

Whither Symmetry? Antitrust Analysis of Intellectual Property Rights at the FTC and DOJ

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In modern antitrust law, intellectual property rights (IPRs) are treated like all other forms of property. Beginning with the Department of Justice Antitrust Division's repudiation of the "Nine No-No's" for patent licensing more than thirty years ago, the US antitrust enforcement agencies and the courts have adhered to a largely symmetrical approach to antitrust enforcement involving all kinds of property. The principle of symmetry was made express in the 1995 Guidelines for the licensing of intellectual property, issued jointly by the Department of Justice and the Federal Trade Commission.

In this article we consider recent instances in which the antitrust agencies have departed from the principle of symmetry in enforcement actions and in policy statements to the effect that injunctive relief is inappropriate in some IPR settings, that IPR-related mergers require special review, and that breach of an IPR-enmeshed contract gives rise to antitrust liability. All reduce to the same unsupported proposition: IPRs are inherently different from other property rights and, for antitrust purposes, inherently suspect. We call upon the FTC and the DOJ to reaffirm the symmetry principle of the 1995 Guidelines, which provides a consistent and predictable theoretical framework for antitrust challenges involving intellectual property, just as antitrust functions for all other sorts of property. Consumers need a special antitrust doctrine for intellectual property no more than they need antitrust rules specific to grocers.

The modern approach of antitrust law to intellectual property rights (IPRs) is in parity with the contemporary approach of antitrust law to all other forms of property.² This has not always been the case, however. The "inhospitality tradition" of the Federal Trade Commission and of the Antitrust Division of the Department of Justice, as applied to IPRs, culminated decades ago in the "Nine No-No's," a set of formalistic, *per se* prohibitions of various patent arrangements. Agencies and courts have since then adopted a largely symmetrical approach to antitrust enforcement involving IPRs and other forms of property.

Several other doctrinal developments support the principle of symmetry in antitrust enforcement concerning intellectual and other property rights. Key among these is rejection of presumption that IPRs are "inherently suspect." That view, now discredited, arises from a misperceived contradiction between antitrust law and IPRs: antitrust constrains monopoly power, whereas IPRs confer monopoly power. This false opposition was repudiated by the Supreme Court in *Illinois Tool Works*, and with good reason;³ that IPRs necessarily confer monopoly power is inconsistent with sound economic theory and demonstrably false. The proposition that antitrust enforcement and IPRs conflict has been overtaken by the realization that each regime spurs dynamic competition.

The FTC/DOJ 1995 Guidelines on licensing IPR provide that the "[a]gencies apply the same general antitrust principles to conduct involving intellectual property that they apply to conduct involving any other form of tangible or intangible property,"⁴ but they also recognize that such symmetry does not mean they should ignore the unique features of IPRs. Rather, the agencies have sensibly incorporated economic theory and em-

pirical data regarding these unique characteristics into the standard analysis. No departure from the principle of symmetry is, or has been, necessary to do that.⁵

We consider in this article whether the antitrust agencies are at times departing from the modern conventions regarding IPRs outlined above. Antitrust academia does not lack in advocates for such a departure. A good deal of recent antitrust scholarship calls for more interventionist antitrust policy regarding IPRs – sometimes even expressly challenging the symmetry principle and calling instead for IP-specific antitrust treatment. Authors

WE CONSIDER IN THIS ARTICLE WHETHER THE ANTITRUST AGENCIES ARE AT TIMES DEPARTING FROM THE MODERN CONVENTIONS REGARDING IPRs OUTLINED ABOVE. ANTITRUST ACADEMIA DOES NOT LACK IN ADVOCATES FOR SUCH A DEPARTURE.... WE FIND TROUBLING A NUMBER OF RECENT ENFORCEMENT ACTIONS THAT DEPART FROM THE PRINCIPLE OF SYMMETRY IN ANALYZING ANTITRUST PROBLEMS INVOLVING IPRs.

expressing this view generally claim the “probabilistic” nature of patent rights induces more opportunistic or anticompetitive behavior than do rights in other types of property.⁶ Some claim the optimal level of antitrust enforcement depends upon the strength of the patent rights associated with each particular industry. For example, Professor Mark Lemley argues the antitrust laws should be strong where IPRs are also strong.⁷ In this view, antitrust acts as an *ad hoc* counterweight to IP; the need for antitrust enforcement “depends on the industry in question and the nature of the invention.”⁸

We find troubling a number of recent enforcement actions that depart from the principle of symmetry in analyzing antitrust problems involving IPRs. In particular, we examine in this article recent agency testimony and enforcement actions discouraging holders of standard essential patents (SEPs) from pursuing preliminary injunctions or exclusion orders, enforcement actions arguing that breach of a FRAND commitment constitutes an antitrust violation, and merger review involving SEPs.

These agency actions may evince a pattern of increasing hostility to IPRs. They certainly represent a departure from the modern approach and imply changes in antitrust doctrine and enforcement more generally. Two such changes bear special emphasis here. The first is a rejection of the symmetry principle in favor of expanding the application of antitrust to IPRs in way that does not apply to other types of property. The second is an extension of antitrust liability that blurs the fundamental distinction between ordinary contract law and antitrust law.

