Articles

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The DOJ's Defense of Deception: Antitrust Law's Role in Protecting the Standard-Setting Process

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Until recently, conventional wisdom held that antitrust law should help ensure that patentholders honor their commitments to standard-setting organizations (SSOs) to charge a reasonable royalty.[1] Like many conventional wisdoms, this one has been turned on its head since Donald Trump's ascent to power. Trump appointed Makan Delrahim to be his Assistant Attorney General for the Department of Justice Antitrust Division. Delrahim was an early supporter of Trump's presidential candidacy and served on Trump's presidential transition team.

The Assistant Attorney General (AAG) for the Antitrust Division has historically used his or her position to advocate for greater competition in the American economy. Many past AAGs have used their time in office to focus on a particular policy passion, such as targeting hard-core, price-fixing cartels or improving the process for evaluating the anticompetitive effects of mergers and acquisitions. Trump's AAG for Antitrust has chosen a less obvious hobbyhorse to be his signature policy imperative: providing antitrust immunity to patent owners who acquire monopoly power by lying to standard-setting organizations.

Since assuming the office in September 2017, Delrahim has used his position to defend the deception of patentholders who lie to standard-setting organizations in order to acquire monopoly power and then charge a monopoly royalty, despite their promises not to. This form of misconduct is called patent holdup.[2] In a series of five major speeches

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1 Broadcom Corp. v. Qualcomm Inc., 501 F.3d 297, 312 n.5 (3d Cir. 2007); Apple Inc. v. Samsung Elecs. Co., 2012 WL 1672493, *7 (N.D. Cal. May 14, 2012) ("recogniz[ing] that fraudulent FRAND declarations that are used to induce SSOs to adopt standards essential patents can be monopoly conduct for the purposes of establishing a Section 2 claim.") (quoting Apple Inc. v. Samsung Elecs. Co., No. 11-CV-01846-LHK, 2011 WL 4948567, at *4 (N.D. Cal. Oct. 18, 2011)); Apple Inc. v. Samsung Elecs. Co., 2011 WL 4948567, at *4 (N.D. Cal. Oct. 18, 2011) ("Courts have recognized that fraudulent FRAND declarations that are used to induce SSOs to adopt standards essential patents can be monopoly conduct for the purposes of establishing a Section 2 claim."); Research in Motion Ltd. v. Motorola, Inc., 644 F. Supp. 2d 788, 796–97 (N.D. Tex. 2008); George S. Cary et al., *The Case for Antitrust Law to Police the Patent Holdup Problem in Standard Setting*, 77 ANTITRUST L.J. 913, 945 (2011) ("Patent holdup where a patentee has deceived an SSO in order to secure a position in the standard is, at its core, an antitrust problem.").

2 Patent lock-in refers to the scenario in which manufacturers invest significant resources to make standard-compliant products and the switching costs are sufficiently high that the manufacturers "become 'locked in' to the standard." *Broadcom Corp.*, 501 F.3d at 310. Some commentators distinguish between patent lock-in and patent holdup, defining the latter as lock-in combined with surprise. This Article does not make this distinction. Instead, holdup is viewed as an example of lock-in whereby implementers who make standard-

from November 2017 through December 2018, Delrahim has strenuously argued that antitrust law should play no role in deterring or remedying patent holdup, even when a patentholder affirmatively misleads an SSO in order to convince it to adopt a standard that requires licenses from that patentholder.[3] Delrahim has given more public speeches defending patentholders' deception than on any other area of antitrust policy.

Through these speeches, Delrahim has sought to dismantle antitrust law as a check on patent holdup, even when patentholders illegally charge a monopoly price or seek to use injunctions to prevent the manufacture of high-tech products that must conform to industry standards. Beyond making academic arguments, Delrahim has used these speeches to renounce the Antitrust Division's endorsement of policy guidelines, issued with the Patent and Trademark Office, which recognize the dangers of patent holdup and the role of antitrust law in deterring and remedying patent holdup.[4] In these speeches,

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compliant products are locked into manufacturing products that read on standard-essential patents.

[3] Makan Delrahim, Assistant Att'y Gen., Antitrust Div., U.S. Dep't of Justice, "Telegraph Road": Incentivizing Innovation at the Intersection of Patent and Antitrust Law 4 (Dec. 7, 2018) [hereinafter Delrahim, Telegraph Road], https://www.justice.gov/opa/speech/file/1117686/download [https://perma.cc/57MX-ULJ9]; Makan Delrahim, Assistant Att'y Gen., Antitrust Div., U.S. Dep't of Justice, Antitrust Law and Patent Licensing in the New Wild West 5 (Sept. 18, 2018) [hereinafter Delrahim, Wild West], https://www.justice.gov/opa/speech/file/1095011/download [https://perma.cc/6ZCN-TZRP]; Makan Delrahim, Assistant Att'y Gen., Antitrust Div., U.S. Dep't of Justice, The Long Run: Maximizing Innovation Incentives Through Advocacy and Enforcement 3 (Apr. 10, 2018) [hereinafter Delrahim, The Long Run], https://www.justice.gov/opa/speech/file/1050956/download [https://perma.cc/3SUN-3D78]; Makan Delrahim, Assistant Att'y Gen., Antitrust Div., U.S. Dep't of Justice, The "New Madison" Approach to Antitrust and Intellectual Property Law 5 (Mar. 16, 2018) [hereinafter Delrahim, New Madison], https://www.justice.gov/opa/speech/file/1044316/download [https://perma.cc/A3TN-N7MJ]; Makan Delrahim, Assistant Att'y Gen., Antitrust Div., U.S. Dep't of Justice, Take It to the Limit: Respecting Innovation Incentives in the Application of Antitrust Law 7 (Nov. 10, 2017) (transcript available at the Office of Public Affairs) [hereinafter Delrahim, Take It to the Limit], https://www.justice.gov/opa/speech/file/1010746/download [https://perma.cc/65ED-26YM].

[4] U.S. DEP'T OF JUSTICE & U.S. PATENT & TRADEMARK OFFICE, POLICY STATEMENT ON REMEDIES FOR STANDARDS-ESSENTIAL PATENTS SUBJECT TO VOLUNTARY F/RAND COMMITMENTS (2013) [hereinafter Joint Policy Statement], https://www.justice.gov/atr/page/file/1118381/download [https://perma.cc/TK9X-DJ5S]. In his December 2018 Stanford speech, Delrahim unilaterally withdrew the Antitrust Division's assent to the 2013 Joint Policy Statement. Delrahim, Telegraph Road, *supra* note 3, at 6–7.

As this Article was going to press, the DOJ and PTO, along with the National Institute of Standards and Technology, issued a new policy statement. U.S. DEP'T OF JUSTICE & U.S. PATENT & TRADEMARK OFFICE, POLICY STATEMENT ON REMEDIES FOR STANDARDS-ESSENTIAL PATENTS SUBJECT TO VOLUNTARY F/RAND COMMITMENTS (Dec. 19, 2019), Delrahim invokes the familiar concepts of innovation and competition. Although some of his claims are facially persuasive, upon closer inspection, Delrahim's arguments are problematic for three reasons. First, his arguments fundamentally misconstrue the nature of competition in the standard-setting context. Second, Delrahim's arguments undermine antitrust principles. Finally, his arguments reward illegal monopolists with the twin rights of charging monopoly prices and of preventing firms from manufacturing products until they submit to the monopolist's demands.

This Article analyzes Delrahim's speeches and the Antitrust Division's new deception-forgiving policy to show that Delrahim's premises and reasoning are demonstrably false. Part One of the Article explains the importance of standards in modern economies. Without standards, many high-tech products could not exist in their present form. Industry participants need to agree on uniform standards in order to ensure network interoperability. These standards are created and implemented through standard-setting organizations that, through their members, compare competing technologies in order to determine which combination of technology will allow manufacturers to produce the most cost-efficient, high-quality products for consumers. Many individual standards require using hundreds of patented inventions in order to comply with the standard. And many products, such as cell phones and computers, require compliance with dozens of standards. This means that many common products read on thousands of patents. After a standard has been adopted and becomes entrenched in an industry, an unscrupulous owner of a standard-essential patent (SEP) could threaten to sue manufacturers and enjoin them from making standard-compliant products unless the manufacturers pay an exorbitant royalty, a royalty based on the value of the standard as opposed to the incremental value of the SEP. This form of misconduct is called "patent holdup." In order to combat this threat, most SSOs require their members to disclose, during the standard-setting process and before the standard is chosen, all their relevant intellectual property (IP) rights and to commit to charging a royalty that is fair, reasonable, and nondiscriminatory (FRAND) if one or more of their protected inventions is incorporated into the standard. Some patent owners, however, lie to SSOs and promise to never charge a non-FRAND royalty but then charge a monopoly royalty after the standard that

https://www.uspto.gov/sites/default/files/documents/SEP%20policy%20statement%20signed.pdf [https://perma.cc/LMT5-2Y33].

includes their patented invention has been adopted and implemented industrywide.

Part Two lays out the basic case for why monopolization through deception followed by FRAND violations is an antitrust issue. After explaining the fundamentals of monopolization law, this Part shows how FRAND violations by monopolist patentholders constitute anticompetitive conduct, as that phrase is used in antitrust law. Competition in the standard-setting context is multifaceted. The standard-setting process begins with competition for the standard and is followed by competition within the standard, as standard-compliant products compete against each other in the retail market. This Part shows how abuse of the FRAND framework can distort the competitive process.

Part Three presents the arguments Delrahim advances to support his position that deception by patentholders toward SSOs, followed by FRAND violations, should be held to not violate antitrust law. First, he emphasizes the rights of patentholders, including their general right to seek injunctive relief against infringers. Second, he argues that owners of SEPs who ignore their FRAND commitments are not engaged in conduct that antitrust law cares about. Third, he presents a litany of horribles that he asserts would happen if antitrust law applied to FRAND violations, including the destruction of innovation, the imposition of compulsory licensing, and the creation of an antitrust duty to deal. Fourth, he attempts to distract from the harms of FRAND violations by implying that the real problems are the SSOs themselves, who are ganging up on poor patentholders, and federal judges, who are ill-equipped to adjudicate FRAND issues. Finally, Delrahim argues that FRAND violations should not fall within the reach of antitrust law because patent law and contract law are better suited to address these issues. All these arguments are deeply flawed, and some are downright disingenuous. This Part also analyzes and disproves Delrahim's asserted justifications for withdrawing antitrust law from the arena of FRAND violations.

Before proceeding, it is worth noting that the problems of lock-in and deception are not necessarily synonymous. It is theoretically possible for a patent-owning firm to make a FRAND commitment during the standard-setting process with the intention of honoring its word. After the standard is adopted and widely implemented—and the patentee now owns a standard-essential patent—the firm may have a change of heart, perhaps following a change in management. After manufacturers are locked into the standard, the firm may engage in an opportunistic breach of contract by demanding a higher-than-FRAND royalty. Delrahim, however, does not distinguish between unpremeditated holdup and ex ante deception as part of a premeditated holdup scheme. Instead, he defends patentholders' deception as conduct that does not raise antitrust concerns. As this Article is a refutation of Delrahim's speeches, it focuses primarily on patent holdup that arises from deception.

I
STANDARD SETTING, PATENT HOLDUP, AND FRAND COMMITMENTS

Most of today's technologically complex products—from cell phones to digital assistants—require competing manufacturers to conform to industry-recognized standards.[5] This is because, as former Federal Trade Commission (FTC) Chair Edith Ramirez explained, "Firms in the information technology and telecommunications industries frequently face the problem that hundreds, thousands, and sometimes hundreds of thousands of different claimed inventions need to work together in a single device and in multiple devices operating together within a system."[6] In order to ensure compatibility among products and the various networks the products use, technological standards are necessary.[7] Without standards, an "industry would balkanize, improvements would slow, and consumers would suffer."[8] Indeed, the Department of Justice Antitrust Division and the FTC have recognized that such "standards are widely acknowledged to be one of the engines driving the modern economy."[9]

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5 Standards can include structural components as well as patented methods. *See generally* Timothy R. Holbrook, *Method Patent Exceptionalism*, 102 IOWA L. REV. 1001 *passim* (2017) (discussing the unique nature of patenting methods without tangible components).

6 *Oversight of the Impact on Competition of Exclusion Orders to Enforce Standard-Essential Patents: Hearing Before the S. Comm. on the Judiciary*, 112th Cong. 4 (2012) [hereinafter Ramirez] (statement of Edith Ramirez, Comm'r, Federal Trade Commission), https://www.ftc.gov/sites/default/files/documents/public_statements/prepared-statement-federal-trade-commission-concerning-oversight-impact-competition-exclusion-orders/120711standardpatents.pdf [https://perma.cc/QQ73-C7QT].

7 Microsoft Corp. v. Motorola, Inc., 795 F.3d 1024, 1030 (9th Cir. 2015) ("Without standards, there would be no guarantee that a particular set of headphones, for example, would work with one's personal music player.").

8 Intel Corp. v. Via Techs., Inc., 174 F. Supp. 2d 1038, 1040 (N.D. Cal. 2001).

9 U.S. DEP'T OF JUSTICE & FED. TRADE COMM'N, ANTITRUST ENFORCEMENT AND INTELLECTUAL PROPERTY RIGHTS: PROMOTING INNOVATION AND COMPETITION 33 (2007), http://www.justice.gov/atr/public/hearings/ip/222655.pdf [https://perma.cc/NZ4F-ZB38].

