THE NEW MADISON APPROACH TO ANTITRUST AND PATENT LICENSING: A PROPERTY RIGHTS AND INNOVATION PERSPECTIVE

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 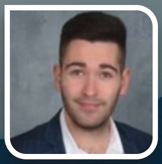

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The New Madison Approach to Antitrust and Patent Licensing: A Property Rights and Innovation Perspective

By Alden F. Abbott & Andrew Mercado

In 2018, Assistant Attorney General for Antitrust Makan Delrahim proposed a legal framework that rejects antitrust as a tool to resolve patent licensing disputes between holders of patents that cover standardized technologies ("standard essential patents" or SEPs) and producers that seek to use those technologies. Critics of this "New Madison Approach" assert that SEP holders' violations of licensing commitments made to standard setting bodies allow them to harm competition by "holding up" and "overcharging" licensees. We reject that critique, which would preclude SEP holders from bargaining for a reasonable share of the future commercialization value their patents will generate. We also demonstrate that the practical unavailability of injunctions for patent infringement inappropriately limits patent holders' bargaining leverage and undermines welfare-creating innovation. We therefore: (1) recommend fully endorse the New Madison Approach; and (2) call for legislation codifying the presumption that patentees are entitled to an injunction for patent infringement.

I. INTRODUCTION AND OVERVIEW

The New Madison Approach ("NMA") advanced by former Assistant Attorney General for Antitrust Makan Delrahim is a simple analytical framework for understanding the interplay between patents and antitrust law arising out of standard setting. A key aspect of the NMA is its rejection of the application of antitrust law to the "hold-up" problem, whereby patent holders demand supposedly supra-competitive licensing fees to grant access to their patents that "read on" a standard – standard essential patents ("SEPs"). This scenario is associated with an SEP holder's prior commitment to a standard setting organization ("SSO"), that is: if its patented technology is included in a proposed new standard, it will license its patents on fair, reasonable, and non-discriminatory ("FRAND") terms. "Hold-up" is said to arise subsequently, when the SEP holder reneges on its FRAND commitment and demands that a technology implementer pay higher-than-FRAND licensing fees to access its SEPs.

The NMA has four basic premises[2] that are aimed at ensuring that patent holders have adequate incentives to innovate and create welfare-enhancing new technologies, and that licensees have appropriate incentives to implement those technologies:

1. Hold-up is not an antitrust problem. Accordingly, an antitrust remedy is not the correct tool to resolve patent licensing disputes between SEP-holders and implementers of a standard.

2. SSOs should not allow collective actions by standard-implementers to disfavor patent holders in setting the terms of access to patents that cover a new standard.

3. A fundamental element of patent rights is the right to exclude. As such, SSOs and courts should be hesitant to restrict SEP holders' right to exclude implementers from access to their patents, by, for example, seeking injunctions.

4. Unilateral and unconditional decisions not to license a patent should be *per se* legal.

Delrahim emphasizes that the threat of antitrust liability, specifically treble damages, distorts the incentives associated with good faith negotiations with SSOs over patent inclusion.[3] Contract law, he goes on to note, is perfectly capable of providing an *ex post* solution to licensing disputes between SEP holders and implementers of a standard. Unlike antitrust law, a contract law framework allows all parties equal leverage in licensing negotiations.[4]

Critics of the NMA maintain, however, that antitrust is needed to prevent the exercise of excessive market power by SEP holders. Those critics tend to ignore basic principles of American antitrust law that undermine their legal case. More fundamentally, however, their policy prescription is fatally flawed, because it fails to take into account the dynamic forward-looking nature of SEPs (and patents in general), which serve as a catalyst for the wealth-creating diffusion of innovation. Put differently, NMA critics view the process of integrating a patent into a standard as the equivalent of winning a lottery so that the extra value is not a reward for anything.[5] In marked contrast, NMA supporters view standard setting as a discovery process, which reveals the relative value of alternative technologies and tends to result in the best patents being integrated into a standard. The latter perspective lends support to SEP valuations that allow SEP holders to obtain an appropriate return for the new economic surplus that results from the commercialization of standard-engendered innovations. It recognizes that dynamic economic growth is fostered through the incentivization of innovative activities backed by patents.

