

WHY THE NEW ADMINISTRATION SHOULD BURY THE NEW MADISON APPROACH



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Why the New Administration Should Bury the New Madison Approach

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The "New Madison" approach sounds so promising. Old but new. Updating the classics for the modern era. What could be bad? In a word: everything. The intersection of patent and antitrust law has a long pedigree. For decades, antitrust's role in patent-based activity has been acknowledged. Patent licenses are subject to antitrust scrutiny. "Pay for delay" settlements are not entitled to antitrust immunity. And activity in the context of standard setting organizations ("SSOs") could conceivably violate antitrust law. That history has recently come under attack. Between 2017 and 2020, the head of the Department of Justice's Antitrust Division, Makan Delrahim, introduced a radical framework — the "New Madison" approach — that extricated patent-based conduct from antitrust scrutiny. Such a gambit diverged from the longstanding bipartisan approach that had recognized antitrust's role in policing standards-based conduct. This essay introduces standards and then addresses five tenets of Delrahim's approach. For each, it presents the argument and then discusses its flaws.

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I. INTRODUCTION

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That history has recently come under attack. Between 2017 and 2020, the head of the Department of Justice’s Antitrust Division, Makan Delrahim, introduced a radical framework — the “New Madison” approach — that extricated patent-based conduct from antitrust scrutiny. Such a gambit diverged from the longstanding bipartisan approach that had recognized antitrust’s role in policing standards-based conduct.

This essay introduces standards and then addresses five tenets of Delrahim’s approach. For each, it presents the argument and then discusses its flaws.

II. STANDARDS

A standard is a common platform that allows products to work together. Standards are ubiquitous in our economy. They allow us to speak to and understand one another. They let consumers access credit card and ATM machines. They underlie phone and wireless networks. They permit computer users to share videos. They appear in countless other settings.

Standards are crucial to our economy. They are especially needed in *network effects markets*, in which users benefit from an increase in the number of other users in the system. A social network or e-mail system, for example, becomes more valuable as more users connect to it. Networks also feature positive feedback. The more popular a computer operating system becomes, the more applications will be written for it.

Even though standards are vital, antitrust traditionally viewed the process of setting standards with suspicion. SSOs tend to be composed of industry rivals discussing sensitive information such as price. As Adam Smith worried: “People of the same trade seldom meet together even for merriment or diversion, but the conversation ends in a conspiracy against the public, or in some contrivance to raise prices.”²

Despite antitrust’s concern, competitors have good reason to engage in such discussions. Before the selection of a standard, an SSO often can choose from an array of alternative technologies.³ After the SSO chooses a standard, however, the owner of the selected technology may gain significant power. If the technology is patented, the owner (in what is known as “patent holdup”) could impose excessive licensing terms that reflect not just the value of the patent but also the significant costs of switching to a new technology. In many cases, the royalties are passed on to consumers, who are forced to pay higher prices.⁴

Nor can SSO members, faced with demands for excessively high royalties, migrate easily to a different technology. After a standard is selected, industry participants begin designing, testing, and producing goods that conform to the standard. That, as former FTC Chair Deborah Platt Majoras explained, is “the whole idea of engaging in standard setting.”⁵ But these efforts, in learning about a particular technology and investing in equipment and complementary products, typically do not have value if the user switches to an alternative technology.⁶ As a result of these costs (as well as the costs of selecting a new standard), the industry will be locked into the chosen standard.

² ADAM SMITH, AN INQUIRY INTO THE NATURE AND CAUSES OF THE WEALTH OF THE NATIONS 145 (1776).

³ In certain settings, there may be only one superior technical option.

⁴ Deborah Platt Majoras, Chair, Fed. Trade Comm’n, *Recognizing the Procompetitive Potential of Royalty Discussions in Standard Setting*, Sept. 23, 2005, at 3., <http://www.ftc.gov/speeches/majoras/050923stanford.pdf>; Joseph Farrell, John Hayes, Carl Shapiro & Theresa Sullivan, *Standard Setting, Patents, and Hold-Up*, 74 ANTITRUST L. J. 603, 645 (2007).

⁵ Majoras, *supra* note 3, at 3.

⁶ Daniel G. Swanson & William J. Baumol, *Reasonable and Nondiscriminatory (RAND) Royalties, Standards Selection, and Control of Market Power*, 73 ANTITRUST L. J. 1, 9 (2005); Farrell et al., 74 ANTITRUST L. J. at 612 n.35.