Although standards may evolve organically, most technical standards are adopted through standard-setting organizations after much deliberation and consideration of the various alternatives available.[10] In January 2013, the United States Department of Justice (DOJ) and United States Patent and Trademark Office (PTO) jointly issued their Policy Statement on Remedies For Standards-Essential Patents Subject to Voluntary F/Rand Commitments,[11] which recognized the following:

> Voluntary consensus standards serve the public interest in a variety of ways, from helping protect public health and safety to promoting efficient resource allocation and production by facilitating interoperability among complementary products. Interoperability standards have paved the way for moving many important innovations into the marketplace, including the complex communications networks and sophisticated mobile computing devices that are hallmarks of the modern age. Indeed, voluntary consensus standards, whether mechanical, electrical, computer-related, or communications-related, have incorporated important technical advances that are fundamental to the interoperability of many of the products on which consumers have come to rely.[12]

These SSO-generated standards "can create enormous value for consumers by increasing competition, innovation, product quality, and choice."[13]

The adoption of standards benefits all categories of market participants. Patentholders have the opportunity to advocate for a standard that includes their patented technology, which could generate a stream of royalties from those who comply with the standard. The manufacturers—often referred to as implementers—have the benefit of a clear standard that allows them to make products for which there will be consumer demand. Finally, consumers benefit from being able to buy standard-compliant, interoperable products from manufacturers who compete against each other in a competitive market.

Once a standard is adopted, however, it may confer monopoly power on certain patentholders, particularly those entities that own so-called standard-essential patents, which are necessary in order to make

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10 Brad Biddle et al., *The Expanding Role and Importance of Standards in the Information and Communications Technology Industry*, 52 JURIMETRICS 177, 180 (2012).

11 Joint Policy Statement, *supra* note 4.

12 *Id.* at 3–4.

13 Ramirez, *supra* note 6, at 4.

standard-compliant products.[14] A single product or system can involve thousands of SEPs[15] because some standards can require manufacturers to secure rights to hundreds or thousands of patents.[16] And some products, such as personal computers, entail compliance with over a hundred standards.[17]

After the standard has been adopted and implemented, the owners of SEPs may attempt to extort unreasonable royalties from manufacturers by threatening to deny them licenses or by suing them for infringement if they continue to make standard-compliant products. This is classic "patent holdup."[18] Holdup occurs because, absent a constraint, the unethical patentholder can demand royalties based on the value of the standard, as opposed to the value of its particular patents.[19] By engaging in patent holdup, it is possible that a patentee

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[14] Suzanne Michel, *Bargaining for RAND Royalties in the Shadow of Patent Remedies Law*, 77 ANTITRUST L.J. 889, 889 (2011) ("A patent owner that asserts a patent against a standardized product may have monopoly power in a relevant technology market solely by virtue of the patented technology having been incorporated into the standard.").

[15] Mark A. Lemley & Carl Shapiro, *Patent Holdup and Royalty Stacking*, 85 TEX. L. REV. 1991, 1992 (2007) ("As a striking example, literally thousands of patents have been identified as essential to the proposed new standards for 3G cellular telephone systems.") (citing David J. Goodman & Robert A. Myers, *3G Cellular Standards and Patents*, *in* PROCEEDINGS OF IEEE INTERNATIONAL CONFERENCE ON WIRELESS NETWORKS, COMMUNICATIONS AND MOBILE COMPUTING 2 (2005)); A. Douglas Melamed & Carl Shapiro, *How Antitrust Law Can Make FRAND Commitments More Effective*, 127 YALE L.J. 2110, 2113 (2018) ("Standards involving information and communications technology can involve hundreds or even thousands of SEPs, many with uncertain boundaries for infringement.").

[16] Microsoft Corp. v. Motorola, Inc., No. C10-1823JLR, 2013 WL 2111217, at *11 (W.D. Wash. Apr. 25, 2013) ("Standards can require the use of hundreds or thousands of SEPs held by dozens of patent holders."); Lemley & Shapiro, *supra* note 15, at 1992 ("In the information technology sector in particular, modern products such as microprocessors, cell phones, or memory devices can easily be covered by dozens or even hundreds of different patents.").

[17] *Microsoft Corp.*, 2013 WL 2111217, at *11 ("High-tech products can comply with dozens or even hundreds of different standards. For example, a typical personal computer ('PC') implements as many as 90 different formal standards and over 100 informal interoperability standards.").

[18] Microsoft Corp. v. Motorola, Inc., 795 F.3d 1024, 1030–31 (9th Cir. 2015) ("The tactic of withholding a license unless and until a manufacturer agrees to pay an unduly high royalty rate for an SEP is referred to as 'hold-up.'") (citing Ericsson, Inc. v. D-Link Sys., Inc., 773 F.3d 1201, 1209 (Fed. Cir. 2014)); Herbert Hovenkamp, *Standards Ownership and Competition Policy*, 48 B.C. L. REV. 87, 104 (2007) ("[I]n the typical 'holdup' case, the firm waits until the standard has been adopted and then surprises participants by asserting the IP right and demanding royalties from those that cannot comply with the standard without infringement.").

[19] *Microsoft Corp.*, 2013 WL 2111217, at *10–11 ("The ability of a holder of an SEP to demand more than the value of its patented technology and to attempt to capture the value of the standard itself is referred to as patent 'hold-up.'"); TCL Commc'n Tech. Holdings,

with a patent on a single component in a multi-part product could extract the lion's share of the entire product's value.[20] After the standard is entrenched, the SEP owner has leverage that it did not enjoy before standardization.[21] SEP owners can effectively engage in holdup because the manufacturers have made significant investments in the standard and switching to a new standard would be cost prohibitive.[22] The costs of patent holdup are often significant. For example, Motorola once insisted upon a royalty that was 150 times more than what a federal court later determined to be the reasonable royalty for their patents. Similarly, LSI demanded a royalty that was more than 500 times the court-determined reasonable royalty.[23]

Ltd. v. Telefonaktiebolaget LM Ericsson, No. CV 15-2370 JVS(DFMx), 2018 WL 4488286, at *6 (C.D. Cal. Sept. 14, 2018) ("Hold up occurs when a patent holder seeks to extract more for the use of his patent than the value which his patent adds to a standard."); Michel, *supra* note 14, at 891 ("At that point, a firm with a patent reading on the standard may have monopoly power in the relevant technology market. If so, the patentee can demand a royalty that reflects not only the ex ante value of the technology compared to alternatives, but also the value associated with investments made to implement the standard.").

20 *See* Colleen V. Chien & Mark A. Lemley, *Patent Holdup, the ITC, and the Public Interest*, 98 CORNELL L. REV. 1, 39 (2012).

21 *Microsoft Corp.*, 795 F.3d at 1030–31 ("[O]nce a standard becomes widely adopted, SEP holders obtain substantial leverage over new product developers, who have little choice but to incorporate SEP technologies into their products."); *Microsoft Corp.*, 2013 WL 2111217, at *10 ("When the standard becomes widely used, the holders of SEPs obtain substantial leverage to demand more than the value of their specific patented technology.").

22 Broadcom Corp. v. Qualcomm Inc., 501 F.3d 297, 310 (3d Cir. 2007) ("Industry participants who have invested significant resources developing products and technologies that conform to the standard will find it prohibitively expensive to abandon their investment and switch to another standard. They will have become 'locked in' to the standard."); *Microsoft Corp.*, 2013 WL 2111217, at *10–11 ("The threat of hold-up increases as the standard becomes more widely implemented and firms make sunk cost investments that cannot be recovered if they are forced to forego implementation of the standard or the standard is changed."); Cary et al., *supra* note 1, at 914 ("Consequently, standardization necessarily entails the exclusion of alternative technologies, and can lock an industry into one method of doing things for an extended period of time, especially where there are significant network effects."); Joseph Farrell et al., *Standard Setting, Patents, and Hold-Up*, 74 ANTITRUST L.J. 603, 616–17 (2007) ("Moving from one standard to another is often costly and disruptive, and, thus, it is ex post both normal and efficient for an industry to be reluctant to make such a shift."); Michel, *supra* note 14, at 891–92 ("Accused infringers will pay royalties based on the costs of switching to another technology, but switching costs may be prohibitively high due to the expense of retooling a manufacturing facility or ensuring interoperability with related products.").

23 Terrell McSweeny, Comm'r, Fed. Trade Comm'n, Holding the Line on Patent Holdup: Why Antitrust Enforcement Matters Commissioner 1, 4 n.16 (Mar. 21, 2018) (transcript available at the Federal Trade Commission), https://www.ftc.gov/system/files/documents/public_statements/1350033/mcsweeny_-_the_reality_of_patent_hold-up_3-21-18.pdf [https://perma.cc/XM6E-3FNN].

Patent holdup inflicts multiple harms across the economy. Patent holdup injures consumers who ultimately pay higher prices when exorbitant royalties are passed on to them.[24] Economic efficiency suffers as output is reduced.[25] In their 2013 Joint Policy Statement, the DOJ and PTO recognized that patent holdup can create inefficiency across markets because "it may induce prospective implementers to postpone or avoid making commitments to a standardized technology or to make inefficient investments in developing and implementing a standard in an effort to protect themselves."[26] The threat of patent holdup can delay implementation of an appropriate standard, which reduces the efficiency of the SSO and the overall economy.[27] Patent holdup ultimately threatens the entire standard-setting process.[28]

Standard-setting organizations have responded to the threat of patent holdup through a two-pronged approach. First, many SSOs require their members to disclose their IP rights during the standard-setting process.[29] In some cases, disclosure may allow an SSO to choose "an equally effective, non-proprietary standard" instead of a patented one.[30] Second, many standard-setting organizations also

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24 *Microsoft Corp.*, 2013 WL 2111217, at *10–11 ("In addition to harming firms that are forced to pay higher royalties, hold-up also harms consumers to the extent that those excess costs are passed onto them."); Farrell et al., *supra* note 22, at 608, 644–47; Michel, *supra* note 14, at 889 ("Consumers will be harmed by higher prices if patentees are able to exercise monopoly power by obtaining licensing fees based on those investments rather than the economic value of the patented technology as determined by competition among alternatives.").

25 *See* Lemley & Shapiro, *supra* note 15, at 2011–17.

26 Joint Policy Statement, *supra* note 4, at 4.

27 *Microsoft Corp.*, 2013 WL 2111217, at *10–11 ("Hold-up by one SEP holder also harms other firms that hold SEPs relating to the same standard because it jeopardizes further adoption of the standard and limits the ability of those other holders to obtain appropriate royalties on their technology."); Adam Speegle, *Antitrust Rulemaking as a Solution to Abuse of the Standard-Setting Process*, 110 MICH. L. REV. 847, 852 (2012) (citing Gil Ohana et al., *Disclosure and Negotiation of Licensing Terms Prior to Adoption of Industry Standards: Preventing Another Patent Ambush?*, 24 EUR. COMPETITION L. REV. 644, 644–45 (2003); David J. Teece & Edward F. Sherry, *Standards Setting and Antitrust*, 87 MINN. L. REV. 1913, 1914–17 (2003)).

28 *Microsoft Corp.*, 2013 WL 2111217, at *10–11 ("Hold-up can threaten the diffusion of valuable standards and undermine the standard-setting process.").

29 *See, e.g.*, Hynix Semiconductor Inc. v. Rambus Inc., 645 F.3d 1336, 1348 (Fed. Cir. 2011); Qualcomm Inc. v. Broadcom Corp., 548 F.3d 1004, 1015 (Fed. Cir. 2008); Broadcom Corp. v. Qualcomm Inc., 501 F.3d 297, 309 n.4 (3d Cir. 2007) ("Each SDO *Amicus* has policies in place to require competing firms to disclose all relevant patents and licensing commitments."); Barnes & Noble, Inc. v. LSI Corp., 849 F. Supp. 2d 925, 937 (N.D. Cal. 2012).

30 *In re* Dell Computer Corp., 121 F.T.C. 616, 624 n.2 (May 20, 1996). The failure to disclose one's intellectual property can provide the basis for an antitrust violation. *Id.* at 618.

require that their members commit to charging a fair, reasonable, and nondiscriminatory[31] royalty—or FRAND royalty—for any of their patents on technology that is incorporated into the standard.[32] FRAND commitments are valuable because they facilitate the adoption of standards that are more likely to be the most efficient. The FRAND obligation is designed to "encourag[e] participation in standard-setting organizations but also . . . ensur[e] that SEPs are not overvalued."[33] The obligation, however, must be binding, because if FRAND commitments are neither credible nor enforceable, SSOs may adopt suboptimal standards in an effort to minimize the risk of patent holdup.

The FRAND apparatus can benefit all parties to the negotiation. Manufacturers and consumers benefit because they are protected against patent holdup. The patentholder benefits because absent the FRAND commitment, the SSO might decide to adopt a standard that does not read on that patentholder's patent. Although the FRAND obligation reduces the royalties that the patentholder will receive, FRAND royalties are significantly better than no royalties. Patentholders want to own a standard-essential patent, even if that patent is subject to a FRAND commitment, because complying with the standard will drive manufacturers to practice the patentholders' invention and, therefore, to pay royalties to the patentholder.

If owners of standard-essential patents violate their FRAND obligations, however, they may be able to charge a monopoly price and engage in patent holdup. Part Two explores the antitrust implications of FRAND violations.

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[31] Some courts and commentators refer to RAND and others to FRAND, but they share the same meaning. Microsoft Corp. v. Motorola, Inc., 795 F.3d 1024, 1031 n.2 (9th Cir. 2015) ("FRAND and RAND have the same meaning in the world of SEP licensing and in this opinion."). This Article uses the FRAND terminology.

[32] *Broadcom Corp.*, 501 F.3d at 313 ("To guard against anticompetitive patent hold-up, most SDOs require firms supplying essential technologies for inclusion in a prospective standard to commit to licensing their technologies on FRAND terms.").

