



IP

ANTITRUST

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I. INTRODUCTION

Before deciding a patent law question in the 1873 case *Adams v. Burke*,² the Supreme Court noted that “[t]he vast pecuniary results involved in such cases, as well as the public interest, admonish us to proceed with care[.]”³ The importance of intellectual property (“IP”), and its role in promoting economic growth and consumer welfare, has persisted; the value added by IP-intensive industries accounted for over \$6.5 trillion of gross domestic product in 2014 and these industries supported (directly or indirectly) 45.5 million jobs.⁴ But despite the risks involved in tampering with a system that has benefitted this country since its inception, some U.S. Government agencies have in recent years been anything but careful in their approach to IP issues. Abandoning antitrust law’s historical deference to the exercise of core IP rights, authorities have taken to using antitrust enforcement to favor IP users over innovators and to reduce the value of IP, threatening innovation incentives. Neither antitrust principles nor sound policy supports such measures. These practices should cease before they do permanent damage to our nation’s innovation ecosystem and the national economy.

II. THE ROLE OF INTELLECTUAL PROPERTY RIGHTS IN STIMULATING INNOVATION

Over 240 years ago, the Framers laid the foundation for the U.S. patent and copyright system by giving Congress power “[t]o promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries[.]”⁵ As the Constitution makes clear, the goal is to encourage creativity and innovation. To that end, it prescribes but one incentive: awarding exclusive rights to the fruits of creativity and innovation. This exclusivity takes legal form in patents and copyrights.

Patents and copyrights (collectively, IP rights or “IPRs”) incentivize innovation on multiple levels. At base, IPRs encourage innovation by assuring that the rewards of innovation go to the innovator, whether the innovator chooses to sell the innovation or license it to others. But in many instances, IPRs do not simply reward innovation — they are an absolutely necessary prerequisite to innovation.⁶ Research, development, and creativity are time-consuming and expensive, but copying the successful results of these endeavors can be quick and easy.⁷ In such (all-too-common) cases, it makes no sense for an innovator to devote time and resources to developing works and inventions that are freely appropriated by competitors.⁸ Moreover, beyond enabling the innovation leading to the IPRs themselves, IPRs enable future innovation by providing an income stream that can be used to fund ongoing research and development.⁹ Finally, by granting exclusivity over a product or technology to an innovator, IPRs drive competitors to come up with even better products or technologies of their own.¹⁰

The innovation enabled by IPRs brings benefits extending beyond innovators. New inventions lead to new products, businesses, and even industries, providing employment to workers, profits to owners and shareholders, and tax revenue for the government. Consumers benefit when innovative technologies result in new, faster, better, or cheaper products. Copyrights incentivize the production of books, films, and music at a

2 84 U.S. 453 (1873).

3 *Id.* at 455.

4 ANTONIPILLAI ET AL., ECON. & STAT. ADMIN. & LEE ET AL., U.S. PATENT & TRADEMARK OFFICE, INTELLECTUAL PROPERTY AND THE U.S. ECONOMY: 2016 UPDATE ii (2016), <https://www.uspto.gov/sites/default/files/documents/IPandtheUSEconomySept2016.pdf>.

5 U.S. Const. art. I, § 8.

6 See Haber, *Patents and the Wealth of Nations*, 23 GEO. MASON. L. REV. 811, 817–20 (2016) (finding “a causal relationship between strong patents and innovation” and discussing studies about the role of patents in Britain’s industrial growth). But see Cheng, *Putting Innovation Incentives Back in the Patent-Antitrust Interface*, 11 NW. J. TECH. & INTELL. PROP. 385, 387 (2013).

7 See Masoudi, Deputy Assistant Att’y Gen., Antitrust Div., U.S. Dep’t of Justice, Intellectual Property and Competition: Four Principles for Encouraging Innovation, Address at the Digital Americas 2006 Meeting: Intellectual Property and Innovation in the Digital World (Apr. 11, 2006), <https://www.justice.gov/atr/speech/intellectual-property-and-competition-four-principles-encouraging-innovation>; see also Cheng, *supra* note 6, at 387 (explaining the cited propositions as elements of the “standard argument concerning the patent-antitrust interface[.]” but arguing that courts have placed too much weight on that argument).

8 See Kappos, Ludwin & Ehrlich, *From Efficient Licensing to Efficient Infringement*, 255 N.Y.L.J. (Apr. 4, 2016).

9 See Cheng, *supra* note 6, at 387; Kesselheim, *Using Market-Exclusivity Incentives to Promote Pharmaceutical Innovation*, 363 NEW ENG. J. MED. 1855, 1855 (2010).