This threat of holdup explains why SSOs have required members to provide certain information or make certain promises before the standard's selection. Some SSOs have mandated that participants disclose patents that could be implicated by the standard. Many have required members to agree to license their IP on fair, reasonable, and nondiscriminatory ("FRAND") terms. Antitrust law traditionally has been suspicious of such price-related activities, which deters SSO members from sharing information that could prevent holdup. But any information a patent holder provides before the SSO adopts a technology involving its patents promises to be useful. And that is why in the past several decades, the antitrust agencies have challenged various types of patent-related behavior in the standard-setting context.⁷

The anticompetitive harms from patent holdup also have been consistently acknowledged by officials in Republican and Democratic administrations. The unanimously adopted 2007 joint report of the Department of Justice and Federal Trade Commission explained the difference between a patentee's power *ex ante* (when "multiple technologies may compete to be incorporated into the standard") and *ex post* (when "the chosen technology may lack effective substitutes precisely because the SSO chose it as the standard"), with this disparity allowing the patentee to "extract higher royalties or other licensing terms that reflect the absence of competitive alternatives."⁸ The FTC also unanimously endorsed a 2011 Report that highlighted how "an entire industry" could be "susceptible" to the "particularly acute" concern of holdup, which can result in "higher prices" and "discourage standard setting activities and collaboration, which can delay innovation."⁹

In a radical reversal, Makan Delrahim cast aside this bipartisan treatment. His approach consisted of five pillars, based on patents' (1) absolute right to exclude and (2) automatic right to injunctive relief, together with (3) an emphasis on "holdout" rather than holdup, (4) skepticism about the need for antitrust, and (5) a restricted conception of innovation.

III. NEW MADISON APPROACH

The first pillar of Delrahim's approach centered on the "core of what it means to hold an IP right — namely, the right to exclude."¹⁰ Patents are "a form of property, and the right to exclude is one of the most fundamental bargaining rights a property owner possesses."¹¹ Patent rights "function best if an owner retains a right to exclude," and "[d]epriving a patent holder of this right would skew the bargain away from the free-market incentive scheme the Constitution and Congress have established."¹²

Delrahim turned for support to the Constitution's text, which provides that "Congress shall have the Power . . . to 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."¹³ He asserted that "the authors of the Constitution not only used the word 'right,' but . . . also preceded it with the equally important word 'exclu-

7 See e.g. *FTC v. Qualcomm Inc.*, Case 5:17-cv-00220-LHK, May 21, 2019, https://www.ftc.gov/system/files/documents/cases/qualcomm_findings_of_fact_and_conclusions_of_law.pdf, judgment in favor of FTC reversed by 969 F.3d 974 (9th Cir. 2020); FTC, *Analysis of Proposed Consent Order To Aid Public Comment, In the Matter of Motorola Mobility LLC and Google Inc.*, File No. 121-0120, Jan. 3, 2013, at 6, <https://www.ftc.gov/sites/default/files/documents/cases/2013/01/130103googlemotorolaanalysis.pdf>; FTC, *FTC Order Restores Competition in U.S. Market for Equipment Used to Recharge Vehicle Air Conditioning Systems*, Nov. 26, 2012, <https://www.ftc.gov/news-events/press-releases/2012/11/ftc-order-restores-competition-us-market-equipment-used-recharge>; FTC, *FTC Challenges Patent Holders' Refusal to Meet Commitment to License Patents Covering "Ethernet" Standard Used in Virtually All Personal Computers in U.S.*, Jan. 23, 2008, <https://www.ftc.gov/news-events/press-releases/2008/01/ftc-challenges-patent-holders-refusal-meet-commitment-license>; *In re Rambus*, No. 9302, 2006 WL 2330117 (Aug. 2, 2006); *In re Union Oil Co. of California*, No. 9305 (F.T.C. Nov. 25, 2003); *In re Dell*, 121 F.T.C. 616 (1996).

8 U.S. DEPT. OF JUSTICE & FTC, *ANTITRUST ENFORCEMENT AND INTELLECTUAL PROPERTY RIGHTS: PROMOTING INNOVATION AND COMPETITION* 35-36 (2007); see also *id.* at 37-38 (quoting witness who stated that holdup results in "either [not] mak[ing] the standard you acceded to [or] blackmail").