I. STANDARD ANTITRUST ANALYSIS INVOLVING IPRs

The symmetry principle holds antitrust limits the operation of IPRs in the same way it limits other rights in property. Symmetry cabins IPR-related antitrust claims and defenses alike. It implies an antitrust claim based upon the use of one’s IPR is no more suspect than a claim arising from the use of any other form of property; it also implies an antitrust claim cannot be defended on the ground that the use of an IPR is inherently less suspect than the use of some other form of property. The US antitrust agencies have recognized the “symmetry limitation” to antitrust claims in the IP Licensing Guidelines,⁹ and the D.C. Circuit endorsed the corollary limitation to defenses in *United States v. Microsoft*, wherein it observed Microsoft’s claim to an “unfettered right to use its intellectual property as it wishes” was “no more correct than the proposition that use of one’s personal property, such as a baseball bat, cannot give rise to tort liability.”¹⁰

An obvious corollary of the symmetry principle is that antitrust claims involving IPRs require no special antitrust presumptions. This does not mean conduct involving IPRs cannot run afoul of antitrust presumptions regarding inherently suspect or presumptively unlawful activity. For example, naked price-fixing is correctly held unlawful *per se* whether the underlying assets involve intellectual or other types of property rights.¹¹ Such a presumption, however, is based upon the anticompetitive effect, not the form, of the conduct. That the conduct involves the transfer, acquisition, or licensing of a particular kind of property, such as an IPR, is irrelevant to the presumption.¹² At the same time, symmetry in the antitrust analysis applied to intellectual property and to other property does not imply or require one to ignore the specific factual or institutional features of the underlying property rights.¹³

We now illustrate operation of the symmetry principle across a representative sample of business conduct in order to highlight recent departures from that principle. Consider licensing agreements, which can be challenged as either collusive or exclusionary under the antitrust laws. Consistent with the symmetry principle, the standard approach in examining an allegedly collusive patent agreement is to focus upon whether the patents are substitutes or complements. Thus, in *Summit Technology, Inc. & VISX, Inc.*,¹⁴ the FTC, applying standard antitrust principles, acknowledged that horizontal relationships involving IPRs can generate efficiencies — but also warned that agreements facilitating naked price fixing or market division would violate the antitrust laws.¹⁵ Summit and VISX had agreed to pool their patents for their rival laser eye surgery technologies, require licensees to pay \$250 to the pool each time a procedure was performed using either firm’s technology, and then split the proceeds according to a specified formula.¹⁶ The FTC successfully argued the fee established a *de facto* price floor, meaning the companies had colluded to charge a minimum fee of \$250 per procedure.¹⁷

In contrast, licensing agreements that include complementary IPR are unlikely to raise antitrust concerns. Consider the DOJ Business Review Letters concerning the various patent pools covering DVD-video, DVD-ROM, MPEG-2, and 3G standards.¹⁸ These pools included only patents “essential” to the relevant standard, which usually meant complementary patents. This focus on complementarity is not unique to IPRs; rather, it is the symmetrical application to IPR agreements of standard antitrust analysis of horizontal relationships, such as joint ventures.¹⁹

Vertical IP licensing agreements are also subject to the same analytical approach applied to vertical agreements involving other property rights. In *Illinois Tool Works, Inc. v. Independent Ink, Inc.*,²⁰ the Supreme Court, undertaking a “reexamination of the presumption of *per se* illegality of a tying arrangement involving a patented product,”²¹ rejected the “patent-equals-market-power presumption” upon which it was based, and thereby joined the longstanding consensus among antitrust scholars,²² the Congress,²³ and the antitrust agencies²⁴ that patents do not ordinarily confer monopoly power. *Independent Ink* is an avowed endorsement of symmetrical antitrust analysis for vertical IPR licensing agreements.

In fact, the symmetry principle holds across the panoply of IPR licensing arrangements. The Guidelines note that although exclusive dealing agreements involving IPR are often pro-competitive, they “may anticompetitively foreclose access to, or increase competitors’ costs of obtaining, important inputs, or facilitate coordination to raise price or reduce output.”²⁵ This is precisely the anticompetitive concern with exclusive dealing and tying contracts involving other forms of property.²⁶ The relevant factors are identical for all types of property: the percentage of inputs potentially foreclosed from rivals by the licensing arrangement or exclusive contract, the duration of the license, the ability of rivals to realign supply contracts, and barriers to entry.²⁷

Refusals to license IPRs also follow the symmetry principle. The antitrust laws have long recognized that a firm generally may, in its “own independent discretion, decline to deal with another firm.”²⁸ Courts have been reluctant to use the antitrust laws to obligate even a firm with monopoly power to deal with a rival, and in *Trinko*,²⁹ the Supreme Court placed the refusal-to-deal liability in *Aspen Skiing*³⁰ “at or near the outer boundary of §2 liability.”³¹ Patent law takes a similar approach.³² Lower courts have faithfully applied the symmetry principle, treating refusals to deal as virtually *per se* lawful³³ or granting the IP holder a presumption of legitimacy.³⁴

Finally, the symmetry principle applies to horizontal merger analysis involving IPRs. The presence of IPRs does not alter the key question identified by the agencies in the 2010 Horizontal Merger Guidelines, whether the merger creates market power that would not otherwise exist. This question requires analysis of the pre- and post-merger incentives and abilities of the merging firms; IPRs may be relevant to the analysis but only to the extent that any other property would be. Indeed, the only reference to IPRs in the Horizontal Merger Guidelines emphasizes that their combination may affect the merged firm’s ability to appropriate the gains from, and thereby its incentive to engage in, innovative activities.³⁵

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In sum, modern antitrust analysis at every turn reflects the symmetry principle endorsed in the 1995 Antitrust IP Guidelines. We next examine whether recent agency actions and statements depart from that principle.