10 *Cf.* Kesselheim, *supra* note 9, at 1855.

professional level, which disseminates scholarship and ideas while providing entertainment and cultural growth.¹¹ Public disclosure requirements for patent protection enrich the body of common knowledge and allow others to extend innovators' creativity.¹² In short, IPRs are powerful drivers of a dynamic culture and economy.

III. ANTITRUST LAW & INTELLECTUAL PROPERTY: HISTORICAL RECONCILIATION, MODERN DAY FRICTION

As envisioned in the Constitution,¹³ the cornerstone of the IPR system's benefits has been the granting of exclusivity to innovators. This exclusivity requires effective deterrents against unauthorized, uncompensated use of IPRs. Though exclusion and restraint are inherent in IPRs, they excite suspicion and hostility in antitrust law.¹⁴ Doctrinally, however, antitrust law does not forbid market power in and of itself — only market power that is unlawfully obtained or used.¹⁵ IPRs are not necessarily problematic from an antitrust perspective;¹⁶ simply put, “[t]he commercial advantage gained by new technology and its statutory protection by patent do not convert the possessor thereof into a prohibited monopolist.”¹⁷ Therefore, instead of attacking the exclusivity at the heart of IPRs, antitrust regulation has historically been limited to preventing their wrongful acquisition and misuse.¹⁸

Developments from 2012 to 2016 impacting patents and copyrights provide worrying evidence that the Government has succumbed to the temptation to use antitrust law as an excuse to weaken IPRs, even though neither antitrust doctrine nor antitrust objectives, properly understood, support that result.¹⁹

IV. ANTITRUST MEASURES AGAINST PATENT HOLD-UP: A DANGEROUS “CURE” FOR AN ILLUSORY DISEASE

In a series of actions and pronouncements, both the Department of Justice (“DOJ”) and the Federal Trade Commission (“FTC”) have in recent years attacked patent holders' ability to enforce “standard-essential patents” (“SEPs”) — patents covering technology incorporated into standards. In many areas of technology, consumers and businesses benefit from interoperability and standardization.²⁰ Technical standards are set by standards-setting organizations (“SSOs”), which are groups to which industry participants belong.²¹ SSOs usually request that any contribution of patented technology that is “essential” to practicing the standard be accompanied by a commitment by the patent holder to license such tech-

11 See Worstall, *Copyright is About Incentives to Innovation, Not Justice: What Incentive Does Naruto Need?*, FORBES (Jan. 7, 2016), <https://www.forbes.com/sites/timworstall/2016/01/07/copyright-is-about-incentives-to-innovation-not-justice-what-incentive-does-naruto-need/#18d02b8e27c3>; see also Mossoff, *How Copyright Drives Innovation: A Case Study of Scholarly Publishing in the Digital World*, 2015 MICH. ST. L. REV. 955 at 956–57 (“copyright does incentivize the creation of new works . . . [though] is not [its] sole justification”).

12 MPEP (9th ed. Rev. 08.2017, Jan. 2018), <https://www.uspto.gov/web/offices/pac/mpep/s608.html>.

13 See source cited supra note 5 and accompanying text.

14 See *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100, 135 (1969) (citations omitted). See also 15 U.S.C. § 1–2 (2012).

15 See *Verizon Commc'ns Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398, 407 (2004).

16 Haber, *Patents and the Wealth of Nations*, 23 Geo. Mason. L. Rev. 811, 813 (2016); see *Genentech, Inc. v. Eli Lilly & Co.*, 998 F.2d 931, 949 (Fed. Cir. 1993), abrogated on other grounds by *Wilton v. Seven Falls Co.*, 515 U.S. 277 (1995).

17 *Abbott Labs. v. Brennan*, 952 F.2d 1346, 1354 (Fed. Cir. 1991).

18 *In re Indep. Serv. Orgs. Antitrust Litig.*, 203 F.3d 1322, 1326–28 (Fed. Cir. 2000).

19 See infra Section III–IV. The goal of U.S. antitrust law should be to protect the competitive process, which protects consumers. Lipsky, Jr., *Protecting Consumers by Promoting Competition*, Federal Trade Commission: Competition Matters (blog) (Mar. 6, 2017 5:22 PM), <https://www.ftc.gov/news-events/blogs/competition-matters/2017/03/protecting-consumers-promoting-competition>.