Having rejected the application of antitrust to SEP holder – innovator licensing disputes, a property rights approach to contractual negotiations over SEP licenses is put forth and compared to a liability rule approach. Economic analysis demonstrates that a property rights approach, which is in harmony with the premises of the NMA, advances wealth-creating dynamic innovation. What's more, a property rights perspective

2 Former Assistant Att'y Gen. Makan Delrahim, Address Before the U. of Pennsylvania Law Sch., *The "New Madison" Approach to Antitrust and Intellectual Property Law,* Antitrust Div. of U.S. Dep't of Just. (2018) (available at https://www.justice.gov/opa/speech/file/1044316/download).

3 Former Assistant Att'y Gen. Makan Delrahim, Remarks at the LeadershIP Virtual Series, *Broke...but Not No More: Opening Remarks--Innovation Policy and the Role of Standards, IP, and Antitrust*, Antitrust Div. of U.S. Dep't of Just. (2020) (According to Delrahim, negotiating in the shadow of dubious antitrust liability is not only unnecessary, but it also dramatically shifts bargaining power between patent holders and implementers in a way that distorts the incentives for real competition on the merits through innovation. Giving implementers the threat of treble damages in antitrust increases the perverse likelihood of "hold-out," which is the other side of the "hold-up" coin.").

4 *Id.*

5 The authors are indebted to Tracy Miller of the Mercatus Center at George Mason University for suggesting this alternative formulation of the underlying thinking that informs the debate between NMA supporters and NMA detractors.

yields a welfare-superior outcome to reliance on a liability rule in dealing with disputes arising out of licensing negotiations. As such, a focus on property rights inspired by the NMA is revealed to be the best legal approach for the promotion of innovation and dynamic growth arising out of the diffusion of standards-based innovations. Strong judicial solicitude for the property rights perspective in reviewing SEP holder – implementer disputes is entirely appropriate, as a matter of law and policy. Legislative change would be required, however, to ensure judicial application of property rights analysis to patent licensing disputes in the United States.

II. CRITICISM OF THE NEW MADISON APPROACH MISSES THE MARK

The NMA is not without its detractors. For example, former Federal Trade Commissioner Terrell McSweeny asserts that the hold-up problem is an antitrust issue due to the additional market power that a standard confers upon SEP holders.[6] This incremental market power, she claims, is a byproduct of the artificial increase in value of the patent that results from adoption of a standard , and thus does not reflect the "fair value" of the underlying intellectual property.[7] The SEP holder is incentivized to attempt to extract monopoly rents through hold-up threats made to implementer-licensees. This scenario, it is asserted, has the potential to lead to an economically inefficient outcome.

Additionally, former Federal Trade Commission Chairman Timothy J. Muris argues that so-called "weak" patents exacerbate the hold-up problem.[8] When a "weak" patent is included in a standard the market power and value of that patent is increased without merit. These patents with "limited inventive value"[9] proliferate among commercial products only because they are claimed to be essential to the standard, not because they are better on the margin. Weak patents are also blamed for stifling innovation and causing "economic damage."[10] Some companies are claimed to use bundles of weak patents in order to gain supra-competitive royalties or substantial settlements to avoid litigation.[11] Furthermore,, some companies allegedly violate antitrust law by using FRAND commitments to induce SSOs to incorporate technologies covered by their patents into a standard, and then demanding increased licensing fees once the technology has been integrated.[12]

These arguments are problematic as a matter of U.S. antitrust law. Patent hold-up involves an attempt to obtain maximum royalties from a patent license, considering its inclusion in a standard. Such an attempt, however, does not harm competition (it only reflects an attempted exercise of existing market power), and therefore it does not support an antitrust claim.[13] Relatedly, because it is not possible to show how hold-up harms competition, antitrust injury cannot be demonstrated.[14] Furthermore, until they are held invalid, patents retain the status of protected property rights under U.S. law.[15] Their mere assertion in the context of a licensing transaction cannot raise an antitrust claim; their purported "weakness" (which reflects a subjective value judgment, not a legal determination) should be of no legal consequence.

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6 Former Commissioner Terrell McSweeny, *Holding the Line on Patent Holdup: Why Antitrust Enforcement Matters,* Federal Trade Commission (2018), at 3 (available at https://www.ftc.gov/system/files/documents/public_statements/1350033/mcsweeny_-_the_reality_of_patent_hold-up_3-21-18.pdf).

7 *Id.*

8 Timothy J. Muris, *Bipartisan Patent Reform and Competition Policy,* Am. Enterprise Inst. (2017), at 3 (available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3292476).