II. IS THE SYMMETRY PRINCIPLE UNDER ATTACK AT THE ANTITRUST AGENCIES?

Recent actions by the antitrust enforcement agencies – including enforcement actions, testimony, and speeches – suggest the beginning of what could be a wholesale departure from the principle of symmetry

described above. More specifically, they evince a drift toward *ad hoc* antitrust treatment of IPRs in myriad settings, including the pursuit of preliminary injunctions or exclusion orders by holders of SEPs; the refusal of SEP holders to license them; merger analysis of transactions involving SEPs or the aggregation of patent rights by patent assertion entities (PAEs); and breaches of contract, especially FRAND contracts with standard setting organizations (SSOs).

Consider first the hostility of the enforcement agencies to SEP holders seeking injunctive relief. To be sure, there is scholarly work exploring the possibility of patent hold-up – usually perfected by the patentee seeking of an injunction in order to extract “supra-competitive” royalties³⁶ – but this only indicates that an injunction against infringement of a patent *could* be inefficient and potentially anticompetitive. It is a far cry from demonstrating, as a matter of either economic theory or empirical data, that the enforcement of a presumptively valid property right is inherently anticompetitive. The reflexive position that an SEP holder violates the antitrust laws simply by seeking an injunction to vindicate its right clearly departs from the symmetry principle.³⁷ Antitrust law does not prohibit the holder of any other right from seeking an injunction to vindicate that right and, of course, it is hardly uncommon for property rights holders to do so.

In many SSOs, the availability of injunctive relief against an infringer is very likely part of the background understanding between the SSO and its members; in fact, the right to an injunction likely accounted in part for the patent owners' decisions to join the SSO and contribute technologies under a F/RAND commitment. "Hold-up" arguments against a patentee pursuing an injunction often neglect the "reverse holdup" problem: weakening the availability of injunctive relief may undermine the incentive of SSOs to negotiate in good faith with patent holders. A key component of property, including intellectual property, is the right of the owner to exclude others from use of the property, which enables clear assignment of property rights and facilitates economic exchange. Like so many situation-specific departures from established antitrust law, "reforms" to fix the SEP hold-up problem risk reducing welfare by raising an overlooked cost.³⁸

Despite this risk, however, the antitrust agencies are increasingly opposing injunctions for aggrieved SEP holders. Recently, for example, the FTC submitted an *amicus* brief to the Federal Circuit in support of a district court's denial of injunctive relief to a RAND-encumbered holder of an SEP.³⁹ Similarly, in June 2012, the FTC encouraged the International Trade Commission to apply the "public interest standard" of Section 337 of the Tariff Act of 1930 in a manner

that would preclude granting an injunction to an SEP holder on the ground that consumers would be harmed thereby.⁴⁰ The Commission has even encouraged the Congress to take up this narrow remedial issue, abdicating the Commission's role as economic analyst in favor of proposing a simplistic legislative change.⁴¹

The DOJ has followed suit. In its Joint Statement on Remedies for Standards-Essential Patents Subject to Voluntary F/RAND Commitments, the DOJ endorsed the view that an exclusion order should generally not be granted because in a particular case "[a] decision maker could conclude that the holder of a F/RAND encumbered SEP had attempted to use an exclusion order to pressure an implementer of a standard to accept more onerous licensing terms than the patent holder would be entitled to receive consistent with the F/RAND commitment."⁴² The DOJ would allow exclusion orders "where the putative licensee is unable or refuses to take a F/RAND license and is acting outside the scope of the patent holder's commitment to license on F/RAND terms" or when the putative licensee is not subject to the jurisdiction of a court that could award damages.⁴³

Neither economic theory nor empirical evidence supports this novel and discriminatory view of FRAND-encumbered SEP holders as unworthy of an injunction to vindicate their rights. Economic theory recognizes the pro-competitive as well as the anticompetitive uses of injunctions. The FTC/DOJ position opposing injunctions for SEP holders in almost all circumstances relies upon an inexplicable presumption of net anticompetitive harm. That presumption is at odds with the conventional antitrust treatment of the exercise of property rights, and is thus in significant tension with the symmetry principle in the 1995 Antitrust-IP Guidelines.⁴⁴

The FTC's opposition to the issuance of injunctions goes beyond mere advocacy. Consider two recent enforcement actions by the agency alleging that a F/RAND-encumbered SEP holder violated Section 5 of the FTC Act by seeking an injunction.⁴⁵ In *Bosch*, the FTC alleged an SEP holder's pursuit of an injunction was an unfair method of competition.⁴⁶ In *Motorola*, the FTC alleged the company "breached its FRAND obligations

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WE THINK THIS SPARSE INTELLECTUAL FOUNDATION IS INSUFFICIENT TO SUPPORT THE SHIFT AWAY FROM THE DECADES-LONG CONVENTION RESPECTING THE SYMMETRY BETWEEN IPR AND NON-IPR ANTITRUST ANALYSIS.

by seeking to enjoin and exclude implementers of its SEPs;” that after its acquisition of Motorola, “Google used these threats of exclusion orders and injunctions to enhance its bargaining leverage against willing licensees;” and that “Motorola filed, and Google prosecuted, patent infringement claims before the United States International Trade Commission.”⁴⁷ These complaints

and consent orders, taken together, logically and necessarily depend upon the presumption that protecting a valid SEP against infringement by obtaining injunctive relief is itself anticompetitive.