20 See Lemley, *Intellectual Property Rights and Standard-Setting Organizations*, 90 CAL. L. REV. 1889, 1893 (2002).

21 Ramirez, Statement of Commissioner Edith Ramirez before the U.S. Senate Committee on the Judiciary (July 11, 2012), <https://www.ftc.gov/public-statements/2012/07/statement-commissioner-edith-ramirez-standard-essential-patents>.

nology on (fair), reasonable and non-discriminatory (“F/RAND”) terms.²² Despite the wide range of potential negotiating positions and strategies between SEP owners and licensees over a F/RAND license, the Government has fixated on one hypothetical scenario: so-called “patent hold-up.”²³ Under this theory, a patent holder succeeds in having its patented technology incorporated into a standard by promising to offer F/RAND licensing terms, but then demands “unreasonable” license terms from companies practicing the standard, backing up its demands with threats of litigation, including injunctions or International Trade Commission (“ITC”) exclusion orders.²⁴ Such behavior might indeed be problematic if it actually occurred, but history has demonstrated that it is not a problem.²⁵ Nevertheless, the DOJ and FTC have focused on hold-up as a basis for wielding antitrust law against SEP owners. For example, at various events in 2013, the then-Deputy Assistant Attorney General of the DOJ Antitrust Division contemplated the merits of imposing Sherman Act Section 2 liability against an SEP owner that purportedly violates F/RAND commitments, including by merely seeking an injunction,²⁶ and the FTC has initiated proceedings on the theory that an SEP owner can violate Section 5 of the FTC Act simply by threatening or seeking an injunction or ITC exclusion order.²⁷

The Government’s actions apparently reached a receptive audience. SEP licensees used their control of committees of the Institute of Electrical and Electronics Engineers (“IEEE”) — the SSO responsible for the ubiquitous 802.11 Wi-Fi standard and others — to push through bylaws amendments that, among other things, require an SEP owner to commit not to seek an injunction against a recalcitrant infringer until first-level appellate review has been exhausted, and define SEP RAND royalty rates as necessarily excluding any value attributable to the standard.²⁸ There were open questions raised concerning anticompetitive licensee collusion and other improprieties in forcing through these bylaws amendments.²⁹ But despite the serious implications of permitting a cabal of IPR purchasers to suppress IPR prices and to weaken incentives for innovation in standardized technology, the DOJ promptly ruled that adoption of the IEEE bylaws amendments would be free of any antitrust concerns.³⁰ This unprecedented assault on owners’ power over the licensing and enforcement of their property threatens real damage to the integrity of IPRs and to the innovation incentives they represent.³¹

22 Maldonado, *Breaching RAND and Reaching for Reasonable: Microsoft v. Motorola and Standard-Essential Patent Litigation*, 29 Berkeley Tech. L. J. 419, 419 (2014). The meaning of FRAND is not “universally agreed upon.” Layne-Farrar, Padilla & Shmalensee, *Pricing Patents for Licensing in Standard-Setting Organizations: Making Sense of FRAND Commitments*, 74 ANTITRUST L.J. 671, 671 (2009).

23 Wong-Ervin, *The Proper Role of Antitrust in Addressing Patent Hold-Up*, 11 SEC. ANTITRUST L. 11, 11–12 (2013), https://www.ftc.gov/system/files/attachments/key-speeches-presentations/wong-erwin_-_proper_role_of_antitrust_in_addressing_patent_hold-up.pdf.

24 For discussions and critiques of various tenets of holdup theory, see Cotter, *Patent Holdup, Patent Remedies, and Antitrust Responses*, 34 J. CORP. L. 1151, 1161–62 (2009); Sidak, *Does the International Trade Commission Facilitate Patent Holdup?*, 1 CRITERION J. INNOVATION 601 (2016).

25 There are virtually no documented instances of SEP hold-up; to the contrary, major SSOs have reported that hold-up is not an issue. See, e.g. Sidak, *The Antitrust Division’s Devaluation of Standard-Essential Patents*, 104 Geo. L.J. Online 48, 61 n.49 (2015); Comments of Telecomms. Indus. Ass’n, June 14, 2011, *Fed. Trade Comm’n Request for Comments and Announcement of Workshop on Standard-Setting Issues*, Project No. P11-1204, 4.