9 FTC, *THE EVOLVING IP MARKETPLACE: ALIGNING PATENT NOTICE AND REMEDIES WITH COMPETITION* 234 (2011). Similarly, former FTC Commissioner McSweeney lamented the DOJ's "unlearn[ing] lessons of 15 years of scholarship and bipartisan study" and "question[ed] longstanding support for combating holdup based on vague concerns about overdeterrence." Commissioner Terrell McSweeney, FTC, *Holding the Line on Patent Holdup: Why Antitrust Enforcement Matters*, at 1, Mar. 21, 2018. And former FTC Chairman Joe Simons stated that "holdup raises potential antitrust issues" and that there is "no special privilege or exemption under the antitrust laws for fraud, deception, or breaches of contract merely because those acts occurred in a standard-setting process." *Prepared Remarks of Chairman Joseph Simons*, Georgetown Law Global Antitrust Enforcement Symposium, at 6, Sept. 25, 2018.

10 Makan Delrahim, *The "New Madison" Approach to Antitrust and Intellectual Property Law*, University of Pennsylvania Law School, Mar. 16, 2018 [*Penn speech*].

11 Assistant Attorney General Makan Delrahim *Delivers Remarks at the USC Gould School of Law's Center for Transnational Law and Business Conference*, Nov. 10, 2017 [*USC speech*].

12 Makan Delrahim, *Protecting Free-Market Patent Bargaining, Competition, and the Right to Exclude*, Ottawa, Canada, Oct. 10, 2018 [*Ottawa speech*].

13 Assistant Attorney General Makan Delrahim *Delivers Remarks at the 19th Annual Berkeley-Stanford Advanced Patent Law Institute*, Palo Alto, CA, Dec. 7, 2018 [*Palo Alto speech*].

sive.”¹⁴ And he stated that patent law “offer[s] incentives for holders of valid patents to seek the greatest rewards possible for their inventions.”¹⁵ In underscoring the importance of absolute exclusionary rights and ignoring the *utilitarian* justification that links these rights with societal welfare, Delrahim’s position implicated a *natural rights* justification for property.

Delrahim’s second pillar centered on injunctions. A patentee’s ability to obtain an injunction against infringement “gives it necessary leverage in a free market negotiation.”¹⁶ The “right to seek an injunction” is “enshrined in the Constitution as a foundation of free market negotiations for patented inventions.”¹⁷ Understanding “patent rights, once conferred, as a form of property right helps frame the current debate over injunctions, and demonstrates how far we’ve strayed off course.”¹⁸ In other words, “a violation by a patent holder of an SSO rule that restricts a patent-holder’s right to seek injunctive relief should be appropriately the subject of a contract or fraud action and rarely if ever should be an antitrust violation.”¹⁹

Third, Delrahim claimed that the notion of patent holdup is overblown. He stated that “in recent years, competition policy has focused too heavily on the so-called unilateral hold-up problem, often ignoring what fuels dynamic innovation and efficiency.”²⁰ In fact, he lamented that “[e]very incremental shift in bargaining leverage toward implementers of new technologies acting in concert can undermine incentives to innovate.”²¹

Delrahim worried that “[t]oo often lost in the debate over the hold-up problem is recognition of a more serious risk: the hold-out problem.”²² He warned that “implementers threaten to under-invest in the implementation of a standard . . . until their royalty demands are met.”²³ This problem is “a more serious impediment to innovation” because (in contrast to implementers, some of whose investments “occur after royalty rates for new technology could have been determined”), innovators “make an investment before they know whether that investment will ever pay off.”²⁴

Fourth, Delrahim disclaimed a role for antitrust. He stated that “patent hold-up is not an antitrust problem”²⁵ and that “a unilateral refusal to license a valid patent should be per se legal.”²⁶ A patent holder “cannot violate the antitrust laws by properly exercising the rights patents confer, such as seeking an injunction or refusing to license such a patent.”²⁷ Nor should a “unilateral violation of a FRAND commitment . . . give rise to a cause of action under Section 2 of the Sherman Act, even if a patent holder is alleged to have misled or deceived a standard-setting organization with respect to its licensing intentions.”²⁸ The reason is that “[a]pplying Section 2 to this sort of unilateral conduct would contravene the underlying policies of the antitrust laws.”²⁹

14 *Id.*

15 Assistant Attorney General Makan Delrahim Delivers Remarks at IAM’s Patent Licensing Conference in San Francisco, San Francisco, CA, Dec. 7, 2018 [*San Francisco speech*].