There is similar evidence suggesting the IPR-specific, asymmetric view extends also to merger review. The consent decree in *Bosch* arose from the FTC’s review of the proposed acquisition of SPX Service Solutions. SPX Service Solutions, an SEP holder, had sued competitors for infringing patents essential to the practice of a standard. This, of course, is insufficient to condemn SPX Service Solutions’ litigation strategy: one cannot know, without more information, whether the injunctions would have proven anticompetitive. There is nothing unusual about a competition agency’s uncovering and prosecuting additional unlawful activity during its investigation of a merger, but in this instance the resulting consent order seems to be an incremental extension of the FTC’s asymmetric stance against patentees with SEPs, if not against IPRs more generally.

Signs of asymmetry are also found at the DOJ. On February 13, 2012, the Antitrust Division issued a closing statement in its investigation of (1) Google Inc.’s acquisition of Motorola Mobility Holdings Inc.; (2) Apple Inc., Microsoft Corp., and Research in Motion Ltd.’s (RIM’s) acquisition of patents from Nortel Networks Corp.; and (3) Apple Inc.’s acquisition of patents from Novell Inc.⁴⁸ The acquisitions all involved patents that would assist the acquiring firm in the development of cellular phone technology, including smartphones and operating systems for those phones. The DOJ had expressed concern that the acquiring companies would use the SEPs they obtained to hold up rivals, to the detriment of competition and innovation.

The DOJ concluded its investigation by declaring that none of the acquisitions was likely to lessen competition substantially, but this nominal approval concealed a radical concession by the firms. In determining it was proper to close the investigations, the DOJ “took into account the fact that during the pendency of these investigations, Apple, Google and Microsoft each made public statements explaining their respective SEP licensing practices.”⁴⁹ Specifically, Apple and Microsoft agreed not to seek injunctions for violations of their licenses they were acquiring. Google’s commitment was “less clear” to the DOJ, for which reason it “continue[d] to have concerns about the potential inappropriate use of SEPs to disrupt competition.”⁵⁰ Concluding its analysis, the DOJ emphasized its obligation to balance the “rightful exercise of patent rights” against “the anticompetitive use of those rights;”⁵¹ noticeably missing was any acknowledgement of the potential pro-competitive benefits to SSOs of injunctions against members that infringe SEPs. The DOJ’s shift in IPR enforcement policy invites the inference that the “voluntary” commitments were in fact a condition laid down by the DOJ for getting the acquisitions approved.

Each of these departures from standard antitrust analysis rests squarely upon the presumption – certainly not the demonstration – that injunctions granted to SEP holders are inherently anticompetitive or likely to be so. This presumption significantly expands the scope of antitrust liability across a variety of dynamic commercial sectors. Yet the most common defense of the presumption illustrates the second serious problem with

the agencies' new policy: it blurs the distinction between contract law and antitrust law.

The most common defense of the presumption is that seeking the injunction itself amounts to a breach of contract,⁵² which is, in turn, the crux of the antitrust violation.⁵³ At least two immediate problems arise. First, mere breach of contract is generally not an antitrust violation: even in patent holdups, federal courts require some additional conduct, such as deception in the standard-setting process, to ground an antitrust violation.⁵⁴ Second, the “injunction-seeking as breach-of-contract” theory depends upon the assumption that a F/RAND commitment comprises an implicit agreement not to seek an injunction. This is far from clear, however. Even a cursory examination of actual industry practice suggests the opposite: no SSO appears expressly to disallow injunctions,⁵⁵ and some SSOs appear expressly to have considered and rejected such a rule. Prohibiting the use of an injunction, as noted before, would subject the SEP holder to reverse hold up in which the potential licensee refuses to pay a royalty that in fact is fair, reasonable and non-discriminatory.

Given the agencies' newfound hostility to IPRs, it should come as no surprise that the FTC has also dubbed some garden-variety breaches of contract as antitrust violations. A glaring example is *N-Data*, in which the Commission alleged that departure from a contractual commitment to an SSO violated Section 5 of the FTC Act without proof that deceptive conduct accounted for the SSO adopting its technology.⁵⁶ Over dissenting statements from Chairman Majoras and Commissioner Kovacic,⁵⁷ the FTC ruled that departure from a contractual commitment to an SSO, standing alone, was enough to violate Section 5. At least one DOJ official has supported exploration of the theory that similar conduct violates Section 2 of the Sherman Act.⁵⁸

One defense of the proposition that antitrust is an appropriate regime for governing contractual disputes involving SSOs is that an SSO is best conceived of as a collaboration among competitors that have entered into a *de facto* agreement with antitrust authorities by which the authorities allow collusive interaction (in the form of standardization) in exchange for tougher antitrust scrutiny. But there is no evidence of such a *de facto* agreement, much less an agreement to depart from standard antitrust principles. Further, there is no empirical evidence supporting the proposition that breach of an SSO contract – even one resulting in higher royalty rates – has economic effects similar to the collusive interaction between rivals condemned by the antitrust laws. And, as we have noted, courts have uniformly rejected this view when interpreting and applying the Sherman Act; SSOs have been routinely considered pro-competitive.

FOR THE ANTITRUST AGENCIES TO FALL PREY TO SUCH TEMPTATION, HOWEVER, TEMPTS AN OBSERVER TO DESPAIR AT THE ANTITRUST PROJECT; IT SOMETIMES APPEARS ANTITRUST ENFORCERS ARE ESPECIALLY PRONE TO REPEATING HISTORICAL MISTAKES. YET THIS MISTAKE IS NOT ONLY NOT ANCIENT, ITS REPUDIATION IS RECENT AND SHOULD BE FRESH IN MEMORY.