9 *Id.*

10 *Id.* at 1.

11 *Id.* at 3.

12 Professors Timothy J. Muris & Michael A. Carrier, among others, have claimed that "FRAND breaches could satisfy the [Sherman Antitrust Act] section 2 elements of exclusionary conduct by demonstrating an exclusion of competitors (the exclusion of rival competitive technologies not chosen by the SSO) that results in competitive injury (price increases and innovation harms from the breach) and acquisition or maintenance of monopoly power (obtained through the breach). Letter from Michael A. Carrier, Timothy J. Muris, et al. to Makan Delrahim (May 17, 2018), at 3 (available at https://patentlyo.com/media/2018/07/Letter-to-Delrahim-May-17-annotated.pdf).

13 See Gregory J. Werden & Luke M. Froeb, *Why Patent Hold-Up Does Not Violate Antitrust Law*, 27 Tex. Intell. Prop. L. J. 1 (2019). See also *FTC v. Qualcomm, Inc.*, 963 F.3d 974 (9th Cir. 2020) (holding that Qualcomm's alleged breach of its SSO commitments to license its SEPs to rivals on FRAND terms did not in itself violate the antitrust laws by impairing the opportunities of rivals, and noting the "persuasive policy arguments" against applying antitrust to essentially contractual disputes between private parties pursuing technological innovation). The Ninth Circuit also held that Qualcomm had no antitrust duty to license its rival chip suppliers.

14 Werden & Froeb, *id.*, at 5, 24-27.

15 See 35 U.S.C. § 261 (1952) ("patents shall have the attributes of personal property"). Patent law does not, however, prevent application of the antitrust law to attempted enforcement of patents obtained through fraud. *Walker Process Equip., Inc. v. Food Mach. & Chem. Corp.*, 382 U.S. 172 (1965). And an objectively baseless patent infringement claim brought in bad faith could constitute an antitrust violation. *Handguards, Inc. v. Ethicon, Inc.*, 601 F.2d 986 (9th Cir. 1979).

The critiques of the NMA framework are also badly misguided as a matter of economic policy. They manifest a narrow short-term static view of markets, focused on the assertion that standard setting artificially raises the market power of patents included in a standard and that a failure to curtail the exercise of such power reduces welfare. This blinkered perspective ignores the fact that the value of patents is forward looking. The implication that patent holders, due to their newfound monopoly power, have an incentive to hold-up to extract additional licensing fees after the innovation is declared an SEP[16] is wrong.

- First, it neglects to consider that a standardized technology may compete with other technologies, constraining the standard's ability to confer market power.

- Second, it does not take into account the fact that standard setting is often a repeat game,[17] creating disincentives for an SEP holder to be seen as engaging in exploitative licensing behavior.

- Third, and most fundamentally, this view takes the SEP as having only the intrinsic value of the innovation standing alone and does not account for the technology commercialization value it acquires when practiced by producers as the result of standardization.[18]

When a patent is integrated into a standard, just as when the innovation is patented, value is added due to the supplemental lines of commercialization that are available to the innovator. The demand for the innovation increases, and therefore the cost of licensing should also increase, *ceteris paribus*. A flaw with an *ex ante* determination of FRAND based on a technology's marginal superiority over alternatives before a standard is finalized (the approach generally favored by NMA critics) is that it fails to account for the SEP's role in generating this enormous amount of *ex post* value.

If a patent is deemed essential, but legal rules require that the FRAND license fee be reached based on mere *ex ante* considerations, then the SEP-holder can capture almost none of the forward-looking surplus created by the patent.[19] This surplus is not due to any unearned "monopoly power" bestowed by the standard. It is a function of the increased value that was not incorporated into the original static pre-standard calculation that informed a purported FRAND valuation. Another way of stating this is that the law should allow FRAND determinations reached in license negotiations to be based on the SEP's forward-looking dynamic contribution to new standard-engendered wealth.

Such an alternative understanding of FRAND appropriately views the SEP-holder's royalty demands in negotiations for more than *ex ante* valued added as "fair and reasonable," not "excessive and anticompetitive." Employing a robust forward-looking approach to FRAND valuation creates appropriate incentives for innovative wealth-creating investments in patenting that are sorely lacking under a crabbed *ex ante* perspective. As such, the misguided application of antitrust to enforce a narrow *ex ante* interpretation of FRAND is harmful to innovation-induced wealth creation.