16 *Ottawa speech*, *supra* note 12.

17 *Id.*

18 *Penn speech*, *supra* note 10.

19 *USC speech*, *supra* note 11.

20 *Id.*

21 *Id.*

22 *USC speech*, *supra* note 11.

23 *Id.*

24 *Id.*

25 *Penn speech*, *supra* note 10.

26 *USC speech*, *supra* note 11; see also *Penn speech*, *supra* note 10.

27 *USC speech*, *supra* note 11.

28 *San Francisco speech*, *supra* note 15.

29 *Id.*

The fact that “a patent holder can derive higher licensing fees through hold-up simply reflects basic commercial reality,” and “[c]ondemning this practice . . . as an antitrust violation, while ignoring equal incentives of implementers to ‘hold out,’ risks creating ‘false positive’ errors of over-enforcement that would discourage valuable innovation.”³⁰ A monopolization cause of action “would skew the patent licensing bargain away from the bargaining outcome that a free market dictates.”³¹ It “would be a mistake to infer that a contractual FRAND commitment somehow establishes a duty under the antitrust laws to license on terms demanded by a licensee or that violations of an ambiguous FRAND term become an antitrust violation.”³² And even deception to an SSO “is not the sort of market-power-enhancing conduct that Section 2 should reach because a cause of action for treble damages would impede the policies underlying the Sherman Act.”³³

Fifth, Delrahim minimized antitrust’s role based on his conception of innovation. He stated that “[a]n antitrust duty to license on FRAND terms would . . . contravene the patent laws’ policy of promoting innovation by offering incentives for holders of valid patents to seek the greatest rewards possible for their inventions.”³⁴ Similarly, he “worr[ied]” that “enforcers have strayed too far in the direction of accommodating the concerns of technology implementers who participate in standard setting bodies, and perhaps risk undermining incentives for IP creators, who are entitled to an appropriate reward for developing breakthrough technologies.”³⁵ And he lamented that “misapplication of the antitrust laws threatens to disrupt the free-market bargain, which could undermine the process of dynamic innovation.”³⁶

Delrahim additionally worried that “in recent years, competition policy has focused too heavily” on holdup, “often ignoring what fuels dynamic innovation and efficiency.”³⁷ He viewed “[e]very incremental shift in bargaining leverage toward implementers of new technologies acting in concert” as potentially “undermin[ing] incentives to innovate.”³⁸ And as a result, he “view[ed] policy proposals with a one-sided focus on the hold-up issue with great skepticism because they can pose a serious threat to the innovative process.”³⁹

IV. NEW MADISON CRITIQUE

While at DOJ, Delrahim offered an aggressive reformulation of the relationship between patent and antitrust law. But that radical rethinking was matched by a lack of support. In particular, each of his five pillars is hobbled by flaws.

First, the right to exclude is not sacrosanct. As I have shown elsewhere,⁴⁰ property owners do not have absolute rights to exclude. There are at least 50 doctrines (such as adverse possession, easements, eminent domain, nuisance, and zoning) that limit property owners’ rights.⁴¹ Just to pick one example, landowners cannot exclude others from entering their land to save lives or property or to avoid some other serious harm.

³⁰ *Penn speech*, *supra* note 10.

³¹ *San Francisco speech*, *supra* note 15.

³² *Id.*

³³ *Id.*; see also *Penn speech*, *supra* note 10: (“I worry that courts and enforcers have overly indulged theories of patent holdup as a supposed competition problem, while losing sight of the basic policies of antitrust law.”).

³⁴ *San Francisco speech*, *supra* note 15.

³⁵ *USC speech*, *supra* note 11.

³⁶ *Id.*

³⁷ *Id.*

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ Michael A. Carrier, *Cabining Intellectual Property Through a Property Paradigm*, 54 DUKE L. J. 1 (2004).