[33] Apple Inc. v. Motorola, Inc., 757 F.3d 1286, 1332 (Fed. Cir. 2014), *overruled on other grounds by* Williamson v. Citrix Online, LLC, 792 F.3d 1339, 1349 (Fed. Cir. 2015); *see also In re* Innovatio, No. 2303, 2013 WL 5593609, at *9 (N.D. Ill. Sept. 27, 2013) ("[P]atent hold-up is a substantial problem that [F]RAND is designed to prevent.").

The actual determination of what constitutes a FRAND royalty can be complicated, but Judge Richard Posner has explained, "The proper method of computing a FRAND royalty starts with what the cost to the licensee would have been of obtaining, just before the patented invention was declared essential to compliance with the industry standard, a license for the function performed by the patent." Apple, Inc. v. Motorola, Inc., 869 F. Supp. 2d 901, 913 (N.D. Ill. 2012).

II
FRAND VIOLATIONS AS AN ANTITRUST CONCERN

Section 2 of the Sherman Act condemns illegal monopolization.[34] In *United States v. Grinnell Corp.*, the Supreme Court held that

> [t]he offense of monopoly under § 2 of the Sherman Act has two elements: (1) the possession of monopoly power in the relevant market and (2) the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident.[35]

Monopoly power is the ability to control prices and exclude competition in the defined relevant market.[36] After a standard has become entrenched, owners of standard-essential patents possess this power, almost by definition.[37]

Section 2 does not condemn all monopolies, only those acquired or maintained through monopoly conduct, which is also sometimes called predatory conduct, exclusionary conduct, or anticompetitive conduct. Courts have not developed a single description of such conduct, but opinions often define "monopoly conduct" in contrast to "competition on the merits," which is legal even when it results in a firm acquiring monopoly power. For example, the Supreme Court has stated that "'exclusionary' comprehends at the most behavior that not only (1) tends to impair the opportunities of rivals, but also (2) either does not further competition on the merits or does so in an unnecessarily restrictive way."[38] Lower courts have subsequently defined exclusionary conduct as "the creation or maintenance of monopoly by means other than the competition on the merits embodied

34 15 U.S.C. § 2 (2012) ("Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony . . . .").

35 384 U.S. 563, 570–71 (1966).

36 United States v. E. I. du Pont de Nemours & Co., 351 U.S. 377, 391 (1956).

37 Microsoft Corp. v. Motorola, Inc., 696 F.3d 872, 876 (9th Cir. 2012) ("[S]tandards threaten to endow holders of standard-essential patents with disproportionate market power."); Apple Inc. v. Samsung Elecs. Co., No. 11-CV-01846, 2012 WL 1672493, at *6 (N.D. Cal. May 14, 2012) ("[S]tandards essential patents are different from normal patents in that standards essential patents confer monopoly power on the patent owner because '[a] standard . . . by definition, eliminates alternative technologies,' and enhances the value of the patent." (citing Research in Motion, Ltd. v. Motorola, Inc., 644 F. Supp. 2d 788, 793 (N.D. Tex. 2008))).

38 Aspen Skiing Co. v. Aspen Highlands Skiing Corp., 472 U.S. 585, 605 n.32 (1985) (quoting 3 P. AREEDA AND D. TURNER, ANTITRUST LAW 78 (1978)).

in the *Grinnell* standard."[39] Anticompetitive conduct is unlikely to qualify as competition on the merits if the monopolist lacks a procompetitive business reason for the challenged conduct.[40] Thus, "[i]f the conduct has no rational business purpose other than its adverse effects on competitors, an inference that it is exclusionary is supported."[41]

A. The Competitive Process of Standard Setting

To determine whether a defendant's conduct is anticompetitive or competition on the merits, it is necessary to understand the nature of competition in the particular market at issue. By setting standards, SSOs perform a competitive function by helping members make objective comparisons among competing technologies.[42] During this competition for the standard, monopoly power is not generally a problem, because, as former FTC Chair Deborah Platt Majoras has explained, "If, at the start of the process, any one of a number of competing formats could win the standards battle, then no single format will command more than a competitive price."[43] Before the adoption of the standard, patented (and unpatented) technologies compete against each other.[44]

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39 Stearns Airport Equip. Co., v. FMC Corp., 170 F.3d 518, 522 (5th Cir. 1999) (citations omitted); Broadcom Corp. v. Qualcomm Inc., 501 F.3d 297, 308 (3d Cir. 2007) ("Anticompetitive conduct may take a variety of forms, but it is generally defined as conduct to obtain or maintain monopoly power as a result of competition on some basis other than the merits." (citing LePage's Inc. v. 3M, 324 F.3d 141, 147 (2003))).

40 *Stearns Airport Equip. Co.*, 170 F.3d at 522 ("The key factor courts have analyzed in order to determine whether challenged conduct is or is not competition on the merits is the proffered business justification for the act."); *see also* Taylor Publ'g. Co. v. Jostens, Inc., 216 F.3d 465, 475 (5th Cir. 2000) (quoting *Stearns Airport Equip. Co.*, 170 F.3d at 522).

41 *Stearns Airport Equip. Co.*, 170 F.3d at 522 (citing *Aspen Skiing Co.*, 472 U.S. at 608).

42 *Broadcom Corp.*, 501 F.3d at 309 ("Standards enhance competition in upstream markets, as well. One consequence of the standard-setting process is that SDOs may more readily make an objective comparison between competing technologies, patent positions, and licensing terms before an industry becomes locked in to a standard."); Michel, *supra* note 14, at 891 ("SSOs establish extensive procedures for evaluating and choosing among alternative technologies to incorporate into the standard.").

43 Deborah Platt Majoras, Chairman, Fed. Trade Comm'n, Recognizing the Procompetitive Potential of Royalty Discussions in Standard Setting 2 (Sept. 23, 2005), http://www.ftc.gov/speeches/majoras/050923stanford.pdf [https://perma.cc/GA28-LV3R].

44 Ericsson, Inc. v. D-Link Sys., Inc., 773 F.3d 1201, 1233 (Fed. Cir. 2014) ("When a technology is incorporated into a standard, it is typically chosen from among different options.").

Competition among patent owners in the standard-setting process takes place in the shadow of an SSO's FRAND policy. The SSO members want to adopt the most efficient standard, and rational patent owners prefer a standard that reads on their patented technology. As part of this competitive process, the patentee bargains with the SSO by promising to forego monopoly power in exchange for the SSO adopting a standard that uses the patentee's patented technology.[45] The efficiency of the standard is a function of several factors, including scalability, interoperability, and cost.[46] Patentholders make a FRAND commitment in order to compete against each other for inclusion in an SSO's standard.[47] Because cost is an important factor in choosing an industry standard, the presence or absence of a FRAND commitment is critical, because it is "a key indicator of the cost of implementing a potential technology."[48] If a patentholder refuses to commit to charging a reasonable royalty, "the SSO may bypass their technology and require that an alternative technology (either non-proprietary, or proprietary subject to a FRAND commitment) be chosen for the standard, or that no standard be adopted at all."[49] In short, FRAND commitments are an important part of the competitive process of standard setting.

After the standard is adopted, competition *for* the standard is replaced by competition *within* the standard as manufacturers try to make the most cost-effective, standard-compliant products. Consumers benefit from this post-standard competition as rival manufacturers compete on the basis of price and quality.[50] This street-

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45 *See* Cary et al., *supra* note 1, at 918 ("And a 'non-discriminatory' royalty is one that prevents the patent holder from exploiting its monopoly position in downstream product markets that incorporate the standard (i.e., refusing to license the technology to firms that compete with the patent holder in products that incorporate its technology via the standard).").

46 *See* HERBERT HOVENKAMP, MARK JANIS, MARK LEMLEY, CHRISTOPHER LESLIE & MICHAEL CARRIER, IP AND ANTITRUST: AN ANALYSIS OF ANTITRUST PRINCIPLES APPLIED TO INTELLECTUAL PROPERTY LAW § 35.02 (3d ed. 2017); Lotes Co. v. Hon Hai Precision Indus. Co., 753 F.3d 395, 400 (2d Cir. 2014); *see also* Golden Bridge Tech. v. Motorola, Inc., 547 F.3d 266, 273 (5th Cir. 2008) ("Potential procompetitive benefits of standards promoting technological compatibility include facilitating economies of scale in the market for complementary goods, reducing consumer search costs, and increasing economic efficiency.").

47 *Broadcom Corp.*, 501 F.3d at 313 ("A firm's FRAND commitment, therefore, is a factor—and an important factor—that the SDO will consider in evaluating the suitability of a given proprietary technology vis-a-vis competing technologies.").

48 *Id.*

49 Cary et al., *supra* note 1, at 916.

50 *Broadcom Corp.*, 501 F.3d at 309 ("The adoption of a standard does not eliminate competition among producers but, rather, moves the focus away from the development of potential standards and toward the development of means for implementing the chosen

level competition is all made possible and more efficient by the SSO standard-setting activities that preceded it because, as the Ninth Circuit has explained, "Standardization provides enormous value to both consumers and manufacturers. It increases competition by lowering barriers to entry and adds value to manufacturers' products by encouraging production by other manufacturers of devices compatible with them."[51]

Despite all the benefits of standardization, the standard-setting process does entail some antitrust risks. Standards can create monopoly power for patentholders. Patents generally do not by themselves confer monopoly power on their owners.[52] But standard-essential patents are different—they do bestow significant market power if the standard is widely adopted.[53] During the competition for the standard, different technologies can price discipline each other, but once the standard is adopted and implemented, alternative technologies can no longer serve this function.[54] Courts recognize that "[b]y incorporating patented technology into a standard, the patent-holder obtains market power because adoption of the standard eliminates alternatives to the patented

standard."); BRUCE D. ABRAMSON, THE SECRET CIRCUIT: THE LITTLE-KNOWN COURT WHERE THE RULES OF THE INFORMATION AGE UNFOLD 329 (2007) ("Competition 'within the standard' replaces competition 'for the standard,' and consumers win."); *see also* Michel, *supra* note 14, at 891 ("In addition, competition among the standardized products of different manufacturers increases choice and decreases prices for consumers.").

51 Microsoft Corp. v. Motorola, Inc., 795 F.3d 1024, 1030 (9th Cir. 2015).

52 Ill. Tool Works Inc. v. Indep. Ink, Inc., 547 U.S. 28, 44–45 (2006); *see* HOVENKAMP, JANIS, LEMLEY, LESLIE & CARRIER, *supra* note 46, § 4.

53 Apple Inc. v. Samsung Electronics Co., Ltd., No. 11-CV-01846, 2012 WL 1672493, at *6 (N.D. Cal. May 14, 2012) ("Moreover, a number of courts have recognized a legal distinction between a normal patent—to which antitrust market power is generally not conferred on the patent owner, and a patent incorporated into a standard—to which antitrust market power may be conferred on the patent owner."); Research in Motion, Ltd. v. Motorola, Inc., 644 F. Supp. 2d 788, 793 (N.D. Tex. 2008).

54 Farrell et al., *supra* note 22, at 607 ("Ex ante, before an industry standard is chosen, there are various attractive technologies, but ex post, after industry participants choose a standard and take steps to implement it, alternative technologies become less attractive. Thus, a patent covering a standard may confer market power ex post that was much weaker ex ante.").

technology."[55] Thus, the standard confers value on the patent.[56] In short, absent a FRAND commitment, standardization often results in patentholders acquiring monopoly power.[57]

Acquisition of monopoly power via standard setting may seem anticompetitive. Standards are necessarily exclusionary because any technology that is noncompliant with the standard is effectively excluded from the market because manufacturers need their phones, music players, and other devices to be standard-compliant in order to ensure interoperability and meet consumer demand.[58] This exclusion, however, does not itself violate antitrust laws.[59] Although patentees bargain during the standard-setting process to exclude competitors, this bargaining is part of the competitive process.[60]

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55 Broadcom Corp. v. Qualcomm Inc., 501 F.3d 297, 314 (3d Cir. 2007) ("When a patented technology is incorporated in a standard, adoption of the standard eliminates alternatives to the patented technology."); Amphastar Pharm., Inc. v. Momenta Pharm., Inc., 297 F. Supp. 3d 222, 230 (D. Mass. 2018), *motion to certify appeal denied*, 313 F. Supp. 3d 366 (D. Mass. 2018); Michel, *supra* note 14, at 889 ("Although multiple alternative technologies may have competed to be chosen during the standard-setting process, once the standard is set, those alternatives will no longer offer viable options because of industry-wide investments made to implement the standard.").

56 Melamed & Shapiro, *supra* note 15, at 2118 ("Further, enforcing sound, rigorously-defined FRAND commitments would enable SEP holders to recover the ex ante value of their technology—that is, the value of the patented technology before implementers were locked in. Ex ante value reflects what the SEP holder would have been paid by implementers of the standard in an ex ante bargain, and is the proper measure of the market value of the SEPs.").

Delrahim concedes this. Delrahim, Wild West, *supra* note 3, at 6 ("Moreover, as a result of having its technology incorporated into a standard, a patent holder may gain incremental market power beyond any power that holding a patent would already convey.").

57 Cary et al., *supra* note 1, at 915 ("Before a standard is adopted, a patent holder seeking to have its technology included in the standard can only charge licensees a price that reflects the incremental value of its technology over the next-best alternative technology." (citing Farrell et al., *supra* note 22, at 611–15)).

58 Delrahim, Wild West, *supra* note 3, at 6 ("In the context of legitimate standard setting, the collective decision to incorporate a patented technology into a standard necessarily involves the 'exclusion' of rival technologies."); *see* Cary et al., *supra* note 1, at 914 ("Selecting a standard ordinarily requires an SSO to choose among competing technologies, and the process frequently results in a collective selection of a patented technology to the exclusion of other patented or non-proprietary technologies.").