26 Hesse, Deputy Assistant Att’y Gen., Antitrust Div., U.S. Dep’t of Justice, IP, Antitrust and Looking Back on the Last Four Years, Address at Global Competition Review, 2nd Annual Antitrust Law Leaders Forum 15–21 (Feb. 8, 2013); Hesse, Deputy Assistant Att’y Gen., Antitrust Div., U.S. Dep’t of Justice, The Art of Persuasion: Competition Advocacy at the Intersection of Antitrust and Intellectual Property, Address in Seattle, WA 9 (Nov. 8, 2013).

27 See Complaint 19–20, 23, In re Robert Bosch GmbH, FTC Docket No. C-4377 (2012); Complaint at 19, 25–27, In re Motorola Mobility LLC & Google Inc., FTC Docket No. C-4410 (2013).

28 Hoffinger, *The 2015 DOJ IEEE Business Review Letter: The Triumph of Industrial Policy Preferences Over Law and Evidence*, CPI ANTITRUST CHRON., Mar. 2015, at 2, 6; Sidak, *Testing for Bias to Suppress Royalties for Standard-Essential Patents*, 1 CRITERION J. INNOVATION 301, 302 (2016); IEEE Standards Association, STANDARDS BOARD BYLAWS, § 6.1–6.2 (IEEE Standards Ass’n 2017).

29 See, e.g. Hoffinger, *supra* note 28, at 6–9; Sidak, *supra* note 28.

30 Business Review Letter from Renata B. Hesse, Acting Assistant Att’y General, Antitrust Div., U.S. Dep’t of Justice, to Michael A. Lindsay, Esq., Dorsey & Whitney LLP 1, 16 (Feb. 2, 2015).

31 Given IP’s importance to the economy, threatened attacks on IPRs cannot be taken lightly. ANTONIPILLAI ET AL., *supra* note 4, at ii.

The Government's actions are irrational not only because of the lack of actual evidence of patent hold-up, but because existing legal and market forces provide sufficient restraints and correctives.³² In such context, there is no justification for initiating or threatening antitrust enforcement to impose particular outcomes on what are plainly contractual disputes between sophisticated parties,³³ let alone for favoring technology users over innovators.

Paradoxically, weakening IPRs to combat the hypothetical problem of patent hold-up has created a serious real-world problem: patent hold-out.³⁴ In patent hold-out, it is not the SEP owner that acts unreasonably, but companies that seek to use SEP technologies, by refusing to take a license or purporting to engage in negotiations but refusing to pay a reasonable price for licensing the SEP.³⁵ Hold-out can deprive companies of fair returns on their substantial investments in research, development and innovation, making future investment less likely or making innovator companies reluctant to contribute cutting-edge technology to standards.³⁶ In contrast to hold-up, the loss of innovation in the standards context is potentially irreparable and thus more serious in its potential impact on industry and consumers.³⁷

The anti-IPR attitude evidenced by the Government's actions over the last several years is worrying for its domestic effects, but these damaging effects extend beyond the U.S. By siding with technology users against innovators, the Government's actions amount to wielding antitrust law to project a misguided industrial policy exemplar globally. As Acting FTC Chairman Ohlhausen notes, "what we say and do here to our patent system reverberates around the world."³⁸ The principle that IPRs can be overridden using antitrust grounds as a pretext to achieve policy results encourages competition authorities abroad to also use antitrust law against IPRs, whether as a pretext for protectionism or for attacks on IPRs in the form of compulsory licensing or state-imposed limits on royalties; in the same speech in which she stated that mere risk of hold-up justifies antitrust intervention, former FTC Chairwoman Ramirez recognized that "enforcement activity that deprives patent owners of a reasonable reward in one country can depress incentives to create technology for next-generation standards that will benefit consumers around the world."³⁹ No good to long-term global welfare can come from antitrust authorities far and wide following the U.S. in a race to the bottom against innovation incentives.

32 E.g. Wright, Comm'r, Fed. Trade Comm'n, SSOs, FRAND, and Antitrust: Lessons from the Economics of Incomplete Contracts, Remarks at the Center for the Protection of Intellectual Property Inaugural Academic Conference, George Mason University School of Law 16–21, 24 (Sept. 12, 2013); Ginsburg, Owings & Wright, *Enjoining Injunctions: The Case Against Antitrust Liability for Standard Essential Patent Holders Who Seek Injunctions*, The Antitrust Source, Oct. 2014, at 1, 2–4.