In any event, the shifting approach to IPRs should be clear from the FTC and DOJ testimony in favor of restricting the availability of injunctions, from the FTC's enforcement actions attacking the pursuit of an injunction as a violation of the antitrust laws, and from the extension of Section 5 to condemn breach of a F/RAND contract with an SSO. The analytical basis for this shift rests upon two points. The first is the presumption that injunctions against infringement of a patent are inherently anticompetitive, particularly with regard to F/RAND-encumbered SEPs. The second is the inference that a FRAND commitment entails a promise not to pursue injunctive relief for infringement. We think this sparse intellectual foundation is insufficient to

support the shift away from the decades-long convention respecting the symmetry between IPR and non-IPR antitrust analysis.

III. CONCLUSIONS

Each of the arguments against symmetry for IPRs is ultimately unpersuasive. Recent agency insistence that injunctive relief is inappropriate in some IPR settings, or that IPR-related mergers require special review, or that IPR-enmeshed contracts give rise to antitrust liability for ordinary breaches of contract, all reduce to the same unsupported proposition: IPRs are inherently different from other property rights and, for antitrust purposes, inherently suspect.

We disagree. The notion that IPRs present a distinct theoretical problem for antitrust is hardly unprecedented; industries from railroads to fashion to baseball have alleged justifications for unprincipled exceptions to generally applicable antitrust rules. We can understand, if not condone, those attempts by private parties; a litigant is famously entitled to its self-serving positions, and the courts and agencies alike have nearly uniformly rejected these requests for exceptions. For the antitrust agencies to fall prey to such temptation, however, tempts an observer to despair at the antitrust project; it sometimes appears antitrust enforcers are especially prone to repeating historical mistakes. Yet this mistake is not only not ancient, its repudiation is recent and should be fresh in memory. We hope the FTC and DOJ will reaffirm the symmetry principle in the 1995 Guidelines, note that the symmetry principle provides a consistent and predictable theoretical framework for antitrust challenges involving intellectual property, just as antitrust functions for all other sorts of property. Consumers need an antitrust doctrine for intellectual property no more than they needed antitrust rules specific to grocers. ▲

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2. We exclude from the scope of our analysis in this paper antitrust scrutiny of conduct preceding the issuance of IPRs.

3. See *Illinois Tool Works Inc. v. Indep. Ink, Inc.*, 547 US 28 (2006), *rev'g* 396 F.3d 1342 (Fed. Cir. 2005).

4. US DEP'T OF JUSTICE & FED. TRADE COMM'N, ANTITRUST GUIDELINES FOR THE LICENSING OF INTELLECTUAL PROPERTY § 2.1 (1995), *reprinted in* 4 Trade Reg. Rep. (CCH) ¶ 13,132, *available at* <http://www.usdoj.gov/atr/public/guidelines/0558.pdf> [hereinafter ANTITRUST-IP GUIDELINES].

5. *Id.* (“That is not to say that intellectual property is in all respects the same as any other form of property. Intellectual property has important characteristics, such as ease of misappropriation, that distinguish it from many other forms of property. These characteristics can be taken into account by standard antitrust analysis, however, and do not require the application of fundamentally different principles.”).

6. The term “probabilistic” reflects the generally accepted proposition that the validity of patent is, on average, less certain than the validity of the title to a piece of real or personal property. See, e.g., Mark A. Lemley & Carl Shapiro, *Probabilistic Patents*, 19 J. ECON. PERSP. 75 (2005).

7. Mark A. Lemley, *New Balance Between IP and Antitrust*, 13 SW. J.L. & TRADE AM. 237, 237 (2007). The argument is grounded in the tradeoff between the benefits, on the one hand, of innovation and dynamic competition and, on the other hand,

the deadweight loss associated with monopoly. One difficulty with calibrating antitrust policy on an industry-by-industry basis based upon a presumed positive or “inverted U-shape” relationship between static product market competition and innovation is that neither economic theory nor the empirical record supports such a presumption. See Douglas H. Ginsburg & Joshua D. Wright, *Dynamic Analysis and the Limits of Antitrust Institutions*, 78 ANTITRUST L.J. 1, 4-5 (2012).

8. Lemley, *supra* note 6, at 237.

9. ANTITRUST-IP GUIDELINES, *supra* note 3, § 2.1, at 3 (discussing that the special characteristics of IP “can be taken into account by standard antitrust analysis . . . and do not require the application of fundamentally different principles”).

10. United States v. Microsoft Corp., 253 F.3d 34, 63 (2001) (per curiam).

11. See United States v. New Wrinkle, 342 US 371 (1952); ANTITRUST-IP GUIDELINES, *supra* note 3, § 3.4 (explaining the agencies will challenge horizontal agreements involving intellectual property rights as per se violations of the antitrust laws when the “type of restraint is one that has been accorded per se treatment” in other settings). See also *id.* at ex. 7 (describing an agency challenge under the per se rule of “a sham intended to cloak [the] true nature” of a particular licensing agreement).

12. The symmetry principle also applies both to *Walker Process* claims, which require proof not only of the defendant’s fraud upon the patent office but also of all the elements of a Section 2 monopolization claim, see *Walker Process Equip., Inc. v. Food Mach. and Chem. Corp.*, 382 US 172, 179 (1965), and to actions for sham litigation, see *Prof’l Real Estate Investors, Inc. v. Columbia Pictures Indus., Inc.*, 508 US 49, 61 (1993). There is no meaningful difference between the antitrust standard applied to these claims and that faced by a plaintiff alleging monopolization or attempted monopolization by the defendant having fraudulently procured a real property right or other government-granted privilege.