59 Delrahim, Wild West, *supra* note 3, at 6 ("Simply winning selection by a standard setting process does not constitute unlawful exclusionary conduct under the antitrust laws.").

60 Delrahim correctly notes that not all exclusionary conduct violates Section 2 because some conduct that excludes rivals is better characterized as competition on the merits, which antitrust law encourages. *Id.* at 4 ("Most obviously, legitimate competition on the merits can be 'exclusionary' in the sense that consumers choose a superior product or service."). Securing monopoly power through innovation, for example, does not violate antitrust laws.

That, however, does not mean that the acquisition of monopoly power through standardization is inherently legal. There are things that a participant in the standard-setting process could do that would violate antitrust laws,[61] as the following section explains.

B. Deception and Breach as Monopoly Conduct

A patentholder engages in deception when it makes a FRAND commitment during the standard-setting process with the intent of charging non-FRAND royalties after the standard incorporating its SEP has become entrenched.[62] This is important for antitrust jurisprudence because deception is a hallmark of some noncompetitive markets.[63]

Courts have found that lying and deception can constitute monopoly conduct. For example, the Supreme Court in *Walker Process Equipment, Inc. v. Food Machinery & Chemical Corp.* held that a firm violates Section 2 of the Sherman Act when it procures a patent through fraud and seeks to enforce it against its rivals.[64] A *Walker Process* claim is essentially a deception-based antitrust cause of action. The antitrust plaintiff must prove that the patent monopolist made a misrepresentation to the Patent Office with "the intent to deceive" or its equivalent.[65]

In addition to the government officials deceived in *Walker Process* cases, courts also condemn deception against private actors as illegal monopoly conduct. In *United States v. Microsoft Corp.*,[66] the D.C. Circuit sitting en banc found that Microsoft had violated Section 2 of

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61 *See, e.g.*, Allied Tube & Conduit Corp. v. Indian Head, Inc., 486 U.S. 492, 500 (1988) (improperly packing SSO voting panel to exclude competitor can violate Sherman Act).

62 It is also deceptive for an SSO member to assert that it possesses no relevant patents—and has no relevant patent applications pending—when it knows that it does. This Article does not discuss this form of patent deception because it is not the focus of Delrahim's public speeches.

63 *See* Maurice E. Stucke, *When a Monopolist Deceives*, 76 ANTITRUST L.J. 823, 824 (2010) ("Deception does not occur in a perfectly competitive market, which has transparent prices, highly elastic demand curves, easy entry and exit, and perfectly informed, profit-maximizing buyers and sellers, who are so numerous that each can act as a price-taker.").

64 382 U.S. 172, 174 (1965); *see* Cary et al., *supra* note 1, at 938 ("*Walker Process* itself demonstrates that a party's acquisition of monopoly power through deception is and always has been a core antitrust concern under Section 2 . . . .").

65 Unigene Labs., Inc. v. Apotex, Inc., 655 F.3d 1352, 1359 (Fed. Cir. 2011). *See generally* Christopher R. Leslie, *Antitrust, Inequitable Conduct, and the Intent to Deceive the Patent Office*, 1 U.C. IRVINE L. REV. 323 (2011) (discussing the relationship between patent deception and antitrust law).

66 253 F.3d 34, 45 (D.C. Cir. 2001).

the Sherman Act when the company sought to defend its monopoly over Intel-compatible PC operating systems by thwarting the evolution of Java, a technology that could undermine Microsoft's monopoly by allowing developers to write their applications once and have them run on any operating system. In violation of its license with Java's owner and licensor, Sun Microsystems, Microsoft created its own version of Java—which it internally referred to as "polluted Java"—that could run only on Microsoft's operating system.[67] Microsoft then lied to application developers and told them that any applications that they wrote on Microsoft's version of Java would run on any operating system.[68] Because developers believed Microsoft's lie, they wrote applications on Microsoft's version of polluted Java that (unbeknownst to them) reinforced Microsoft's monopoly over operating systems. The D.C. Circuit concluded that Microsoft's deception of the application developers "served to protect [Microsoft's] monopoly of the operating system in a manner not attributable either to the superiority of the operating system or to the acumen of its makers, and therefore was anticompetitive."[69] In short, deception constituted monopoly conduct.

The reasoning of deception-based antitrust cases extends to dishonesty directed against standard-setting organizations. In scenarios not involving FRAND commitments, the Supreme Court has recognized that abuse of the SSO process can create antitrust liability when parties engage in "deceptive practices."[70] Manipulating the standard-setting process is anticompetitive and can violate Section 2. Deception undermines the competitive process of standard formulation because the negotiation for the most appropriate standard "is undermined if buyers are deceived or manipulated into a deal that they did not knowingly choose."[71] Thus, federal courts have recognized that "[i]ntentional misrepresentations designed to deceive a standard-setting organization can constitute an antitrust violation."[72]

Such reasoning should extend to deception regarding FRAND commitments for several reasons. First, this deception distorts

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67 *Id.* at 76–77.

68 *Id.*

69 *Id.* at 77.

70 Allied Tube & Conduit Corp. v. Indian Head, Inc., 486 U.S. 492, 500 (1988).

71 Farrell et al., *supra* note 22, at 609 ("This is not merely a private contracting problem, but an antitrust problem. It concerns the inefficient acquisition of market power that harms consumers; more fundamentally, deceiving buyers or keeping them in the dark about the terms on which a technology will be available subverts the competitive process.").

72 Amphastar Pharm., Inc. v. Momenta Pharm., Inc., 297 F. Supp. 3d 222, 230 (D. Mass. 2018), *motion to certify appeal denied*, 313 F. Supp. 3d 366 (D. Mass. 2018).

competition for the standard. The Third Circuit has explained that "[d]eception in a consensus-driven private standard-setting environment harms the competitive process by obscuring the costs of including proprietary technology in a standard and increasing the likelihood that patent rights will confer monopoly power on the patent holder."[73] By misrepresenting relevant cost information, FRAND deceitfulness may lead to the improper exclusion of technologies that would have benefitted consumers in the long run.[74] The patentholder's deception creates an unfair advantage over rivals who told the truth.[75] This rewarding of dishonesty can threaten the long-term survival of SSOs.[76]

Second, when a firm intentionally misrepresents a commitment to charge a FRAND royalty that is relied upon by an SSO in adopting a standard that reads on the firm's patent, it commits fraud as that concept exists in *Walker Process* jurisprudence.[77] Some scholars have argued that deception during the private standard-setting process is even more dangerous because "standard setting inherently involves competitors in an industry choosing 'winners' and 'losers,' not through traditional competition on the merits, but rather through negotiation and agreement, which are also core concerns of the antitrust laws."[78]

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73 Broadcom Corp. v. Qualcomm Inc., 501 F.3d 297, 314 (3d Cir. 2007).

74 Note, *Deception as an Antitrust Violation*, 125 HARV. L. REV. 1235, 1239 (2012) ("While deception of consumers causes anticompetitive harm by distorting consumer choice, other forms of deception cause anticompetitive harm by distorting the competitive process. For example, deception of a standard-setting organization can lead the organization to set standards unfavorable to rival products, which tends to exclude rivals or raise rivals' costs, thereby reducing output and raising prices."); *see also* Mark R. Patterson, *Coercion, Deception, and Other Demand-Increasing Practices in Antitrust Law*, 66 ANTITRUST L.J. 1, 51–55 (1997).

75 *Broadcom Corp.*, 501 F.3d at 313 ("Misrepresentations concerning the cost of implementing a given technology may confer an unfair advantage and bias the competitive process in favor of that technology's inclusion in the standard.").

76 *See infra* notes 149–61 and accompanying text.

77 In *Unigene Labs., Inc. v. Apotex, Inc.*, 655 F.3d 1352, 1358–59 (Fed. Cir. 2011), the Federal Circuit noted that *Walker Process* fraud is a form of "common law fraud," whose elements are

> (1) a representation of a material fact, (2) the falsity of that representation, (3) the intent to deceive or, at least, a state of mind so reckless as to the consequences that it is held to the equivalent of intent (scienter), (4) a justifiable reliance upon the misrepresentation by the party deceived which induces him to act thereon, and (5) injury to the party deceived as a result of his reliance on the misrepresentation.

Id. at 1359. Thus, if a firm intended to not honor its FRAND obligations when it made them, the conduct satisfies the definition of fraud used in *Walker Process* jurisprudence.

78 Cary et al., *supra* note 1, at 938–39.

Taking a slightly different tack than those scholars, this Article argues that the negotiation over the standard is, in fact, a form of competition on the merits. But, in any case, there may be circumstances in which deception against an SSO is arguably more anticompetitive than deception against the PTO. *Walker Process* claims involve fraudulently procured patents that can be invalidated, which can generally permit restoration of a competitive market. In contrast, FRAND deception occurs with valid patents whose owners have manipulated the standard-setting process. The market for standard-compliant products cannot return to its pre-deception state, because once the standard has been adopted and implemented it is entrenched, and the cost of switching creates a lock-in effect. FRAND deception is, thus, relatively difficult to remedy.

Third, deception can create Section 2 liability, in part, because deception cannot be supported by any procompetitive justifications.[79] In finding Microsoft liable for illegal monopolization, the D.C. Circuit noted that "Microsoft offers no procompetitive explanation for its campaign to deceive developers. Accordingly, we conclude this conduct is exclusionary, in violation of § 2 of the Sherman Act."[80] Lies regarding FRAND obligations similarly lack such a justification. Owners of SEPs cannot reasonably assert that their FRAND fraud improved the efficiency of the standard-setting process or somehow increased consumer welfare. Like most anticompetitive conduct, FRAND deception is motivated by the desire to maximize profits beyond competitive returns at the expense of consumers.

Given the above analysis, it is not surprising that federal courts have held that a patentholder's FRAND deception before an SSO constitutes anticompetitive conduct as that term is used in antitrust

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[79] Note, *supra* note 74, at 1236 ("Deception can cause a myriad of anticompetitive harms to both economic efficiency and consumer welfare, with no countervailing procompetitive justifications."); Richard Dagen, Rambus*, Innovation Efficiency, and Section 5 of the FTC Act*, 90 B.U. L. REV. 1479, 1496 n.90 (2010) ("[I]t cannot be said that 'economics literature is replete with procompetitive justifications' for deception." (quoting Leegin Creative Leather Prods., Inc. v. PSKS, Inc., 551 U.S. 877, 889 (2007)); Maurice E. Stucke, *How Do (and Should) Competition Authorities Treat a Dominant Firm's Deception?*, 63 SMU L. REV. 1069, 1074 (2010) ("Deception lacks any redeeming economic qualities or cognizable efficiency justifications.").

[80] United States v. Microsoft Corp., 253 F.3d 34, 77 (D.C. Cir. 2001).

jurisprudence.[81] Most notably, the Third Circuit in *Broadcom Corp. v. Qualcomm Inc.*[82] famously held

> (1) in a consensus-oriented private standard-setting environment, (2) a patent holder's intentionally false promise to license essential proprietary technology on FRAND terms, (3) coupled with an [SSO's] reliance on that promise when including the technology in a standard, and (4) the patent holder's subsequent breach of that promise, is actionable anticompetitive conduct.[83]

Among courts and commentators, a clear consensus exists that acquiring or maintaining monopoly power through deception regarding FRAND commitments satisfies the monopoly conduct element of illegal monopolization.[84]

Beyond deception, the violation of a FRAND commitment amounts to monopoly conduct because it is not competition on the merits. The FRAND commitment is essentially a legally binding contract.[85] Disregarding a FRAND commitment, therefore, constitutes a breach of contract.[86] Courts, for example, have noted that FRAND violations breach the duty of good faith and fair dealing that are read into every contract.[87] Acquiring monopoly power through breach of contract is not competition on the merits.[88] Courts have even held that inducing others to breach contracts is anticompetitive conduct.[89] In sum, even

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[81] Broadcom Corp. v. Qualcomm Inc., 501 F.3d 297, 312 (3d Cir. 2007) ("[T]he FTC has found deception of an SDO to constitute anticompetitive conduct in violation of § 2 of the Sherman Act.").

[82] *Id.* at 323.

[83] *Id.* at 314.

[84] *Id.* at 308; Caribbean Broad. Sys., Ltd. v. Cable & Wireless PLC, 148 F.3d 1080, 1097 (D.C. Cir. 1998); Stucke, *supra* note 79, at 1103–04 ("If defendant attains or maintains its monopoly by deceiving the private standard-setting organization (or otherwise manipulating its process), this raises antitrust concerns."); Thomas F. Cotter, *Patent Holdup, Patent Remedies, and Antitrust Responses*, 34 J. CORP. L. 1151, 1194 (2009) ("If the patentee uses deceptive conduct to acquire monopoly power that otherwise would not exist, either in its own hands or someone else's, the standard for liability would appear to be met."); Susan A. Creighton et al., *Cheap Exclusion*, 72 ANTITRUST L.J. 975, 986 (2005).

[85] *See, e.g.*, Microsoft Corp. v. Motorola, Inc., 864 F. Supp. 2d 1023, 1032 (W.D. Wash. 2012); Apple Inc. v. Samsung Elecs. Co., No. 11-CV-01846, 2012 WL 1672493, at *12 (N.D. Cal. May 14, 2012) ("Moreover, both parties agree that Samsung's contractual obligation arising from its FRAND declarations to ETSI at the very least created a duty to negotiate in good faith with Apple regarding FRAND terms.").

[86] Delrahim concedes this. *See infra* note 185.

[87] Microsoft Corp. v. Motorola, Inc., 795 F.3d 1024, 1045 (9th Cir. 2015).