⁴¹ *Id.*

Delrahim's discussion of exclusive rights granted to patentees as a type of natural property rights also ignores the uncontroversial utilitarian framework for the patent grant. The Supreme Court has long made clear the primacy of the utilitarian justification. Half a century ago, for example, the Court in *Graham v. John Deere* explained that "[t]he patent monopoly was not designed to secure to the inventor his natural right in his discoveries," but instead was "a reward, an inducement, to bring forth new knowledge" and was to be granted only to "inventions and discoveries which furthered human knowledge."⁴²

Exclusive rights exist not to bestow on patentees a moral right to a reward but to promote the best interests of society. That is why patents, like other forms of intellectual property, are subject to doctrines (like novelty, nonobviousness, the written description and enablement disclosure requirements, and a limited 20-year term) that ensure that protections for market competition balance patents' incentive effects. Relatedly, it tells only half the story to focus on the incentive relevant to the initial invention while ignoring follow-on innovation, which is just as important and may be significantly undermined when patent owners abuse their FRAND obligations.

A focus on exclusionary natural rights also is inconsistent with Supreme Court rulings. In upholding the Patent Office's *inter partes review* process for administratively reconsidering patents, the Court made clear that "[p]atents convey only a specific form of property right — a public franchise."⁴³ In *FTC v. Actavis*, the Court explained that antitrust has a role to play within the scope of the patent, as it would be "incongruous" to "determine antitrust legality by measuring [a] settlement's anticompetitive effects solely against patent law policy, rather than by measuring them against procompetitive antitrust policies as well."⁴⁴ And in *Lear v. Adkins*, the Court eliminated the doctrine of licensee estoppel, finding that a licensee could challenge patent validity even after licensing the patent.⁴⁵

Second, the position that patent infringement automatically leads to an injunction is, for good reason, no longer the law. More than a decade ago, the Supreme Court ruled unequivocally that courts must decide whether to grant injunctions "consistent with traditional principles of equity, in patent disputes no less than in other cases."⁴⁶ To similar effect, the patent statute provides that courts "may grant injunctions in accordance with the principles of equity to prevent the violation of any right secured by patent, on such terms as the court deems reasonable."⁴⁷ In fact, the Federal Circuit, not historically associated with insufficient protection of patent rights, has made clear that the framework the Supreme Court set forth in *eBay v. MercExchange* "provides ample strength and flexibility for addressing the unique aspect of FRAND committed patents and industry standards in general."⁴⁸ Because there could be thousands of patents in a product today, it is not appropriate to uniformly apply standards from the 18th century, when there were so few patents in a product that "if you put technology in a bag and shook it, it would make some noise."⁴⁹

In his rush to criticize every position that did not blindly accept an unadorned right to an injunction in every case, Delrahim inaccurately portrayed reasonable statements. For example, Delrahim withdrew from a 2013 statement⁵⁰ jointly issued by the DOJ and U.S. Patent and Trademark Office ("PTO") that acknowledged that "[i]n some circumstances, the remedy of an injunction or exclusion order may be inconsistent with the public interest" but also recognized that an exclusion order "may still be an appropriate remedy," such as when "the putative licensee is unable or refuses to take" a FRAND license.⁵¹ The statement even found injunctions appropriate for "a constructive refusal to negotiate," which occurs when an implementer "insist[s] on terms clearly outside the bounds of what could reasonably be considered" to be FRAND terms "in an

⁴² 383 U.S. 1, 9 (1966).

⁴³ *Oil States Energy Servs. v. Greene's Energy Group*, 2018 WL 1914662, at *8 (U.S. Apr. 24, 2018); see also *id.* at *6 (patents "involv[e] public rights").

⁴⁴ 570 U.S. 136, 148 (2013).

⁴⁵ 395 U.S. 653, 668-75 (1969).

⁴⁶ *eBay v. MercExchange*, 547 U.S. 388, 394 (2006).

⁴⁷ 35 U.S.C. § 283.

⁴⁸ *Apple v. Motorola*, 757 F.3d 1286, 1332 (Fed. Cir. 2015).

⁴⁹ Robert P. Merges, *As Many As Six Impossible Patents Before Breakfast: Property Rights for Business Concepts and Patent System Reform*, 14 BERKELEY TECH. L.J. 577, 585 (1999).

⁵⁰ DOJ & PTO, *Policy Statement on Remedies for Standard-Essential Patents Subject to Voluntary F/RAND Commitments*, Jan. 8, 2013, <https://www.justice.gov/atr/page/file/1118381/download>.