13. See ANTITRUST-IP GUIDELINES, *supra* note 3, § 2.1 (“Intellectual property has important characteristics, such as ease of misappropriation, that distinguish it from many other forms of property. These characteristics can be taken into account by standard antitrust analysis, however, and do not require the application of fundamentally different principles”).

14. *In re Summit Tech., Inc.*, 127 F.T.C. 208 (1999).

15. Analysis of Proposed Consent Order to Aid Public Comment, *Summit Tech., Inc.*, FTC File No. 9286, *available at* <http://www.ftc.gov/os/1998/08/d09286ana.htm>.

16. Complaint at ¶ 12, *In re Summit Tech, Inc.*, 127 F.T.C. 208 (1999), *available at* <http://www.ftc.gov/os/1998/03/summit.cmp.htm>.

17. *Id.*

18. Letter from Charles A. James, Assistant Attorney Gen., Dep’t of Justice Antitrust Div., to Ky P. Ewing, Esq., Vinson & Elkins L.L.P. (Nov. 12, 2002), *available at* <http://www.usdoj.gov/atr/public/busreview/200455.pdf>; Letter from Joel I. Klein, Assistant Attorney Gen., Dep’t of Justice Antitrust Div., to Carey R. Ramos, Esq., Paul, Weiss, Rifkind, Wharton & Garrison (June 10, 1999), *available at* <http://www.usdoj.gov/atr/public/busreview/2485.pdf>; Letter from Joel I. Klein, Assistant Attorney Gen., Dep’t of Justice Antitrust Div., to Garrard R. Beeney, Esq., Sullivan & Cromwell (Dec. 16, 1998), *available at* <http://www.justice.gov/atr/public/busreview/2121.pdf>; Letter from Joel I. Klein, Assistant Attorney Gen., Dep’t of Justice Antitrust Div., to Garrard R. Beeney, Esq., Sullivan & Cromwell (June 26, 1997), *available at* <http://www.usdoj.gov/atr/public/busreview/215742.pdf>.

19. FED. TRADE COMM’N & U.S. DEP’T OF JUSTICE, ANTITRUST GUIDELINES FOR COLLABORATION AMONG COMPETITORS § 3.2 (2000), *available at* <http://www.usdoj.gov/atr/public/busreview/200455.pdf> (“Participants in an efficiency-enhancing integration typically combine, by contract or otherwise, significant capital, technology, or other complementary assets to achieve procompetitive benefits that the participants could not achieve separately.”).

20. *Illinois Tool Works Inc. v. Indep. Ink, Inc.*, 547 US 28 (2006), *rev’g* 396 F.3d 1342 (Fed. Cir. 2005). See generally Joshua D. Wright, *Missed Opportunities in Independent Ink*, 5 CATO SUP. CT. REV. 333 (2006); Bruce H. Kobayashi, *Spilled Ink or Economics Progress: The Supreme Court’s Decision in Illinois Tool Works v. Independent Ink*, 53 ANTITRUST BULL. 5, 12-13 (2008).

21. *Id.* at 38. As others have noted, the Court’s analysis appears to conflate the presumption of market power and a special per se rule of illegality applied to patent ties. See Kobayashi, *supra* note 15, at . The Court is clear, however, that neither the market

power presumption nor the special per se rule applied to patent ties survives the Court's analysis.

22. See, e.g., 10 Philip E. Areeda et al., *Antitrust Law* ¶ 1737a (2d ed. 2004); 1 Herbert Hovenkamp et al., *IP and Antitrust: An Analysis of Antitrust Principles Applied to Intellectual Property Law* § 4.2 (“[A]n intellectual property right does not confer a monopoly.”); Richard A. Posner, *Antitrust Law* 97–98 (2d ed. 2001) (“[M]ost patents confer too little monopoly power to be a proper object of antitrust concern.”).

23. See 35 U.S.C. § 271(d)(4), (5) (requiring proof of market power in the tying product in a patent misuse case), added in 1988.

24. ANTITRUST-IP GUIDELINES, *supra* note 3, § 2.2, at 4.

25. *Id.* § 4.1.2, at 19.

26. See, e.g., Alden F. Abbott & Joshua D. Wright, *Antitrust Analysis of Tying Arrangements and Exclusive Dealing*, in *ANTI-TRUST LAW AND ECONOMICS* 183 (Keith N. Hylton ed., 2010).

27. See, e.g., *United States v. Microsoft Corp.*, 253 F.3d 34, 69-70 (2001).

28. *United States v. Colgate & Co.*, 250 US 300, 307 (1919) (“In the absence of any purpose to create or maintain a monopoly, the [Sherman] act does not restrict the long recognized right of trader or manufacturer engaged in an entirely private business, freely to exercise his own independent discretion as to parties with whom he will deal.”).

29. *Verizon Communications, Inc. v. Law Offices of Curtis V. Trinko*, 540 US 398 (2004).

30. *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 US 585 (1985).

31. The Court distinguished *Aspen Skiing* on the grounds that, among other things, (1) the defendant in *Trinko* was not alleged to have ceased a course of dealing with its rivals, (2) the defendant had not refused to sell the relevant services at the retail price it would have charged but for government regulation, and (3) the services at issue were available separately only as a result of government compulsion.