If one rejects antitrust as a means for resolving innovator-implementer FRAND disputes, what is the appropriate contract law approach for handling such controversies? Two alternative frameworks are considered below: one based on a property rule that features injunctions and one based on a liability rule that emphasizes damages. Although the analysis is applicable to patent licensing in general, it is particularly relevant to FRAND licensing, which is emphasized below. It will be shown that the injunctions-based property rule, which comports with the NMA's stress on the right to exclude, is preferable as a matter of innovation-induced economic welfare.[20]

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16 Muris, *supra* note 8, at 8.

17 See Pierre Larouche & Florian Schuett, *Repeated Interaction in Standard Setting,* 28 J. Of Econ. & Mgmt. Strategy 488 (2019).

18 For a discussion of this topic see Daniel Spulber, The Case for Patents 4 (2021) ("The rewards view tends to be backward-looking; according to this view, patents complete most of their economic functions at the time they are granted.") (Internal quotation marks omitted).

19 For a more detailed discussion of the appropriate legal rule to govern FRAND negotiations, and the problems with an artificial valuation approach based on marginal *ex ante* considerations, see Richard A. Epstein & Kayvan B. Noroozi, *Why Incentives for "Patent Holdout" Threaten to Dismantle FRAND, and Why it Matters,* 32 Berkeley Tech. L. J. 1381 (2017), at 1384.

20 See, for example, Ben Depporter, *Property Rules, Liability Rules and Patent Market Failure,* 1 Erasmus L. Rev. 59 (2008), at 63 ("by emphasizing the *ex ante* incentive for the innovator and the reliance on private bargaining, law and economics scholarship operates on the presumption that property rules (injunctions) may be preferred in the field of patents") (This essay's analysis, which is somewhat stylized for purposes of general application, eschews a detailed discussion of current legal standards and case law.)

III. WELFARE EVALUATION OF PROPERTY AND LIABILITY RULES IN THE PATENT LICENSING CONTEXT

A. Patent Licensing with a Property Rule (the Right to Exclude)

The right to exclude is a well-established principle of property law. In fact, it is the fundamental underlying foundation upon which the institution of property exists.[21] In the patent law context, assigning the patentee right the right to enjoin use of its patent is the manifestation of the right to exclude. The right to enjoin informs a potential licensee-implementer that if it fails to agree to terms with the patentee, it can be totally excluded from legally accessing the patented innovation. This means, in the case of an SEP, that the implementer will be unable to employ valuable standardized technology in manufacturing its products, thereby harming its commercial prospects. When the patentee-innovator is given the right to enjoin the implementer, it may seek a return to innovation that reflects longer-term considerations.[22] Once a patent has been widely implemented, and further technologies spring up as part of an innovative cycle, the value of the patent rises. If not for this original patent, there would not have been a host of other innovations generated as a by-product of the adoption of a standard.[23] The patentee innovator, then, has a high incentive to look to the future and set a fee based on what the patent's value is estimated to be in the future. Also, not willing to be relegated to utilizing second-rate, non-standardized technology and calibrating its expected profits in light of the future value of standards-based sales, the implementer should be willing to negotiate mutually acceptable licensing terms based on a dynamic forward-looking valuation.[24]

In short, a property rule that authorizes patentee injunctions promotes mutually beneficial licensing transactions, creating economic surplus for both contracting parties and raising economic welfare. The innovator can negotiate a licensing rate that is higher than its reservation price, but lower than the implementer's reservation price.[25]

B. Patent Licensing with a Liability Rule

Under a liability rule, the patentee has no right to enjoin unauthorized use of its patent and must seek damages in court if another party is utilizing its patented technology without permission. SEP holders that do seek infringement damages in court are stymied by the fact that U.S. courts have treated reasonable royalties for patent infringement as tantamount to FRAND license rates.[26] This means, in effect, that an implementer does not face serious consequences if it fails to negotiate with the SEP holder for a license. As a group of leading patent scholars have explained:

> Thus, an opportunistic manufacturer of standardized products could decide that the most efficient course of action is not to seek a FRAND license from a SEP holder at all, but instead to delay until it is sued for infringement, at which point its maximum liability (assuming that both patent validity and infringement are established) would only be the FRAND royalty it otherwise would have paid *ex ante*. As discussed elsewhere, this form of conduct by standards implementers has been termed "hold out."[27]

It follows that a liability rule seriously disincentivizes investment in innovation directed toward potential standardized technologies. By eliminating an innovator SEP-holder's leverage, it creates a *de facto* licensing scheme that inures to the benefit of the implementer. The im-

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21 Thomas W. Merrill, *Property and the Right to Exclude*, 77 Neb. L. Rev. 730 (1998), at 730.