⁵¹ *Id.*

attempt to evade the putative licensee's obligation to fairly compensate the patent holder."⁵² The statement was so reasonable that the Federal Circuit relied on it to explain why injunctions are warranted when it overturned a district court that had "applied a *per se* rule that injunctions are unavailable for SEPs" and delineating when "an injunction may be justified."⁵³

Third, the holdup problem has been recognized by courts and standard setting organizations themselves as a real problem.⁵⁴ As one court stated, patent holdup is not a theoretical concern, but instead "is a substantial problem that [F]RAND is designed to prevent."⁵⁵ And a second court rejected the argument that "holdup does not exist in the real world," finding that such an argument "does not trump the evidence . . . that holdup took place in this case."⁵⁶

Similarly, former FTC Commissioner Terrell McSweeney pointed to "ample evidence" of patent holdup, including FTC enforcement actions, panelists' acknowledgement of the problem, "strong anecdotal support," and courts' conclusions that patentees "demand[ed] far more than that to which they were entitled," with courts in two cases awarding only 1/150 and 1/500 of the royalties sought.⁵⁷ The fact that SSOs — those with the most knowledge of the issues — adopt FRAND policies is itself telling proof that holdup is a problem. Otherwise, it is unclear why they would adopt policies to prevent holdup.⁵⁸

Finally, *holdup* presents a more serious antitrust concern than *holdout*. Implementers that suffer holdup because of sunk investments in a technology are vulnerable to paying supra-competitive royalties based on the entire value of the product, as opposed to the value of the patented technology.⁵⁹ In contrast, the risks faced by patent holders who complain about licensees "holding out" are consistent with the situation facing "anyone . . . that makes a speculative investment, whether in technology, real estate, corporate securities, or any other industry."⁶⁰

To be sure, coordinated action between licensees could implicate antitrust law, but these concerns are not presented in licensing disputes at the core of holdout. Both licensors and licensees can engage in holdout, merely by "refus[ing] to perform in good faith or negotiate reasonably ."⁶¹ In contrast, the holdup problem, and accompanying lock-in binding implementers, exist on only one side of the exchange.

Fourth, patentees that obtain or maintain monopoly power *as a result of* breaching a FRAND commitment present a straightforward monopolization case.⁶² FRAND breaches could satisfy the elements of monopolization, in particular, the requirement that a plaintiff demonstrate exclusionary conduct by showing 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). In addition, antitrust liability does not take aim only at a patentee's right to exclude but instead is on the table because of the *voluntary commitment* to license on FRAND terms.

⁵² *Id.*

⁵³ *Apple v. Motorola*, 757 F.3d 1286, 1331-32 (Fed. Cir. 2014).

⁵⁴ For a discussion of the bipartisan recognition of the anticompetitive harms from patent holdup, see *supra* notes 7-8 and accompanying text.

⁵⁵ *In re Innovatio IP Ventures*, 2013 WL 5593609, at *9 (N.D. Ill. Oct. 3, 2013).

⁵⁶ *Microsoft v. Motorola*, 2013 WL 5373179, at *7 (W.D. Wash. Sept. 24, 2013).

⁵⁷ Commissioner McSweeney, *supra* note 9, at 4.

⁵⁸ TIMOTHY J. MURIS, BIPARTISAN PATENT REFORM AND COMPETITION POLICY, AMERICAN ENTERPRISE INSTITUTE REPORT 9 (2017).

⁵⁹ A. Douglas Melamed & Carl Shapiro, *How Antitrust Law Can Make FRAND Commitments More Effective*, 127 YALE L.J. 2110, 2119 (2018).

⁶⁰ *Id.*; see also *id.* ("Requiring that buyers guarantee an adequate return to those who make speculative investments would be antithetical to the operation of the market system and would badly distort investment incentives.").

⁶¹ MURIS, *supra* note 58, at 9.

⁶² E.g. *Broadcom v. Qualcomm*, 501 F.3d 297, 314 (3d Cir. 2007); *Microsoft Mobile v. Interdigital*, 2016 WL 1464545, at *2 (D. Del. Apr. 13, 2016). Relatedly, seeking an injunction against a licensee willing to pay a FRAND rate — such as where LSI sought an exclusion order in the U.S. International Trade Commission before proposing a FRAND license to Realtek, *Realtek Semiconductor v. LSI*, 946 F. Supp. 2d 998, 1007-08 (N.D. Cal. 2013) — can constitute monopolization.