32. See, e.g., *Hartford-Empire Co. v. United States*, 323 US 386, 432-33 (patent owner “has no obligation either to use it or to grant its use to others”), *clarified by* 324 US 570 (1945); *Cont'l Paper Bag Co. v. E. Paper Bag Co.*, 210 US 405, 429 (1908) (“[E]xclusion may be said to have been of the very essence of the right conferred by the patent, as it is the privilege of any owner of property to use or not use it, without question of motive.”); see also *Townshend v. Rockwell Int'l Corp.*, No. C99-0400, 2000 US Dist. LEXIS 5070, at *23 (N.D. Cal. Mar. 28, 2000) (“[A] patent holder is permitted under the antitrust laws to completely exclude others from practicing his or her technology.”).

33. *In re Indep. Serv. Orgs. Antitrust Litig.*, 203 F.3d 1322, 1327-28 (Fed. Cir. 2000) (“[A]bsent exceptional circumstances, a patent may confer the right to exclude competition altogether.”).

34. *Image Technical Services, Inc. v. Eastman Kodak Co.*, 125 F.3d 1195, 1219-20 (9th Cir. 1997). For an economic analysis reconciling the Ninth and Federal Circuit decisions by taking into account the scope of the alleged refusal to deal in each case, see Michelle M. Burtis and Bruce H. Kobayashi, *Why an Original Can Be Better Than a Copy: Intellectual Property, the Antitrust Refusal to Deal, and ISO Antitrust Litigation*, 9 SUP. CT. ECON. REV. 143 (2001).

35. See U.S. DEP'T OF JUSTICE & FED. TRADE COMM'N, *HORIZONTAL MERGER GUIDELINES* §10, at 31 (2010), *available at* <http://www.ftc.gov/os/2010/08/100819hmg.pdf> (“The Agencies also consider the ability of the merged firm to appropriate a greater fraction of the benefits resulting from its innovations. Licensing and intellectual property conditions may be important to this enquiry, as they affect the ability of a firm to appropriate the benefits of its innovation.”).

36. See, e.g., Joseph Farrell et al., *Standard Setting, Patents, and Hold-Up*, 74 ANTITRUST L.J. 603, 611-15 (2007). The economic forces at work in such cases of *ex post* opportunism are not, however, patent-specific. Indeed, they were first identified and explored with respect to other types of property. See, e.g., Benjamin Klein, Robert Crawford & Armen A. Alchian, *Vertical Integration, Appropriable Rents, and the Competitive Contracting Process*, 21 J.L. & ECON. 297 (1978).

37. To be clear, we have no quarrel with the holding in *eBay Inc. v. MercExchange, L.L.C.* 547 US 388, 391 (2006), that whether a permanent injunction should issue in favor of a patent holder is to be determined “consistent with traditional principles of equity,” which require that the plaintiff “demonstrate: (1) that it has suffered an irreparable injury; (2) that remedies available at

law, such as monetary damages, are inadequate to compensate for that injury; (3) that, considering the balance of hardships between the plaintiff and defendant, a remedy in equity is warranted; and (4) that the public interest would not be disserved by a permanent injunction.” Indeed, the principle of symmetry requires no less. Similarly, the courts properly consider whether a patentee, like any other applicant for a preliminary injunction, has shown that it will probably succeed on the merits of its case. *See Amazon.com, Inc. v. Barnesandnoble.com*, 239 F.3d 1343, 1951 (Fed. Cir. 2001). Rather, our objection is to the idea that a patentee violates the antitrust laws merely by seeking an injunction.

38. *See generally* Joshua D. Wright, Comm’r, Fed. Trade Comm’n, SSOs, FRAND, and Antitrust: Lessons from the Economics of Incomplete Contracts (Sept. 12, 2013), <http://ftc.gov/speeches/wright/130912cpip.pdf>.

39. Brief for Fed. Trade Comm’n as Amicus Curiae Supporting Neither Party at 16, *Apple Inc. v. Motorola, Inc.*, Nos. 2012-1548 & 2012-1549 (Fed. Cir. Dec. 5, 2012) (stating that “[w]hen a patentee makes a FRAND commitment to an SSO, the irreparable harm analysis, balance of harms, and the public interest will, as here, generally militate against an injunction”). Commissioner Wright was not a member of the Commission when the brief was filed; Commissioner Ohlhausen did not vote in favor of its submission.

40. *See* Third Party United States Fed. Trade Comm’n’s Statement on the Public Interest, *In re* Certain Wireless Communication Devices, Portable Music & Data Processing Devices, Computers and Components Thereof, Inv. No. 337-TA-745 (June 6, 2012), www.ftc.gov/os/2012/06/1206ftcwirelesscom.pdf; Third Party United States Fed. Trade Comm’n’s Statement on the Public Interest, *In re* Certain Gaming and Entertainment Consoles, Related Software, and Components Thereof, Inv. No. 337-TA-752 (June 6, 2012), <http://www.ftc.gov/os/2012/06/1206ftcgamingconsole.pdf>. Commissioner Wright was not a member of the Commission when the statement was filed.

41. Fed. Trade Comm’n, Prepared Statement of the Fed. Trade Comm’n before S. Comm. on the Judiciary, Concerning Oversight on the Competition of Exclusion Orders to Enforce Standard-Essential Patents at 2 (July 11, 2012), *available at* <http://www.ftc.gov/os/testimony/120711standardpatents.pdf>

42. UNITED STATES DEP’T OF JUSTICE & UNITED STATES PATENT & TRADEMARK OFFICE, POLICY STATEMENT ON REMEDIES FOR STANDARDS-ESSENTIAL PATENTS SUBJECT TO VOLUNTARY F/RAND COMMITMENTS, at 6 (2013), *available at* http://www.uspto.gov/about/offices/ogc/Final_DOJ-PTO_Policy_Statement_on_FRAND_SEPs_1-8-13.pdf.