[88] Christopher R. Leslie, *Monopolization Through Patent Theft*, 103 GEO. L.J. 47, 86 (2014).

[89] *See, e.g.*, United States v. Am. Can Co., 230 F. 859, 874 (D. Md. 1916).

without deception at the outset, violating FRAND commitments can constitute monopoly conduct.[90]

A FRAND violation retroactively distorts the competitive process because the competitive process for picking the standard is tainted after the patentee has breached its FRAND commitment.[91] It is too late for a new competitive process to select a different standard because of switching costs.[92] This is very different from the situation in which, for example, a year-long contract is granted every year and a particular firm gets the contract through misrepresentations; that situation can be remedied moving forward at the next opportunity for contract renewal.[93] Breach of a FRAND obligation—whether or not preceded by affirmative deception during the standard-setting process—has long-lived anticompetitive consequences.

III
THE DOJ'S NEW POLICY ALLOWING MONOPOLIZATION THROUGH PATENTHOLDER DECEPTION

Through his series of speeches, Trump's Assistant Attorney General for the Antitrust Division has been trying to make the case that a patentholder's use of deception to manipulate standard-setting decisionmakers and to acquire market power is perfectly acceptable from an antitrust point of view. In his *New Madison* speech at the

90 Cary et al., *supra* note 1, at 943 (noting the argument "that avoiding the FRAND constraint is the conduct giving rise to monopoly power, and should be actionable monopolization.").

91 *See* Michel, *supra* note 14, at 892 ("The ability of patentees to demand the 'holdup' value based on sunk costs could raise prices for consumers beyond the competitive level, while undermining efficient choices made among technologies competing for inclusion in a standard.").

It may seem odd to claim that ex post conduct can taint the ex ante process. It does so in this case because the legitimacy of the entire standard-setting apparatus is premised on the belief that patentees must honor their promises to charge a FRAND royalty. Even in the absence of ex ante deception—of the type that Delrahim has essentially defended in his public speeches—ex post FRAND violations expose a troubling flaw that could undermine all standard-setting processes. The competitive process that incorporates a FRAND requirements allows SSO members to compare apples to apples, e.g., Technology *A* with a FRAND royalty versus Technology *B* with a FRAND royalty. If there is no meaningful enforcement of those FRAND representations ex post, then the ex ante competitive process was flawed because it did not provide for a proper apples-to-apples evaluation.

92 *Id.* at 891–92 ("Indeed, it is often difficult, or even impossible, to modify a standard due to the need for newly manufactured products to be backward-compatible and interoperable with similar products already owned by consumers, resulting in industry 'lock in.'").

93 Nat'l Reporting Co. v. Alderson Reporting Co., 763 F.2d 1020, 1022 (8th Cir. 1985).

University of Pennsylvania Law School, Delrahim opined that "hold-up is fundamentally not an antitrust problem, and therefore *antitrust* law should not be used as a tool to police FRAND commitments that patent-holders make to standard setting organizations."[94] At his *Long Run* speech in Washington D.C. the following month, Delrahim asserted that "[u]sing the *antitrust* laws to impugn a patent holder's efforts to enforce valid IP rights risks undermining the dynamic competition we are charged with fostering."[95] During his *New Wild West* speech in Fall 2018, Delrahim reiterated that "[a] unilateral violation of a FRAND commitment should not 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."[96] Delrahim explicitly stated that there is no Section 2 issue even when a patentholder monopolist has "*deceived* the standard setting body by making a commitment to license on FRAND terms when it purportedly never had any *intention* of granting such a license."[97] This Part presents Delrahim's reasoning across his five speeches and exposes the holes in his arguments.

A. Delrahim's Rights of Patentholders

In most of his speeches, Delrahim begins by noting the constitutional basis for intellectual property rights, including the fact that before the Bill of Rights was ratified, the Constitution's only use of the word "rights" resided in Article I, Section 8, which authorized (but did not require) Congress to create patent and copyright rights.[98] At times, he seems to speak as though IP rights are the only rights that matter.[99] Among the patent rights that Delrahim touts are the right to injunctions, the right to refuse licenses, and the right to raise prices. Although he invokes each of these rights to defend misconduct by FRAND violators, the following sections explain why he is wrong.

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94 Delrahim, New Madison, *supra* note 3, at 5.

95 Delrahim, The Long Run, *supra* note 3, at 3.

96 Delrahim, Wild West, *supra* note 3, at 5.

97 *Id.* at 3.

98 Delrahim, Telegraph Road, *supra* note 3, at 2–3.

99 Delrahim, New Madison, *supra* note 3, at 3 ("Remarkably, the word 'right' appears only *once* in the original Constitution—which took effect two years before the Bill of Rights was ratified—in the Copyright and Patent Clause.").

1. The Right to Injunctive Relief

Delrahim champions great deference to a patentholder's so-called right to injunctions. For example, he has repeatedly "criticized the argument that it ought to be a violation of antitrust law for a holder of a standard-essential patent, or SEP, to exclude competitors from using the technology, including by seeking an injunction against the sale of infringing goods."[100] Delrahim has promised that his Antitrust Division is "committed to ensuring that patent holders maintain their full constitutional right to seek an injunction against infringement"[101] even when an SEP owner is flouting its FRAND commitments.[102] Delrahim does not mention that under patent law the right to injunctive relief is not absolute.[103]

Trump's AAG argues that royalty rates between the owners of SEPs and the manufacturers of standard-dependent products should be "resolved through the free market, typically in the form of freely negotiated licensing agreements for royalties or reciprocal licenses."[104] Further, he argues that the patent owner should be able to enjoin production by any manufacturers with whom it does not reach an agreement.[105]

Delrahim's argument betrays a fundamental lack of understanding of how free markets work. Although Delrahim often invokes the concept of "free-market competition,"[106] he fails to recognize that patents are the antithesis of free market competition. In a truly free market, rivals would be able to copy each other's innovations and compete for customers' business. Patent law represents an exemption from free-market competition because the constitutional drafters recognized (and current policymakers continue to appreciate) that without being able to stifle short-term competition, innovators may not have sufficient incentive to innovate, because their inventions could be copied by competitors who could sell for a cheaper price because they

100 Delrahim, Telegraph Road, *supra* note 3, at 4.

101 *Id.* at 14.

102 *See id.*

103 *See* eBay Inc. v. MercExchange, L.L.C., 547 U.S. 388, 391 (2006) ("According to well-established principles of equity, a plaintiff seeking a permanent injunction must satisfy a four-factor test before a court *may* grant such relief. . . . The decision to grant or deny permanent injunctive relief is an act of equitable discretion by the district court . . . .") (emphasis added).

104 Delrahim, Take It to the Limit, *supra* note 3, at 3–4.

105 *Id.* at 11–13; *see also* Delrahim, New Madison, *supra* note 3, at 12–15; Delrahim, Telegraph Road, *supra* note 3, at 3–5.

106 Delrahim, Telegraph Road, *supra* note 3, at 3.

do not have to recoup investments in research and development.[107] Without giving innovators some protection against immediate competition, innovations could dry up.[108] It is right to restrain the free market in a limited fashion in order to grant IP rights, but it is wrong to suggest that patent licensing occurs in a truly free market.

There is no such thing as a free market in the context of standard-essential patents. After the standard has been adopted, the patentee has all the bargaining power, because the manufacturers are already locked into the standard. In a free market, both parties to the proposed transaction have the ability to walk away from the negotiation. But the standard-implementers cannot simply walk away because—having manufactured standard-compliant products—the SEP holder is suing for patent infringement. The SEP holder is not engaging in a market transaction when it violates its FRAND commitment; rather, it is offering to settle a legal dispute on nonmarket terms.[109] In Delrahim's world, the SEP owner should be able to shut down any manufacturer that does not acquiesce and submit to the patentholder's demands, even though the manufacturer can neither turn to another patentholder for a license nor design around the patent, because standard-conforming products cannot be made without reading on the SEP.[110] The patent owner can issue an ultimatum to every manufacturer: pay a monopoly royalty or exit the market. This is the very definition of patent holdup.[111] The looming threat of injunction allows the SEP owner to demand a non-FRAND royalty based on the value of the entire standard instead of the (much lower) pre-standard value of the patent.[112] That threat of injunction prevents a truly free licensing negotiation.[113]

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107 CHRISTOPHER R. LESLIE, ANTITRUST LAW AND INTELLECTUAL PROPERTY RIGHTS 4–5 (2011).

108 *See* Timothy R. Holbrook, *Possession in Patent Law*, 59 SMU L. REV. 123, 132 (2006) (discussing the inconsistencies between the teaching function and reward theory of patents).

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

110 *See* Microsoft Corp. v. Motorola, Inc., No. C10-1823JLR, 2013 WL 2111217, at *10–11 (W.D. Wash. Apr. 25, 2013) ("[E]xplaining that the 'essence of hold-up' is that while *ex ante* competition constrains what a patent holder can obtain for access to its patent, *ex post*, the technology in the standard does not face that competition.") (paraphrasing economist Schmalensee testimony).

111 *See supra* text accompanying notes 16–26 (discussing harms of patent holdup).

112 Michel, *supra* note 14, at 897.

113 Realtek Semiconductor Corp. v. LSI Corp., 946 F. Supp. 2d 998, 1008 (N.D. Cal. 2013) (explaining that seeking an injunction "is a clear attempt to gain leverage in future licensing negotiations"); Michel, *supra* note 14, at 889–90 ("Remedies for patent

In the case of an SEP, in order to temper that patentee's overwhelming power arising from its patented technology being incorporated into the standard, the manufacturer should be able to make a standard-compliant product and have a court later calculate the reasonable level of royalties that the manufacturer owes the SEP owner if the patentee refuses to grant a license on FRAND terms. This would allow the product market to function efficiently while the parties determine the appropriate royalty rate. Consumers benefit because competition among the manufacturers for retail sales—competition within the standard—continues unabated. The patentholder, even though it cannot enjoin the use of the SEP in the manufacture of standard-compliant products, will receive a reasonable royalty on every unit of product that reads on the patent. This approach is fair because the patentholder agreed to charge a FRAND royalty in exchange for having the SSO consider including its patented technology in the standard. This may be less than the monopoly royalty, but a reasonable royalty is precisely what the patentholder agreed to when making the FRAND commitment. After all, the "R" stands for "reasonable."

Delrahim, however, disparages this approach because it deprives the SEP owner of the power to shut down the manufacturer's factories. The DOJ/PTO Joint Policy Statement warned against injunctions or exclusion orders that "may harm competition and consumers by degrading one of the tools [SSOs] employ to mitigate the threat of such opportunistic actions by the holders of F/RAND-encumbered patents that are essential to their standards."[114] This, however, is the Policy Statement that Delrahim unilaterally rescinded in his *Telegraph Road* speech at Stanford Law School.[115]

The AAG is wrong to suggest that allowing antitrust claims based on monopolization through FRAND deception would infringe the legitimate right of patentholders to seek injunctions where appropriate. For example, injunctions may be appropriate when would-be licensees refuse to pay a FRAND royalty or when manufacturers practice the patent without a license in a product that is not complying with a standard.[116] But patent owners who have agreed to FRAND royalties

infringement are particularly important because they set the framework for licensing negotiations and provide the source of the patentee's power to extract monopoly rents from standardized products.").

114 Joint Policy Statement, *supra* note 4, at 6.

115 Delrahim, Telegraph Road, *supra* note 3, at 6–7.

116 Joint Policy Statement, *supra* note 4, at 7 ("An exclusion order may still be an appropriate remedy in some circumstances, such as where the putative licensee is unable or refuses to take a F/RAND license."); Melamed & Shapiro, *supra* note 15, at 2124 ("Instead,

sometimes initiate legal actions before even offering licensees a license.[117] That is a clear violation of the FRAND commitment.

Delrahim repeatedly ignores that the patentholder has made a FRAND commitment. For example, he has emphasized the need "to protect the patent holder's right to seek an injunction against infringing uses of its technology, even when the patent is essential to the practice of a technological standard."[118] But he never really wrestles with the fact that the only reason the patent is essential to the practice of a technological standard may be because the patentholder herself promised to forego, or limit, her right to injunctive relief.[119] The patentholder has a general right to ask a court for an injunction, but this is a right that can be bargained away;[120] a patentee who makes a FRAND commitment in exchange for possible inclusion in a standard has struck this bargain and should be held to it.

2. The Right to Refuse to License

In general, patent owners possess the right to decline to license their IP rights. Delrahim has embraced this uncontroversial point in his effort to create a more sweeping right that exempts unilateral refusals to license from antitrust liability altogether. In his first speech on FRAND violations, Delrahim proclaimed that "a unilateral refusal to license a valid patent should be *per se* legal" under antitrust laws.[121] His argument and reasoning are flawed.

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the proper approach would be to make injunction remedies available only if the implementer refuses to pay the FRAND rate after that rate has been determined.").

117 *See, e.g.*, *Realtek Semiconductor Corp.*, 946 F. Supp. 2d at 1006 ("Defendants' conduct in this case (bringing the ITC action *before* offering a license) is even more glaringly inconsistent with its RAND obligations than Motorola's request for an injunction at the district court *after* offering a license to Microsoft in the *Motorola* case.") (emphasis in original).

118 Delrahim, Telegraph Road, *supra* note 3, at 2.

119 *Cf.* Doug Lichtman, *Understanding the RAND Commitment*, 47 HOUS. L. REV. 1023, 1039–43 (2010) (arguing that injunctions should not apply in the RAND context); *see* Joseph Scott Miller, *Standard Setting, Patents, and Access Lock-In: RAND Licensing and the Theory of the Firm*, 40 IND. L. REV. 351, 358 (2007) (arguing that the FRAND commitment creates an "irrevocable waiver of injunctive relief" that helps prevent patent holdup).