22 Malcolm T. Meeks & Charles A. Eldering, *Patent Valuation: Aren't We Forgetting Something? Making the Case for Claims Analysis in Patent Valuation by Proposing a Patent Valuation Method and a Patent-Specific Discount Rate Using the CAPM*, 9 Nw. J. Tech. & Intell.Prop. 194 (2010), at 208 and 222.

23 Clearly, of course, many patents may support the implementation and wide-scale adoption of a standard, and the relative contribution of any individual SEP must be calibrated in that light. The salient point of this discussion is not the valuation of specific SEPs, but rather the observation that SEP valuation in general should take into account long-term dynamic considerations (with calculations reflecting appropriate discounting for risk and present values of future rents).

24 The implementer should be willing to accept a royalty rate that yields it expected returns from future sales, discounted by risk, that are greater than the expected returns from future sales, also discounted by risk, that it would have obtained through reliance on an inferior non-standardized technology. The SEP-holder should be mindful of the implementer's incentives and financial constraints, of course, in undertaking negotiations.

25 The exact relative distribution of rents between innovator and implementer will depend on a variety of case-specific factors, such as the information and other sources of potential leverage available to each negotiating party.

26 Curtis Dodd, *Damages for Patent Infringement versus FRAND Licensing Rates*, IPWatchdog (Dec. 8, 2020) (available at https://www.ipwatchdog.com/2020/12/08/damages-patent-infringement-versus-frand-licensing-rates/id=128050/).

27 Jorge L. Contreras et al., *The Effect of FRAND Commitments on Patent Remedies,* Utah L. Fac. Scholarship 160, at 295 (2018).

plementer may effectively use standardized technology "for free" until it is hauled into court. What's more, if and when that happens, it must pay no more than a FRAND license rate it might have bargained for in the first place. Indeed, that license rate, which is determined by a court rather than through *ex ante* negotiations, may well be deflated to take into account such factors as potential "royalty stacking."[28] Moreover, the likelihood that a court would even consider the dynamic value of an SEP in prompting the beneficial future diffusion of new technologies (a key potential element of negotiations under a property rule) is close to nil. In short, the combination of a liability rule with existing judicial approaches to damages seriously undervalues the contribution of SEPs to innovation-induced economic welfare. As such, a liability rule is economically inferior to a property rule.

IV. IMPLICATIONS OF IMPLEMENTING THE NEW MADISON APPROACH

Hypothesized property rule and liability rule alternatives for FRAND licensing, and the NMA itself, should be viewed in context of the existing United States legal standards applicable to FRAND litigation. In essence, a *de facto* liability rule framework, rather than a property law framework, currently governs the treatment of SEPs in the United States.[29]

In 2006, in the *eBay* case,[30] the U.S. Supreme Court overturned Federal Circuit precedent in rejecting the historical property rule presumption that a patentee is entitled to an injunction when it has successfully defended patent validity and shown infringement. *eBay* held that a court must weigh four equitable factors in deciding on a case-by-case basis whether an injunction is warranted. This, of course, created welfare-inimical litigation uncertainty as to whether a property or liability rule would apply in any particular patent licensing dispute. With respect to SEPs, a combination of judicial decisions and government policy pronouncements have created a situation in which SEPs "now effectively operate under a liability-rule regime in which no injunction threat can be credibly asserted."[31] Accordingly, the following comparative evaluation is advanced in support of overruling *eBay* and reinstituting a property rule framework to govern American patent licensing disputes.

The advantages of a property rule over a liability rule have already been described. Those advantages are assessed in greater detail below. Specifically, a property rule approach to contract law disputes over SEP licensing (with the patentee enjoying an automatic right to enjoin infringement) compares favorably to a liability rule approach with respect to information in the market, litigation-related costs, innovation, and social surplus. Adoption of a property rule for SEP licensing (and, more generally, for all patent licensing), combined with a rejection of antitrust as a vehicle for handling SEP licensing disputes, would implement the NMA approach.

A. Information and Litigation-related Costs

First, a property rule yields lower transaction costs through better information during negotiations as well as reduced litigation-related costs.