33 See generally, e.g. Wright, supra note 32.

34 A 2015 ITC proceeding found evidence of hold-out but not patent hold-up. *In the Matter of Certain 3G Mobile Handsets*, USITC Inv. No. 337-TA-613 (Remand), 2015 WL 6561709, at *23, 25–26 [hereinafter *Certain 3G Mobile Handsets*].

35 Letter from Ambassador Michael B. G. Froman, U.S. Tr. Rep., to Honorable Irving A. Williamson, Chairman, USITC, at 2 (Aug. 3, 2013); Ohlhausen, Comm'r, Fed. Trade Comm'n, Antitrust Oversight of Standard-Essential Patents: The Role of Injunctions, Address at the 2015 IP and Antitrust Forum, China Intellectual Property Law Association (Sept. 12, 2015) at 9–10, 16 [hereinafter Ohlhausen, *Antitrust Oversight*]; see *Certain Wireless Devices with 3G and/or 4G Capabilities and Components Thereof*, Inv. No. 337-TA-868, USITC (June 13, 2014) (Initial Determination).

36 *Certain 3G Mobile Handsets*, supra note 34, at *26; see Ohlhausen, *Antitrust Oversight*, supra note 35, at 5–6, 8–11, 16; Ganglmair, Froeb & Werden, *Patent Hold-Up and Antitrust: How a Well-Intentioned Rule Could Retard Innovation*, 60 J. INDUS. ECON. 249 (2012); Wright, supra note 32, at 26–31.

37 See, e.g. Ohlhausen, *Antitrust Oversight*, supra note 35, at 5, 8–11; Wright, supra note 32, at 32–33. The joint DOJ-USPTO statement on F/RAND remedies correctly emphasized the need to preserve innovation incentives in the SSO context. See 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 (2013), at 8.

38 Ohlhausen, *Patent Rights in a Climate of Intellectual Property Rights Skepticism*, 30 Harv. J.L. & Tech. 103, 106 (2016) [hereinafter Ohlhausen, *Patent Rights*].

39 Id. at 106–07; Ohlhausen, *The Elusive Role of Competition in the Standard-Setting Antitrust Debate*, 20 Stan. Tech. L. Rev. 93, 96–97 (2017); Ramirez, Chairwoman, Fed. Trade Comm'n, Standard-Essential Patents and Licensing: An Antitrust Enforcement Perspective, Address at 8th Annual Global Antitrust Enforcement Symposium, Georgetown University Law Center 2, 7, 9 (Sept. 10, 2014).

V. WEAKENING COPYRIGHT IPRS: PERFORMING RIGHTS ORGANIZATIONS THWARTED FROM WELL-SETTLED LICENSING MODELS

The pattern of U.S. antitrust regulators siding with those who utilize creativity and innovation over creators and innovators is also evident in the copyright context through the DOJ's attempts to impose restrictions on creators belonging to performing-rights organizations ("PROs"). PROs aggregate IPRs of thousands of individual contributors, such as songwriters and publishers, which can then be licensed by users of their creations, such as radio shows and restaurants.⁴⁰ By offering "blanket licenses" to the works of their members, PROs make it easy for licensees to obtain the rights they need without negotiating many individual licenses.⁴¹

In 2016, the DOJ unexpectedly took the position that consent decrees under which two of the largest PROs have operated since 1941 prohibit fractional licensing: licensing by a PRO of the share of a co-owned work it has received from the work's creator.⁴² The DOJ's position — which the Copyright Office had rejected⁴³ — threatens to upend settled expectations in the industry, hurt creators of copyrighted works, and devalue their IPRs. Under this view, the works of co-creators who belong to different PROs become effectively unlicensable, unfairly depriving them of royalty income and unfairly depriving the public of access to those works.⁴⁴ Forcing all rights to a co-owned work to be licensed from one PRO may be convenient for users, but deprives creators of the freedom to work with the PRO of their choice since all co-creators must agree on a PRO in order for their works to be licensable.⁴⁵ Fortunately, the DOJ's radical reinterpretation was rejected by the Southern District of New York, which declared: "[n]othing in the Consent Decree gives support to the [Antitrust] Division's views."⁴⁶ The Second Circuit Court of Appeals affirmed the decision, "that the consent decree neither requires full work licensing nor prohibits fractional licensing of BMI's affiliates' compositions."⁴⁷ As with SEPs, licensee arguments in the PRO context ignore the long-term damage that interfering with IPRs can cause to an innovation economy that rests on those IPRs.⁴⁸