120 *See* Microsoft Corp. v. Motorola, Inc., 696 F.3d 872, 884 (9th Cir. 2012) (A FRAND commitment includes "at least arguably, a guarantee that the patent-holder will not take steps to keep would-be users from using the patented material, such as seeking an injunction.").

121 Delrahim, Take It to the Limit, *supra* note 3, at 8 ("The enforcement of valid patent rights should not be a violation of antitrust law. A patent holder cannot violate the antitrust

Although antitrust law recognizes every firm's—not just IP owners'—general right to refuse to deal,[122] antitrust law also restricts this right in the face of monopoly conduct.[123] Although Delrahim begins his speeches by emphasizing the rights of patentholders, he seems to forget the Supreme Court's warning in *Lorain Journal*, where the Court found an antitrust violation and noted that "the word 'right' is one of the most deceptive of pitfalls; it is so easy to slip from a qualified meaning in the premise to an unqualified one in the conclusion. Most rights are qualified."[124] That includes the right to refuse to do business. Even in the absence of enforceable contracts, terminating an existing business relationship may constitute exclusionary conduct under antitrust law, as the Supreme Court held in *Aspen Skiing Co. v. Aspen Highlands Skiing Corp*.[125] In *Aspen Skiing*, the Court upheld a jury verdict of illegal monopolization against a ski company that terminated a profitable and desirable—but noncontractual—business arrangement in order to drive its one rival from the market.[126]

Conduct characterized as a unilateral refusal to license can violate antitrust laws in many ways entirely outside the context of standards. For example, patent tying—in which the patentholder refuses to license its patent unless the licensee also purchases or licenses a separate product—can violate the Sherman Act.[127] Some may say that tying represents a conditional refusal to deal, instead of a simple refusal.[128] But courts have found unconditional refusals to deal in intellectual

laws by properly exercising the rights patents confer, such as seeking an injunction or refusing to license such a patent. Set aside whether taking these actions might violate the common law. Under the *antitrust laws*, I humbly submit that a unilateral refusal to license a valid patent should be *per se* legal.").

122 United States v. Colgate & Co., 250 U.S. 300, 307 (1919).

123 *Id.* ("*In the absence of any purpose to create or maintain a monopoly*, the 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.") (emphasis added).

124 Lorain Journal Co. v. United States, 342 U.S. 143, 155 (1951) (quoting Am. Bank & Trust Co. v. Fed. Bank, 256 U.S. 350, 358 (1921)).

125 472 U.S. 585 (1985).

126 *Id.* at 610–11.

127 *See* Christopher R. Leslie, *Patent Tying, Price Discrimination, and Innovation*, 77 ANTITRUST L.J. 811, 815 (2011).

128 In one of his speeches, Delrahim makes this distinction. Delrahim, New Madison, *supra* note 3, at 5 ("[C]onsistent with the fundamental right to exclude, from the perspective of the antitrust laws, a unilateral and unconditional refusal to license a patent should be considered *per se* legal.").

property to violate antitrust law.[129] In short, a so-called unilateral refusal to license is not—and never has been—per se legal.[130]

In any case, FRAND violations do not involve a simple refusal to license because the SEP owner has already contractually obligated itself to license its patents to all manufacturers in a nondiscriminatory fashion and on reasonable terms. An SEP owner cannot legally refuse to license its patent as part of the standard because it has agreed to license its SEP to all comers as part of its bargain with the SSO.[131] The Ninth Circuit has explained that, under the FRAND agreements used by SSOs, "an SEP holder cannot refuse a license to a manufacturer who commits to paying the [F]RAND rate."[132] Importantly, the patentholder's right to refuse licenses is not inalienable. Thus, even though some antitrust opinions may seem to imply a right to unilaterally refuse to license,[133] these cases are distinguishable because they did not involve a patentholder who has promised to grant FRAND licenses in exchange for being included in a standard.

Many of Delrahim's arguments are founded on a misreading of case law. For example, Delrahim relies a great deal on the Supreme Court's opinion in *Verizon Communications Inc. v. Law Offices of Curtis V. Trinko, LLP*.[134] He asserts that the *Trinko* Court rejected the plaintiff's claim that Verizon had run afoul of Section 2 by refusing to provide adequate connections for its rivals, in violation of FCC regulations, "because the claim would condemn a monopolist's refusal to share its resources and effectively would create an antitrust duty to help a competitor."[135] Delrahim, however, mischaracterizes *Trinko* when he claims that the majority "applied a *legal* rule, rather than a fact-specific

129 *See, e.g.*, Image Tech. Servs., Inc. v. Eastman Kodak Co., 125 F.3d 1195, 1216 (9th Cir. 1997).

130 *See* Howard A. Shelanski, *Unilateral Refusals to Deal in Intellectual and Other Property*, 76 ANTITRUST L.J. 369, 369–70 (2009).

131 *See* Layne S. Keele, *Holding Standards for RANDsome: A Remedial Perspective on RAND Licensing Commitments*, 64 KAN. L. REV. 187, 190–91 (2015) ("The Joint Electron Device Engineering Council (JEDEC) requires its participants to agree to 'offer to license on RAND terms to all Potential Licensees' any patent having standard-essential claims.") (citing JEDEC SOLID STATE TECHNOLOGY ASSOCIATION, JEDEC POLICIES MANUAL, JM21R §§ 8.2.4, 8.2.1 (July 2015)).

132 Microsoft Corp. v. Motorola, Inc., 795 F.3d 1024, 1031 (9th Cir. 2015).

133 *See, e.g.*, Indep. Serv. Orgs. Antitrust Litig. v. Xerox Corp., 203 F.3d 1322, 1324 (Fed. Cir. 2000).

134 540 U.S. 398 (2004).

135 Delrahim, Wild West, *supra* note 3, at 4.

rule."[136] The *Trinko* opinion is completely fact-specific, turning on Justice Scalia's assertion that an antitrust remedy was unnecessary because the federal government had already created a regulatory scheme to address the precise misconduct at issue in the case.[137]

Separately, Delrahim claimed that *Trinko* held that "a business has no antitrust duty to deal with another company, and only in limited circumstances will a refusal to deal give rise to a potential antitrust claim."[138] His statement is inherently self-contradictory. He starts off with the sweeping claim that there is "no antitrust duty to deal" and then admits that a "refusal to deal" can create antitrust liability. If the refusal to deal violates antitrust law in any particular instance, then there is an "antitrust duty to deal" in that case. The issue, then, is whether acquiring one's monopoly power by promising to charge a FRAND royalty—in order to get one's patented technology included into a standard—creates such a duty. The answer is yes because otherwise patentees can acquire monopoly power through deception, which is not competition on the merits.[139]

Moreover, with his focus on *Trinko* and other pro-defendant opinions, Delrahim does not reconcile his position with the larger body of antitrust jurisprudence in which courts, including the Supreme Court on many occasions, have imposed a duty to deal.[140] And while the *Trinko* Court asserted that *Aspen Skiing* represented the "outer boundary" of Section 2 liability, FRAND violations by an SEP owner fall well within the parameters of *Aspen Skiing* and, indeed, present a stronger case for antitrust liability. Unlike the successful antitrust plaintiffs in *Aspen Skiing*, plaintiffs bringing monopolization claims based on FRAND deception can point to an actual enforceable promise that the defendant has breached.

Ultimately, Delrahim is adamant that antitrust law should not impose any duty to deal on patentholders.[141] But what he consistently

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136 *Id.* at 5 (emphasis in original).

137 *Trinko*, 540 U.S. at 412 ("One factor of particular importance is the existence of a regulatory structure designed to deter and remedy anticompetitive harm.").

138 Delrahim, Wild West, *supra* note 3, at 9.

139 *See supra* notes 75–76 and accompanying text.

140 *See, e.g.*, Aspen Skiing Co. v. Aspen Highlands Skiing Corp., 472 U.S. 585, 604 (1985); Otter Tail Power Co. v. United States, 410 U.S. 366, 389 (1973); Lorain Journal Co. v. United States, 342 U.S. 143, 155 (1951); United States v. Terminal R.R. Ass'n, 224 U.S. 383, 516 (1912).

141 Makan Delrahim, Assistant Attorney Gen., U.S. Dep't of Justice, "Don't Stop Thinking About Tomorrow": Promoting Innovation by Ensuring Market-Based Application of Antitrust to Intellectual Property (June 6, 2019) [hereinafter Delrahim, Thinking About Tomorrow] ("An antitrust cause of action premised on a failure to abide by FRAND

fails to recognize is that no one is *imposing* a duty on patentholders. They have voluntarily undertaken a duty to issue licenses on reasonable and nondiscriminatory terms as part of their participation in the standard-setting process.[142] This is not an instance of judges creating and imposing duties on innocent monopolists.[143]

In short, attaching antitrust liability for monopolization through FRAND deception does not infringe upon a patentholder's right to refuse to license its intellectual property because the patentholder has already bargained away that right. So, even if Delrahim and his followers were correct on the law, FRAND violations do not involve a simple unilateral refusal to license. It is simply absurd to say that acquiring monopoly power through acts of deception and breach of contract should be per se legal, as a matter of antitrust law.

3. The Right to Raise Price

The conceptual counterpart to the so-called unilateral refusal to license is the SEP owner demanding a monopoly royalty from manufacturers making standard-compliant products. The threat to refuse to license an SEP is generally part of a larger strategy to extort non-FRAND payments. Delrahim, and other commentators who defend patent holdup, argue that such demands for non-FRAND royalties cannot violate antitrust laws because the Sherman Act does not prohibit a lawful monopolist from charging a monopoly price.[144] Delrahim, for example, argues that "[t]here is no duty under the antitrust laws for a patent holder to license on FRAND terms, even after having committed to do so."[145] He concedes that "a FRAND

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commitments would be inconsistent with Section 2 of the Sherman Act. That is because there is no duty under U.S. antitrust law for a holder of an intellectual property right to license on FRAND terms, even after having committed to do so."), https://www.justice.gov/opa/speech/assistant-attorney-general-makan-delrahim-delivers-remarks-organisation-economic-co [https://perma.cc/J68P-6DYV].

142 This stands in contrast to a situation where an SSO adopts a standard that incorporates a patented invention without the participation of the patentholder. In that case, the patentholder would not have to license its SEP on FRAND terms, and a court should not hold that the patentholder is obligated to license.

143 Delrahim makes similar arguments when he—incorrectly—tries to equate antitrust liability for FRAND deception with compulsory licensing. *See infra* notes 180–84 and accompanying text.

144 *See* Bruce H. Kobayashi & Joshua D. Wright, *Federalism, Substantive Preemption, and Limits on Antitrust: An Application to Patent Holdup*, 5 J. COMPETITION L. & ECON. 469, 490 (2009).

145 Delrahim, Wild West, *supra* note 3, at 7 ("That is also true even where a patent holder never allegedly intended to license on the terms that a court ultimately determines are

commitment may create a duty under contract law to fulfill that obligation," but not an antitrust duty because "Section 2 . . . is agnostic to the price that a patent-holder seeks to charge after committing to such a term."[146] Delrahim also asserts that "having undertaken a contractual duty to charge 'nondiscriminatory' rates, the Sherman Act does not compel a patent-holder to abide by this promise."[147]

Any references to the general antitrust rule that a lawful monopolist can legally charge a monopoly price, however, are irrelevant in the context of FRAND deception. The FRAND violator is not a lawful monopolist if it used deception in the standard-setting process to acquire its monopoly power. Further, the patentholder's improper demand for non-FRAND royalties is not merely a monopolist charging a monopoly price, as Delrahim would like to characterize it. The charging of a monopoly royalty is evidence of the initial deception. If the SEP owner never charges a non-FRAND royalty, this demonstrates that its representations to the SSO members during the standard-setting process were honest and sincere. If, however, the SEP owner disregards its FRAND commitment and engages in patent holdup after the standard has been adopted and becomes entrenched, this suggests that the monopolist may have lied to the SSO in order to acquire monopoly power. Delrahim does not recognize the antitrust significance of the deception because, as he repeatedly states, he is not particularly bothered by patentholders lying to SSOs in order to manipulate the standard-setting process.[148]

Not only does Delrahim not appreciate that deception can constitute monopoly conduct, Delrahim astonishingly speaks in praise of deception. For example, he asserts that no

> antitrust duty spring[s] into being if a patent holder allegedly "deceives" an SSO when it commits to license on FRAND terms and its participants rely on that representation in deciding to adopt the technology. That is because Section 2 should not condemn a patent

'FRAND.'"); *see also* Kobayashi & Wright, *supra* note 144, at 492 (noting that recent case law has rendered antitrust claims involving deviations from FRAND commitments inactionable).

146 Delrahim, Wild West, *supra* note 3, at 7. Delrahim is wrong to suggest that the price that the SEP owner charges is irrelevant to Section 2 entirely. The royalty rate demanded in excess of the FRAND level provides the measure for antitrust damages.

147 *Id.* at 8. Delrahim also asserts that "[t]he Sherman Act is indifferent to price discrimination . . . ." *Id.* That is not completely accurate. When a monopolist engages in price discrimination by using high prices in one market to subsidize below-cost prices in another market, this predatory pricing scheme can violate the Sherman Act. *See* Christopher R. Leslie, *Predatory Pricing and Recoupment*, 113 COLUM. L. REV. 1695, 1697–98 (2013).

148 *See supra* notes 94–97 and accompanying text.