As compared to negotiations under a liability rule, information affecting the bargaining process is improved when the innovator holds enjoinment rights, because both counterparties have a clear understanding of relative negotiating power and the prospect for mutual harm if a deal is not struck. If the lowest offer that the innovator is willing to take is higher than the implementer is willing to pay, then there will be no deal. Under any other circumstance, however, the counterparties will come to an agreement that is favorable for both sides and they will have a high incentive to cooperate. This is because a failure to strike a deal will harm an SEP-holder by preventing it from earning substantial rents from broadscale implementation of a standard. It will also harm the implementer by preventing it from using the standardized technology (and thus relegating it to rely on an inferior, less-profitable alternative). The strong mutual incentives to reach a contract make litigation less likely.

Costs are fostered by the incentives to litigate that a liability rule engenders. Under a liability rule, the implementer can elect to infringe and merely pay reasonable court-determined licensing royalties, in effect forcing the innovator to sue to vindicate its rights. Under a property rule, by contrast, the infringing implementer will quickly be blocked from continued production, thereby causing it to waste the assets it employed to begin producing the standardized product without a license. Thus, a property rule strongly incentivizes the implementer to strike a licensing bargain and avoid infringing conduct that would generate these costs.

28 See Dodd, *supra* note 26.

29 This is in marked contrast to civil law countries, where the property rule presumption that patentees automatically will obtain a judicial injunction as a remedy for patent infringement remains strong. "[I]n the EU and other civil law jurisdictions injunctions typically issue automatically in patent cases, subject only to the violation of competition law." Contreras et al., *supra* note 27, at 340 (2018).

30 *eBay Inc. v. MercExchange, L.L.C.*, 547 U.S. 388 (2006).

31 Jonathan M. Barnett, Innovators, Firms, and Patents (2021), at 161.

Furthermore, under a property rule, licensing litigation only needs to address the question of infringement. Litigation issues under a liability rule, including reasonable royalty determinations, are likely to be more complex and costly to resolve.

B. Innovation and Social Surplus

Second, under a property rule, as contrasted to a liability rule, innovation will rise and drive an increase in social surplus, to the benefit of innovators, implementers, and consumers.

Innovators' welfare will rise, as previously noted. First, innovators already in the market will be able to receive higher licensing fees due to their improved negotiating position. Second, new innovators enticed into the market by the "demonstration effect" of incumbent innovators' success will in turn engage in profitable R&D (to them) that brings forth new cycles of innovation.

Implementers will experience welfare gains as the flood of new innovations enhances their commercial opportunities. New technologies will enable implementers to expand their product offerings and decrease their marginal cost of production. Additionally, new implementers will enter the market as innovation accelerates. Seeing the opportunity to earn high returns, new implementers will be willing to pay innovators a high licensing fee in order to produce novel and improved products.

Finally, consumers will benefit from expanded product offerings and lower quality-adjusted prices. Initial high prices for new goods and services entering the market will fall as companies compete for customers and scale economies are realized. As such, more consumers will have access to new and better products, raising consumers' surplus.

V. CONCLUSION

Innovation has the potential to better the lives of millions of individuals around the world, but the U.S. legal incentive structure around patents needs to be realigned to spur greater American innovation. The New Madison Approach puts forward four guiding principles to solve the welfare-inimical misalignment of incentives among SSOs, implementers, and innovators. The NMA rejects the application of antitrust law to patent licensing disputes between SEP holders and implementers of standards. The NMA also endorses the right of SEP holders to obtain injunctions as a matter of course against infringing conduct (a property rule) – a legal policy that is currently rejected in the United States but finds support in many foreign jurisdictions. U.S. legal reforms to adopt the NMA's proposals would accelerate American innovation and inure to the benefit of American innovators, implementers, and consumers. In particular, the statutory overruling of the Supreme Court's *eBay* holding, to restore the presumption that any patentee may obtain an injunction against proven infringement of its patent, is badly needed.[32]

32 Stronger Patents Act, S.2082, 116th Cong. (2019) (would among other things overrule *eBay*). See *Sens. Coons and Cotton, Reps. Stivers and Foster introduce bipartisan, bicameral bill to protect US patent holders, inventors* (July 10, 2019) (available at https://www.coons.senate.gov/news/press-releases/sens-coons-and-cotton-reps-stivers-and-foster-introduce-bipartisan-bicameral-bill-to-protect-us-patent-holders-inventors).

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