VI. THE WAY FORWARD IS A RETURN TO PRUDENCE AND DEFERENCE

The assault on IPRs must stop before it does serious harm to innovation itself and to the innovation economy that has been a bright spot for our country. Instead of being used as a pretext to favor those who benefit from innovation over innovators themselves, antitrust law should resume its historical deference to IPRs. As the Ninth Circuit put it in beating back an earlier attempt at antitrust overreach, "[t]he antitrust laws do not grant the government a roving commission to reform the economy at will."⁴⁹ Indeed, the DOJ and FTC would do well to respect to the basic principles they themselves set forth in the latest revision of the "Antitrust Guidelines for the Licensing of Intellectual Property":

- (1). "The [IP] laws and the antitrust laws share the common purpose of promoting innovation and enhancing consumer welfare."
- (2). "[T]he Agencies apply the same [antitrust] analysis to conduct involving [IP] as to conduct involving other forms of property, taking into account the specific characteristics of a particular property right[.]"

40 Brief of the American Society of Composers, Authors and Publishers as *Amicus Curiae* Supporting Defendant-Appellee Broadcast Music, Inc. at *1, *United States v. Broad. Music, Inc.*, No. 16-3830-cv (2d Cir. Aug. 24, 2017) [hereinafter ASCAP Br.].

41 See, e.g. Statement of the Department of Justice on the Closing of the Antitrust Division's Review of the ASCAP and BMI Consent Decrees, Aug. 4, 2016, 2, 5–6.

42 See *id.*, at 2–3, 5–6, 11–16; ASCAP Br., *supra* note 40, at 1, 4, 6–7.

43 Letter from Maria A. Pallante, Register of Copyrights, United States Copyright Office, to Doug Collins, Vice Chairman Subcommittee on Courts, Intellectual Property and the Internet, United States House Concerning PRO Licensing of Representatives (Jan. 29, 2016), at 1–3.

44 See, e.g. *id.* at 23–24, 27–29.

45 See *id.* at 14, 17–20, 26–27

46 *United States v. Broad. Music, Inc.*, 207 F. Supp. 3d 374, 376 (S.D.N.Y. 2016).

47 *United States v. Broad. Music, Inc.*, No. 16-3830-cv, 2017 U.S. App. LEXIS 25545 (2d Cir. Dec. 19, 2017).

48 See, e.g. Brief for Consumer Action and Public Knowledge in Support of Plaintiff-Appellant at 3, *Broad. Music* (June 2, 2017) (making a "hold-up" argument).

49 *United States v. Westinghouse Elec. Corp.*, 648 F.2d 642, 648 (9th Cir. 1981).

(3). “[T]he Agencies do not presume that [IP] creates market power in the antitrust context[.]”

(4). “If an [IPR] does confer market power, that market power does not by itself offend the antitrust laws.”⁵⁰

But merely paying lip service to these important principles does not mitigate the harmful overreach of past Government actions.

As it has historically, antitrust law can and should patrol instances in which IPRs are wrongfully obtained, wrongfully exercised, or used as a pretext to impose costs or controls on subject matter that is not validly protected by IPRs. But antitrust authorities should not challenge the exercise of IPRs, even if that exercise leads in the short term to higher prices or to purportedly negative market outcomes. As we have seen, IPR issues have legal and market solutions outside of antitrust enforcement. The DOJ and FTC would do well to heed Commissioner Ohlhausen’s emphasis on “regulatory humility”⁵¹ and advice that “responsible policymakers should be reluctant to diminish IP rights,”⁵² and should instead “approach questions of reform cautiously, and . . . insist upon evidentiary showings of harm before allowing anecdotal, but quantitatively deficient, claims of patent abuse to drive policy.”⁵³ For even if an IPR results in high profits to its owner, that is what the patent and copyright systems are designed to accomplish: reward innovators and creators for the long-term benefit of our country. We disrupt the rewards for innovation and creativity enshrined in our Constitution at our peril.

⁵⁰ U.S. DEP’T OF JUSTICE AND F.T.C., ANTITRUST GUIDELINES FOR THE LICENSING OF INTELLECTUAL PROPERTY 2, 4 (2017).

⁵¹ Fed. Trade Comm’n, F.T.C. File No. 121-0081, Statement of Commissioner Maureen K. Ohlhausen: In the Matter of Robert Bosch GmbH at 2.

⁵² Ohlhausen, *Patent Rights*, supra note 38, at 148.

⁵³ Id. at 146.