> holder's profit-maximizing intentions or aspirations at the time it makes a FRAND commitment . . . .[149]

In other words, in Delrahim's antitrust worldview, deception is not blameworthy as long as it is done in pursuit of monopoly profits.[150] Delrahim apparently finds it to be perfectly natural for "the holder of a standard-essential patent [who] knew upfront precisely what price would satisfy the vague definition of 'FRAND' . . . to *demand a much higher price* after the SSO incorporated its technology into a standard."[151] At a minimum, Delrahim downplays the fact of deception; at a maximum, he embraces it. In either case, the presence of deception negates his argument that patentholders have an unfettered right under antitrust law to charge monopoly prices.

4. Summary

Despite his praise for the rights of patentholders, Delrahim does not seem to truly comprehend the fact that the constitutional and statutory rights of patentholders do not include any right to deceive SSOs in order to manipulate the standard-setting process. Nor does the patentee's bundle of rights include the right to breach its contractual commitments with immunity from antitrust scrutiny. Because deception and breach are the core components of FRAND violations, Delrahim's forays into the *general* rights of patent owners are largely an attempt to distract from the bad conduct of certain monopolist patentholders.

B. Scare Tactics

In addition to expanding the rights of patentholders beyond recognition, Trump's antitrust head has also penned a litany of horrors that he claims will befall the American economy if antitrust law were to serve as a check on FRAND violations. In particular, Delrahim raises the twin threats of reduced innovation and compulsory licensing. Both sets of arguments are overwrought and inaccurate.

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149 Delrahim, Wild West, *supra* note 3, at 10.

150 He notes that the antitrust's acceptance of deception is appropriate "particularly where remedies are already available to an unhappy licensee or SSO participant." *Id.* This is a reference to his embrace of contract law, which is discussed later.

151 *Id.* (emphasis added). He thinks this is fine because it can be sorted out later in contract litigation, but contract law is not a suitable replacement for antitrust law in these circumstances. *See infra* notes 191–210 and accompanying text.

1. Innovation

In his speeches, Delrahim tries to create the specter of antitrust liability destroying innovation incentives if FRAND violations are treated as anticompetitive conduct.[152] In particular, Delrahim argues that, even in the presence of FRAND commitments, courts should grant injunctions against alleged infringers in order to "optimize[] the incentive[s] to innovate for the benefit of the public."[153] At times, he asserts that allowing owners of FRAND-encumbered SEPs to enjoin manufacturers from making products is necessary to reward inventors.[154] This is counterintuitive. Allowing patentholders to evade their contractual commitments made to SSOs does not "reward[] successful inventors," as Delrahim argues.[155] Rather, it distorts the competitive process through which the standard was initially adopted, which was based on the patentholders' representations that they would charge FRAND royalties.[156] Moreover, there is nothing in patent law that suggests—let alone mandates—that patentholders should be able to maximize their profits by any means they choose.[157]

Delrahim repeatedly describes FRAND violators as "innovators" and suggests that this characterization alone warrants antitrust immunity, lest liability deter or discourage inventors from inventing.[158] But this is a red herring, a distraction. If a patentholder monopolizes a market solely through its innovation, and nothing else, the monopoly is legal. But no one is suggesting that monopolization through innovation should trigger antitrust liability. Rather, it is a patentholder's deception and/or breach of relied-upon commitments that leads to antitrust scrutiny, because neither of these bad acts represents competition on

152 Delrahim, Thinking About Tomorrow, *supra* note 141 ("Any additional deterrence that the Sherman Act could offer risks curbing procompetitive conduct and reducing innovation . . . .").

153 Delrahim, Telegraph Road, *supra* note 3, at 5.

154 *Id.* at 6 ("Since injunctions against infringement frequently *do* serve the public interest in maintaining a patent system that incentivizes and rewards successful inventors through the process of dynamic competition, enforcement agencies without clear direction otherwise from Congress should not place a thumb on the scale against an injunction in the case of FRAND-encumbered patents.") (emphasis in original).

155 *Id.*

156 Delrahim implicitly assumes that all innovators will be found liable for antitrust violations. But that's simply not the case.

157 Leslie, *supra* note 127, at 831; United States v. Line Material Co., 333 U.S. 287, 300 (1948) ("The original context of the words [in United States v. Gen. Elec. Co., 272 U.S. 476, 490 (1926)] makes clear that they carry no implication of approval of all a patentee's contracts which tend to increase earnings on patents . . . .").

158 Delrahim, Wild West, *supra* note 3, at 12.

the merits.[159] Delrahim asserts that acquiring market power "as a result of a patent holder's so-called 'deception' about its licensing obligations . . . 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."[160] Delrahim never really explains why monopolization-through-deception is not conduct that violates Section 2. Instead, he expresses concern that patentholders may be liable for treble damages.[161] But treble damages are easy to avoid: if the monopolist patentholder does not engage in deception and honors its FRAND commitments, then it will not be on the hook for any damages. In a similar vein, Delrahim notes that "the Supreme Court has cautioned against antitrust standards that would create an unacceptable risk of 'false positives' or condemnations of lawful pro-competitive conduct."[162] Invoking that concern, Delrahim asserts that holding innovators liable for their misconduct could deter innovation.[163] That is absurd. Liability for misconduct deters misconduct. It does not deter any lawful behavior that is not the basis for liability in the first place. Delrahim offers no explanation for why holding patentees liable for breaking their FRAND commitments after having deceived an SSO into incorporating their patented invention into a standard would be likely to produce "false positives" against patentholders who have not engaged in such behavior.[164]

Delrahim consistently fails to appreciate how easy it is for an SEP owner to avoid antitrust liability: license the patent on FRAND terms. If there is a dispute about what constitutes a FRAND royalty, the

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159 *See supra* notes 81–86 and accompanying text.

160 Delrahim, Wild West, *supra* note 3, at 11.

161 *Id.* at 12.

162 *Id.* at 5. Delrahim asserts that

> recognizing a Section 2 cause of action for violations of a FRAND commitment would create an unacceptable risk of "false positive" condemnations of pro-competitive conduct by licensees. The prospect of antitrust liability and treble damages for breaching a potentially vague FRAND term—or allegedly "misrepresenting" one's intentions to offer some FRAND rate—threatens to chill incentives for innovators to develop new technologies that fuel dynamic competition.

Id. at 11.

163 *See id.* at 6.

164 *Cf.* Mark A. Lemley, *Faith-Based Intellectual Property*, 62 UCLA L. REV. 1328, 1336 (2015) ("Participants on both sides of the IP debates are increasingly staking out positions that simply do not depend on evidence at all. That is, their response to evidence that doesn't accord with their beliefs is not to question their beliefs, or even to question the evidence, but to retreat to a belief system that doesn't require evidence at all.").

patentholder can go to court and get a ruling on the FRAND rate, instead of suing for an injunction and threatening to drive a manufacturer from the market. Seeking and following judicial guidance on the FRAND rate immunizes the SEP owner against both antitrust liability and a breach of contract lawsuit.

Some of Delrahim's innovation arguments read like a defense of patent holdup writ large. For example, he asserts, "An antitrust duty to license on FRAND terms would also 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."[165] Taken at face value, this approach would eliminate antitrust liability for any patentholders' anticompetitive conduct (tying, sham litigation, etc.) because such liability would reduce the maximum possible return they could earn on their patent.[166] Delrahim's statement ignores the fact that the patentholder *acquired* its monopoly power by legally promising *not* "to seek the greatest rewards possible for [its] invention[]."[167]

Furthermore, Delrahim is wrong to assert that antitrust liability for willful misconduct weakens incentives for innovation. The patentee is receiving just compensation under the FRAND regime.[168] By bargaining to have its patent included in the industry standard, the SEP owner is locking in a steady stream of profits. Delrahim provides no evidence that these FRAND royalties are insufficient to reward and encourage innovation. And, in any event, the patentholder *chose* to pursue FRAND royalties rather than maintaining its patent outside the standard and retaining the right to set its own royalty rate for its patented technology.

To make his innovation-based arguments, Delrahim describes a binary world in which firms are either innovators or implementers, and the "dueling interests of innovators and implementers always are in tension."[169] If this were a tug-of-war match, Delrahim would be loudly rooting for the innovators. Delrahim does not merely champion innovators; he affirmatively disparages implementers and the work of

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165 Delrahim, Wild West, *supra* note 3, at 9–10.

166 *See* Leslie, *supra* note 127, at 824.

167 Delrahim, Wild West, *supra* note 3, at 9–10.

168 *See* Joint Policy Statement, *supra* note 4, at 8 ("DOJ and USPTO strongly support the protection of intellectual property rights and believe that a patent holder who makes such a F/RAND commitment should receive appropriate compensation that reflects the value of the technology contributed to the standard.").

169 Delrahim, Take It to the Limit, *supra* note 3, at 3.

standard-setting organizations, which he accuses of having been "given too little scrutiny when they have acted as a forum to slow down, rather than to facilitate, the adoption of disruptive innovations."[170]

The development of advanced technological goods, however, is not a zero-sum game in which one team wins and the other team loses. Delrahim's description of the relationship between innovators and implementers is deeply flawed because no clear line separates these groups. In response to his first deception-forgiving speech, a group of leaders in the high-tech industry wrote to Delrahim, "We are not mere implementers of standards. Rather, we contribute technologies to standards and drive research, development, investment and innovation throughout the value chain."[171] Signatories to the letter included Apple, Audi, Cisco Systems, Dell, Hewlett Packard, Intel, Microsoft, and Samsung—all major players in the innovation game. In short, Delrahim is wrong to suggest that implementers are not innovators and that recognizing their legal rights would somehow hurt innovation.[172]

Moreover, Delrahim ignores an entire class of (undisputed) innovators—those inventors who own patented technology that was not included in the adopted standard. Unchosen standards are often rife with innovations. When a patent owner engages in deception to secure a particular standard, the innovators who own patents that would have been SEPs for an alternative standard that was not selected due to another patentee's deceptive conduct suffer a loss of revenue that could constitute a form of antitrust injury.

Not only is Delrahim's innovation analysis incorrect, it is counterproductive to its stated goals. The industry letter in response to Delrahim's first speech explained that the Trump appointee's approach would "instead threaten US industry and consumer interests, harm US innovation, and interfere with parties' right to contract."[173] The Department of Justice used to recognize this, noting in its prior joint statement with the PTO that "F/RAND commitments may also contribute to increased follow-on innovation by allowing nondiscriminatory access to networks both to new entrants and to

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[170] Delrahim, Telegraph Road, *supra* note 3, at 2.

[171] Letter from Industry to Makan Delrahim, Assistant Att'y Gen., U.S. Dep't of Justice (Jan. 24, 2018) [hereinafter Industry Letter], https://cdn.patentlyo.com/media/2018/07/Letter-from-Industry-Jan-24-annotated.pdf [https://perma.cc/5S96-VED9].

[172] *See* Melamed & Shapiro, *supra* note 15, at 2120 ("Allowing SEP owners to engage in such opportunism would inhibit innovation and the adoption of new technologies by implementers, which are often significant innovators themselves.").

[173] Industry Letter, *supra* note 171, at 1.

established market participants to introduce new generations of network-operable devices."[174] Patent holdup harms innovation by discouraging firms from participating in SSOs because "[w]here the danger of abuse undermines the collaborative process by threatening to extract supracompetitive prices from competitors, industry members are less likely to participate in SSOs in the future and, as a result, consumers are less likely to benefit from these organizations."[175] Douglas Melamed and Carl Shapiro have explained that "supracompetitive pricing by SEP holders increases the cost of follow-on inventions that build on or improve the technologies claimed by the SEPs. This cost acts as a tax on follow-on innovation, reducing such innovations and impairing the very process of invention that the patent laws are intended to promote."[176] Moreover, because Delrahim looks at the issue only through the eyes of the SEP owner that seeks to evade its FRAND obligation, he overlooks the fact that by delaying the implementation of the standard, the holdout who commits holdup hurts all the other innovators who have SEPs.[177] Ultimately, because SSOs facilitate and reward innovation and because patent holdup can chill industry members from participating in the standard-setting process, the failure to deter and remedy patent holdup harms innovation.[178] Former FTC Commissioner Terrell McSweeny explained that "[b]y protecting the integrity of the standard-setting process itself, sound antitrust enforcement actually strengthens market opportunities for new technologies, thus improving the incentive for valuable innovation."[179] Thus, while Delrahim is right to praise innovation, he

174 Joint Policy Statement, *supra* note 4, at 5.

175 Adam Speegle, *Antitrust Rulemaking as a Solution to Abuse of the Standard-Setting Process*, 110 MICH. L. REV. 847, 852 (2012) ("[T]he costs of patent holdup inflicted on industry members, both in litigation and in royalty payments, draw funding away from research and development and, in extreme cases, may drive some companies out of business.") (internal citations omitted).

176 Melamed & Shapiro, *supra* note 15, at 2116.

177 Microsoft Corp. v. Motorola, Inc., No. C10-1823JLR, 2013 WL 2111217, at *10–11 (W.D. Wash. Apr. 25, 2013) ("Hold-up by one SEP holder also harms other firms that hold SEPs relating to the same standard because it jeopardizes further adoption of the standard and limits the ability of those other holders to obtain appropriate royalties on their technology.").

178 *In re* Dell Comput. Corp., 121 F.T.C. 616, 618 (1996); Michel, *supra* note 14, at 889 ("Such licensing fees can also deter innovation by increasing the costs and uncertainty of other innovators and by discouraging adoption of standards."); Delrahim, New Madison, *supra* note 3, at 5.

179 McSweeny, *supra* note 23, at 6 ("The motivation for firms to engage in holdup will endure where there is opportunity. Given the importance of standard-setting to the modern

is wrong to argue that permitting deception and FRAND violations is the correct way to encourage innovation.