43. *Id.*

44. We also aware of recent instances in which the FTC and DOJ continue to endorse the symmetry principle, at least rhetorically. *See, e.g.*, Renata Hesse, Deputy Assistant Attorney Gen., United States Dep’t of Justice, IP, Antitrust, and Looking Back on the Last Four Years (Feb. 8, 2013) (“[T]he Antitrust Division applies the same general antitrust principles to mergers and conduct matters involving intellectual property that it applies to any other type of property. That stance will continue.”).

45. Commissioner Wright did not participate in either of these decisions.

46. Complaint at ¶ 20, *In re* Robert Bosch GmbH, Docket No. C-4377, File No. 121-0081, 2012 WL 5944820 (Fed. Trade Comm’n, Nov. 21, 2012).

47. Complaint at ¶¶ 25-26, *In re* Motorola Mobility LLC, Docket No. C-4410, File No. 121-0120, 2013 WL 3944149 (Fed. Trade Comm’n, July 23, 2013).

48. Press Release, United States Dep’t of Justice, Statement of the Department of Justice’s Antitrust Division on Its Decision to Close Its Investigations of Google Inc.’s Acquisition of Motorola Mobility Holdings Inc. and the Acquisitions of Certain Patents by Apple Inc., Microsoft Corp. and Research in Motion Ltd. (Feb. 13, 2012), *available at* http://www.justice.gov/atr/public/press_releases/2012/280190.pdf.

49. *Id.*

50. *Id.*

51. *Id.*

52. *Apple, Inc. v. Motorola, Inc.*, 869 F. Supp. 2d 901, 914 (N.D. Ill. 2012) (“By committing to license its patents on FRAND terms, [the patent holder] committed to license the [patent-in-suit] to anyone willing to pay a FRAND royalty and thus implicitly

acknowledged that a royalty is adequate compensation for a license to use that patent.”).

53. This theory has been asserted primarily as a violation of Section 5 of the FTC Act. *See, e.g., In re Motorola Mobility LLC*, Docket No. C-4410, File No. 121-0120, 2013 WL 3944149 (Fed. Trade Comm’n, July 23, 2013); *In re Negotiated Data Solutions, LLC*, FTC File No. 051-0094 (Jan. 23, 2008), *available at* <http://www.ftc.gov/os/caselist/0510094/080122statement.pdf>. *Cf. Hesse, supra* note 43, at 21 (indicating the DOJ’s interest in examining whether Section 2 of the Sherman Act should apply in cases of patent holdup that do not involve deception).

54. *See Rambus Inc. v. FTC*, 522 F.3d 456, 466–67 (D.C. Cir. 2008), *cert. denied*, 129 S. Ct. 1318 (2009); *Broadcom Corp. v. Qualcomm Inc.*, 501 F.3d 297, 311 (3d Cir. 2007). In each case, the court held a showing of deception that led to the acquisition of market power was required to state a claim under the Sherman Act.

55. It is not clear that any SSO disallows injunctions. In fact, industry players have argued that, as an example, “European Telecommunications Standards Institute (ETSI) policies do not contain any provision precluding members from seeking injunctive relief when an infringer and potential licensee has rejected a FRAND licensing offer from the patent holder.” *See James Ratliff & Daniel L. Rubinfeld, The Use and Threat of Injunctions in the RAND Context*, 9 J. COMPETITION L. & ECON. 1, 7 (2013). In addition,

Most of the SSOs and their stakeholders that have considered these proposals over the years have determined that there are only a limited number of situations where patent hold-up takes place in the context of standards-setting. The industry has determined that those situations generally are best addressed through bi-lateral negotiation (and, in rare cases, litigation) as opposed to modifying the SSO’s IPR policy and arguably unnecessarily burdening the standardization process for the many ICT standards that are being widely implemented in the marketplace with no apparent IPR-related challenges.

Letter from Microsoft to the Fed. Trade Comm’n, Comment for Patent Standards Workshop, Project No. P11-1204, 3-5 (June 14, 2011), *available at* <http://www.ftc.gov/os/comments/patentstandardsworkshop/00009-60523.pdf>.

56. Statement of the Federal Trade Commission, *Negotiated Data Solutions LLC*, FTC File No. 051-0094 (Jan. 23, 2008), *available at* <http://www.ftc.gov/os/caselist/0510094/080122statement.pdf>.

57. *See, e.g., In re Negotiated Data Solutions, LLC*, FTC File No. 051-0094 (Jan. 23, 2008) (Kovacic, Comm’r, dissenting), *available at* <http://www.ftc.gov/os/caselist/0510094/080122kovacic.pdf>.

58. *See generally Hesse, supra* note 43; *see also* George S. Cary, Mark W. Nelson, Steven J. Kaiser & Alex R. Sistla, *The Case for Antitrust Law to Police the Patent Holdup Problem in Standard Setting*, 77 ANTITRUST L.J. 913 (2011). For an economic and legal defense of the proposition that patent holdup – and in particular patent holdup involving mere breach of contract rather than deception in the standard-setting process – should not be governed by antitrust law, *see* Bruce H. Kobayashi & Joshua D. Wright, *The Limits of Antitrust and Patent Holdup: A Reply to Cary et al.*, 78 ANTITRUST L.J. 701 (2012).