Moreover, the conduct here is not immune from the application of antitrust law. Parties filing petitions with government agencies often can claim antitrust immunity based on the *Noerr-Pennington* doctrine, as “[t]hose who petition [the] government for redress are generally immune from antitrust liability.”⁶³ But the “absolutist position” that the *Noerr* doctrine “immunizes every concerted effort that is genuinely intended to influence governmental action” would allow parties to violate the antitrust laws, for example by being “free to enter into horizontal price agreements.”⁶⁴ A breach of a FRAND promise is “distinguish[able] from *Noerr* and its progeny” because it is “the type of commercial activity that has traditionally had its validity determined by the antitrust laws themselves.”⁶⁵

Fifth, a problem with linking innovation to only the initial patentee’s contribution is that it ignores the advances contributed by implementers that incorporate the patented invention into their products. As industry organizations have explained, “the assumption that only the upstream inventions that are contributed to standard-setting activities merit protection is . . . incorrect.”⁶⁶ The reason is that “[a] product can contain a multitude of technological innovations separate and apart from a given SEP.”⁶⁷ For example, “different wireless access points may implement the same standard, but differ significantly relative to other features, such as throughput, antenna design, configuration and management, and interference management features that go beyond the standard.”⁶⁸

One prominent example of this observation is the smartphone, which includes “an advanced microprocessor, a sophisticated graphics processor, flash memory, [dynamic random-access memory] DRAM, location awareness technology, touch technology, voice recognition, high-definition still and video cameras, video and music replay, power management technology, and an advanced operating system.”⁶⁹ Each of these technologies “provide[s] benefits to end users that are independent of the cellular technology that enables telephony connections” and that could be patented.⁷⁰

In fact, “[t]he patent laws are intended to limit, not maximize, the royalties to which patent holders are entitled.”⁷¹ In particular, the patent statute limits a patentee’s infringement remedies to compensatory damages not less than a “reasonable royalty” and enhanced damages up to a specified maximum.⁷² Many cases have limited the amounts a patentee can recover,⁷³ with William Lee and Doug Melamed pointing out that “courts generally show concern about overcompensating standard-essential patent holders.”⁷⁴

In short, each of the pillars on which Delrahim relies is hobbled by significant flaws.

V. CONCLUSION

The New Madison approach was not faithful to a longstanding bipartisan recognition of antitrust’s importance for patent-related conduct. Relegating Makan Delrahim’s outside-the-mainstream principles to the dustbin of history would do much to foster innovation and a reasonable approach to patents, antitrust, and standards.

63 *Prof’l Real Estate Investors, Inc. v. Columbia Pictures Indus.*, 508 U.S. 49, 56 (1993).

64 *Allied Tube & Conduit Corp. v. Indian Head, Inc.*, 486 U.S. 492, 503 (1988).

65 *Id.* at 505; see also *FTC v. Superior Court Trial Lawyers Ass’n*, 493 U.S. 411, 424-25 (1990).

66 ACT / The App Ass’n et al., Letter to Assistant Attorney General Makan Delrahim, at 23, May 30, 2018, http://actonline.org/wp-content/uploads/05302018_Multi-Assn_DOJ-SEP-White-Paper_FINAL.pdf.

67 *Id.*

68 *Id.*

69 *Id.* at 24.

70 *Id.*

71 Melamed & Shapiro, *supra* note 58, at 2121.

72 See 35 U.S.C. § 284 (2012).

73 See e.g. *Microsoft Corp. v. Motorola, Inc.*, 795 F.3d 1024, 1031 (9th Cir. 2015); *Ericsson, Inc. v. D-Link Sys., Inc.*, 773 F.3d 1201, 1234 (Fed. Cir. 2014); *VirnetX, Inc. v. Cisco Sys., Inc.*, 767 F.3d 1308, 1326 (Fed. Cir. 2014); *In re Innovatio IP Ventures, LLC Patent Litig.*, 2013 WL 5593609 (N.D. Ill. Oct. 3, 2013); *Lucent Techs., Inc. v. Gateway, Inc.*, 580 F.3d 1301, 1324 (Fed. Cir. 2009).

74 William F. Lee & A. Douglas Melamed, *Breaking the Vicious Cycle of Patent Damages*, 101 CORNELL L. REV. 385, 430 (2016).

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