files/documents/cases/2013/07/130724googlemotorolado.pdf>.

²⁶ Decision and Order, *In re Negotiated Data Sols. LLC*, No. C-4234 (Sept. 22, 2008), <https://www.ftc.gov/sites/default/files/documents/cases/2008/09/080923ndsdo.pdf>.

²⁷ See, e.g., Korea Fair Trade Comm’n, Rule No. 12, Guidelines for Review of Unreasonable Exercise of Intellectual Property Rights, *amended by* Rule No. 205, Dec. 17, 2014, art. III.5 (S. Kor.), *translated* [http://www.aipla.org/committees/committee_pages/Standards_and_Open_Source/Committee%20Documents/KFTC%20IPR%20Guidelines%20\(Amended%20Dec.%202014\).pdf](http://www.aipla.org/committees/committee_pages/Standards_and_Open_Source/Committee%20Documents/KFTC%20IPR%20Guidelines%20(Amended%20Dec.%202014).pdf); Japan Fair Trade Comm’n, Guidelines for the Use of Intellectual Property under the Antimonopoly Act, Sept. 28, 2007, Part 3(1)(e) (Japan), *translated* http://www.jftc.go.jp/en/pressreleases/yearly-2016/January/160121.files/IPGL_Frand_attachment.pdf; Anti-Monopoly Law of the People’s Republic of China (promulgated by the Standing Comm. Nat’l People’s Cong., Aug. 30, 2007, effective Aug. 3, 2008) 2007 Standing Comm. Nat’l People’s Cong. Gaz. 10, art. 26 (China) *translated*

These consent agreements, including *N-Data*, are based upon the theory that breach of a FRAND commitment alone constitutes an unfair method of competition.²⁸ Yet this theory does not qualify as an unfair method of competition under the current Section 5 Unfair Methods of Competition Policy Statement.²⁹ The reason is simple: No U.S. court has ever found a breach of FRAND—without more—is a violation of the Sherman Act.³⁰

It is essential that the FTC bear in mind certain provisions of its Antitrust Guidelines for the Licensing of Intellectual Property, issued jointly with the Department

<http://english.mofcom.gov.cn/article/policyrelease/Businessregulations/201303/20130300045909.shtml>. See also Douglas H. Ginsburg et al., *Comment on the State Administration for Industry and Commerce Anti-Monopoly Guidelines on the Abuse of Intellectual Property Rights* (George Mason Law & Econ. Research Paper No. 16-02, Jan. 2016), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2713763; Bruce H. Kobayashi et al., *Comment on the Korea Fair Trade Commission's Revised Review Guidelines on Unfair Exercise of Intellectual Property Rights* (George Mason Law & Econ. Research Paper No. 15-45, Oct. 2015), https://www.law.gmu.edu/assets/files/publications/working_papers/LS1535.pdf; Joshua D. Wright & Douglas H. Ginsburg, *Comment on the Japan Fair Trade Commission's Draft Partial Amendment to the Guidelines for the Use of Intellectual Property Under the Antimonopoly Act* (George Mason Law & Econ. Research Paper No. 15-30, Sept. 2015), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2655685; Joshua D. Wright, *The Taiwan Fair Trade Commission's Problematic Qualcomm Decision Highlights the Urgent Need for U.S. Leadership in International Antitrust*, FEDERALIST SOC'Y: REGULATORY TRANSPARENCY PROJECT (Dec. 13, 2017), <https://fedsoc.org/commentary/blog-posts/the-taiwan-fair-trade-commission-s-problematic-qualcomm-decision-highlights-the-urgent-need-for-u-s-leadership-in-international-antitrust>.²⁸ See Statement of the Fed. Trade Comm'n, *In re Negotiated Data Solutions LLC*, No. C-4234 (Jan. 23, 2008), <https://www.ftc.gov/sites/default/files/documents/cases/2008/01/080122statement.pdf>. But see Kobayashi & Wright, *supra* note **Error! Bookmark not defined.**; Bruce H. Kobayashi & Joshua D. Wright, *Intellectual Property and Standard Setting*, in the ABA HANDBOOK ON THE ANTITRUST ASPECTS OF STANDARD SETTING 95 (2010).

²⁹ See Statement of the Fed. Trade Comm'n, *On the Issuance of Enforcement Principles Regarding "Unfair Methods of Competition" Under Section 5 of the FTC Act*, at 1 (Aug. 13, 2015), https://www.ftc.gov/system/files/documents/public_statements/735381/150813commissionstatementsection5.pdf, ("Our statement makes clear that the Commission will rely on the accumulated knowledge and experience embedded within the 'rule of reason' framework developed under the antitrust laws over the past 125 years—a framework well understood by courts, competition agencies, the business community, and practitioners.").

³⁰ *Id.*

of Justice, when making enforcement decisions. The Guidelines provide: “The agencies will not presume that a patent, copyright, or trade secret necessarily confers market power upon its owner.”³¹ Treating SEPs as though they necessarily confer market power will lead to unwarranted anticompetitive restraints. If the government displays an eagerness to step in and prevent innovators from appropriating lawful gains attributable to their inventions, then potential innovators will have diminished incentives to innovate. The chief consideration when making any decision must be its effect on consumer welfare.

Conclusion

We applaud the FTC for holding these hearings to consider the current status of antitrust in the U.S. As part of this self-evaluation, we urge the FTC to scrutinize closely its recent treatment of IP rights, especially in how they relate to SEPs and FRAND commitments. We hope that moving forward the FTC will place a strong emphasis on the enforcement of IP rights, recognizing that concerns of holdup are not supported by the evidence. Further, we recommend that the FTC recalibrate its enforcement tactics in the area of IP and antitrust by moving away from some recent

³¹ FED. TRADE COMM’N & U.S. DEP’T OF JUSTICE, ANTITRUST GUIDELINES FOR THE LICENSING OF INTELLECTUAL PROPERTY, at 4 (2017) (citing *Ill. Tool Works Inc. v. Indep. Ink, Inc.*, 547 U.S. 28, 45-46 (2006)), https://www.ftc.gov/system/files/documents/public_statements/1049793/ip_guidelines_2017.pdf (“Congress, the antitrust enforcement agencies, and most economists have all reached the conclusion that a patent does not necessarily confer market power upon the patentee. Today, we reach the same conclusion.”).

decisions that do not fit within the mainstream of recent microeconomic analysis – and the agency’s own Guidelines and Section 5 Policy Statement.

Again, we thank you for the opportunity to comment in anticipation of the upcoming hearings.