2. Compulsory Licensing

In most of his speeches, Delrahim tries to create the illusion that allowing antitrust claims based on monopolization through FRAND deception would constitute compulsory licensing. For example, in his *New Madison* speech, he asserted that "because a key feature of patent rights is the right to exclude, standard setting organizations and courts should have a very high burden before they adopt rules that severely restrict that right or—even worse—amount to a de facto compulsory licensing scheme."[180] Delrahim made this claim more explicitly in his *Telegraph Road* speech, asserting that a FRAND commitment should not prevent patentholders from securing preliminary injunctions against any manufacturers who refuse to meet the patentee's royalty demands because "[a] FRAND commitment does not and should not create a compulsory licensing scheme."[181] In his most recent speech, *Wild West*, Delrahim argued that acquiring monopoly power by lying to an SSO should not create antitrust liability because "the Sherman Act does not convert FRAND commitments into a compulsory licensing scheme."[182]

The "compulsory licensing" label is trotted out as a bogeyman of sorts. Delrahim invokes the phrase that "FRAND is not a compulsory licensing scheme" to mean that the SEP owner who has obligated itself to charging a FRAND royalty is, somehow, under no such obligation because that would constitute "compulsory licensing." This misconstrues the concept of compulsory licensing beyond recognition. A compulsory license describes the scenario in which an IP owner is forced to license its IP—generally on terms that the IP owner played no role in setting—despite never agreeing to do so. This description does not depict a FRAND commitment.

Delrahim's statement that a "FRAND commitment does not . . . create a compulsory licensing scheme" is correct, but not for the reasons he thinks. Delrahim argues that the FRAND commitment should not obligate the SEP owner to issue any licenses because that

economy, it is imperative that the FTC continue to take holdup seriously and not abdicate its antitrust enforcement mission in this area.").

180 Delrahim, New Madison, *supra* note 3, at 5.

181 Delrahim, Telegraph Road, *supra* note 3, at 6.

182 Delrahim, Wild West, *supra* note 3, at 10.

would constitute a "compulsory licensing scheme." That is incorrect. The SEP owner does have a legal obligation to license its patent, not because of any "compulsory licensing scheme," but because the patentholder has *voluntarily*—and legally—obligated itself to license its patents to all licensees on reasonable and nondiscriminatory terms. Thus, a FRAND obligation looks nothing like a compulsory license because the patent owner has voluntarily agreed to it.[183]

Under the Delrahim approach, all contractual obligations are "compulsory" because after the parties have voluntarily entered into their contract, they are compelled to honor their commitments. That is not what compulsory means, not in general and not in the context of compulsory licensing. Delrahim seems to be trying to harness the patent community's reflexive distaste toward compulsory licensing by suggesting that enforcing voluntary FRAND commitments would amount to compulsory licensing. It is a linguistic sleight of hand that should have no currency.

C. The Non-Antitrust Feint

As his final tactic, Delrahim argues that antitrust liability for FRAND violations is unwise and unnecessary because other areas of law are better suited for the task of enforcing FRAND commitments. The two bodies of law that he routinely invokes are patent law and contract law. This section presents Delrahim's arguments and explains why neither patent law nor contract law can perform the same vital functions as antitrust law when it comes to deterring and remedying monopolization through FRAND deception.

1. Patent Law

Delrahim argues strenuously that the issue of FRAND violations should be dealt with through patent law, not antitrust law. For example, in his December 2018 Stanford speech, in which he argued against antitrust liability for monopolization through FRAND deception,

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183 *See* Joint Policy Statement, *supra* note 4, at 5 ("SDOs and their members rely on these voluntary F/RAND commitments to facilitate the bilateral licensing negotiations . . . .").

In an actual compulsory licensing regime, the patentholder cannot escape licensing requirements by declining to participate in the regime. In contrast, the patentholder member of an SSO had the ex ante option of not participating in the standard-setting process or not making a FRAND commitment. But it chose to voluntarily limit its post-standard freedom to charge a non-FRAND royalty in exchange for the SSO considering its inclusion in the industry standard.

Delrahim started with the premise that "[w]hen it comes to the test for obtaining injunctive relief against infringement, patent law already strikes a careful balance that optimizes the incentive to innovate, for the benefit of the public."[184] He proceeded to champion the legal test from *eBay v. MercExchange*,[185] which provides that

> a patent holder seeking an injunction must demonstrate (1) it has suffered an irreparable injury; (2) remedies available at law, such as monetary damages, are inadequate to compensate for that injury; (3) considering the balance of hardships between the plaintiff and defendant, a remedy in equity is warranted; and (4) the public interest would not be disserved by a permanent injunction.[186]

Delrahim praised the *eBay* test for "allow[ing]" courts "to consider effects in the market, including (as Justice Kennedy noted in concurrence) how significant the patented invention is to the use of the product, and whether the patent holder can be properly rewarded for that contribution without the ability to exclude competitors."[187] It is interesting that Delrahim described the *eBay* test as merely *allowing* courts to consider these issues and not requiring them to do so. He concluded that the *eBay* "test is used to maintain appropriate incentives to innovate, it thus facilitates the goals of antitrust law and patent law alike."[188]

Delrahim's embrace of the *eBay* test as a replacement for antitrust scrutiny—and as embodying antitrust goals—is unpersuasive. First, the *eBay* test has nothing to do with antitrust law, and the Supreme Court never considered antitrust issues in this non-antitrust case. The *eBay* Court never intended its test for patent injunctions to replace antitrust law as a remedy for monopolization through FRAND deception (or other anticompetitive uses of a patent).

Second, the *eBay* test did not consider the factual context in which the patentholder has already committed itself to licensing all manufacturers on reasonable and nondiscriminatory terms. Douglas Melamed and Carl Shapiro have explained that the *eBay* test cannot solve the problem of patent holdup occurring in violation of FRAND commitments because "[w]hile the *eBay* case has limited the

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184 Delrahim, Telegraph Road, *supra* note 3, at 5.

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

186 Delrahim, Telegraph Road, *supra* note 3, at 5 (quoting *eBay Inc.*, 547 U.S. at 396–97).

187 *Id.*

188 *Id.*

availability of injunctions in infringement cases involving SEPs, it has not eliminated that possibility or the bargaining leverage that the prospect of an injunction can confer upon SEP holders in royalty negotiations with infringers."[189] In other words, the *eBay* test is not designed to address the pursuit of injunctions by SEP owners who have leverage arising from the fact that they made a FRAND commitment that they now seek to avoid.

Moreover, the *eBay* standard counsels against granting injunctions to patentholders who have made FRAND commitments. Suzanne Michel has explained that the patentee's promise to charge a FRAND royalty "provides strong evidence that denial of an injunction and [payment of] ongoing royalties will not irreparably harm the patentee."[190] Thus, the first *eBay* factor is not satisfied. With regard to the second factor, adequacy of legal remedies, Michel argues, "A court-ordered payment of ongoing royalties can ensure that the patentee receives the full value of the invention and protect incentives to innovate."[191] The balance of equities and hardships, the third *eBay* factor, favors the standard implementers over the patentholders because the latter are engaging in patent holdup, threatening to drive alleged infringers from the markets even if they are willing to pay a FRAND royalty.[192] Finally, the public interest factor inquiry favors denial of injunctions to patentees who have made FRAND commitments because allowing injunctions in these circumstances facilitates patent holdup, which ultimately harms consumers and innovation.[193]

Third, like patent law itself, the *eBay* test does not provide for any remedy for misconduct by the patentholder. Patent law is neither

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189 Melamed & Shapiro, *supra* note 15, at 2123.

190 Michel, *supra* note 14, at 908 (citing Hynix Semiconductor Inc. v. Rambus Inc., 609 F. Supp. 2d 951, 983–85 (N.D. Cal. 2009); Advanced Cardiovascular Sys., Inc. v. Medtronic Vascular, Inc., 579 F. Supp. 2d 554, 560–61 (D. Del. 2008)).

191 *Id.*

192 *Id.* ("As a key part of this analysis, courts should consider whether an infringer may face significant hardship as a result of an injunction if it is impossible to participate in the market without complying with the standard.") (citing *Hynix Semiconductor Inc.*, 609 F. Supp. 2d at 984–85); TruePosition, Inc. v. Andrew Corp., 568 F. Supp. 2d 500, 532–33 (D. Del. 2008)).

193 Michel, *supra* note 14, at 910 ("Courts should also consider whether grant of an injunction would deprive consumers of interoperable products and threaten to undermine the collaborative innovation that can result from the standard-setting process. Courts should also consider whether an injunction awarded against a standard would result in higher prices to consumers resulting only from holdup of the standard and not the value of the technology."); *see supra* notes 22–26 (discussing consumer harm caused by patent holdup) and notes 156–65 (discussing innovation harms from patent holdup).

intended nor designed to compel patentholders to honor their contractual relations. Most of the patent statute is concerned with the standards for patentability, the process of securing patents, and the enforcement of patents, not constraining the actions of patentees.[194] Although some patent doctrines, such as inequitable conduct, penalize certain misconduct by a patent applicant committed during the application process, FRAND violations have nothing to do with the patent application process. Instead, the misdeeds happen after the patent has been issued.

Patent law's only major post-issuance constraint on a patentee's misconduct is the equitable doctrine of patent misuse.[195] To date, however, courts have held that FRAND violations do not constitute patent misuse.[196] Moreover, patent law does not provide monetary remedies to those who are injured by the misconduct of patentholders.[197] Antitrust remedies are needed to penalize patent holdup, in part because antitrust remedies can deter misconduct in ways that patent law does not.[198]

In sum, arguments that antitrust law is unnecessary or inappropriate to address the issue of FRAND violations because patent law is better equipped to handle the problem are flawed. Such vague gestures toward patent law betray a lack of understanding about this body of law and its ability to corral misconduct by patentees.

2. Contract Law

In most of his speeches, Delrahim contends that SEP owners who lie about FRAND commitments in order to have their patented technology included in a standard should be immune from antitrust liability because contract law can better address the problem.[199] The arguments

194 35 U.S.C. §§ 100–329 (2012).

195 In theory, equitable estoppel can police some forms of post-issuance bad conduct and the doctrine could be applied to FRAND violations. *See* Doug Lichtman, *Understanding the RAND Commitment*, 47 HOUS. L. REV. 1023, 1043 (2010) ("Courts could interpret RAND as a public commitment that creates a defense of equitable estoppel.").

196 Saint Lawrence Commc'ns LLC v. Motorola Mobility LLC, No. 2:15-CV-351-JRG, 2018 WL 915125, at *7 (E.D. Tex. Feb. 15, 2018) ("[A] breach of FRAND is not determinative of patent misuse.").

197 Christopher R. Leslie, *Antitrust and Patent Law as Component Parts of Innovation Policy*, 34 J. CORP. L. 1259, 1275–76 (2009).

198 *Id.*

199 Delrahim, Take It to the Limit, *supra* note 3, at 8–9; Delrahim, Thinking About Tomorrow, *supra* note 141, at 3 ("[C]ontract law is available and adequate to remedy such conduct.").

that he makes to support this position reveal that Delrahim has no interest in remedying or deterring FRAND fraud.

In litigation involving FRAND violations, the core of the plaintiff's case is the same under either a contract law approach or an antitrust law approach. The same conduct—charging a supra-FRAND royalty—is the foundation of both a breach of contract and an antitrust violation. Besides the fact that Section 2 liability requires proof of a defendant's monopoly power, the two most important differences are the remedies and the universe of potential plaintiffs. With respect to remedies, under contract law, if the patentee charges a royalty that is not FRAND, the contract plaintiff can recover the difference between the FRAND amount and the royalty actually paid. In contrast, successful antitrust plaintiffs are entitled to treble damages on the overcharge as well as reasonable attorneys' fees and costs.[200] These differences in available remedies have important implications for both compensation and deterrence. Although called compensatory damages, the single damages associated with contract law do not actually fully compensate victims of breach for their injuries. Although contract damages are supposed to make the nonbreaching party whole, they do not for several reasons. First, contract law does not generally provide attorneys' fees for successful plaintiffs.[201] Second, contract remedies do not compensate the nonbreaching party for the time and effort of investigating their contract claims.[202] As a result, even when a plaintiff wins her contract law case, she is not fully compensated for her injuries. She remains worse off than if the contract had been properly performed.

Congress provided for the automatic trebling of antitrust damages in order to deter firms from engaging in anticompetitive conduct in the

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200 15 U.S.C. § 15 (2012).

201 Personalized Media Commc'ns, L.L.C. v. Sci.-Atlanta, Inc., No. 1:02-CV-824-CAP, 2011 WL 13174439, at *2 (N.D. Ga. May 18, 2011) ("An award of attorneys' fees in a breach of contract action is governed by the American Rule, under which the litigating parties shoulder their own litigation expenses unless an exception applies."), *vacated*, 493 F. App'x 78 (Fed. Cir. 2012); Pursuit Partners, LLC v. Reed Smith, LLP, No. FSTCV155015213S, 2018 WL 1882738, at *2 (Conn. Super. Ct. Mar. 26, 2018) ("The cited authorities appear to stand for the unremarkable proposition that a party cannot assert a claim for attorneys fees incurred in connection with pursuing the breach of contract action itself. In effect, it is nothing more than a contractual-focused assertion of the so-called 'American rule' whereby each litigant bears litigation expenses, absent a statute or contract (or other recognized basis) shifting that liability.").

202 *See* John M. Bjorkman, *Minnesota and the American Rule: The Recoverability of Attorneys' Fees Following* In re Silicone Implant Insurance Coverage Litigation, 30 WM. MITCHELL L. REV. 541, 543 (2003).

first place.[203] Antitrust law's treble damages are also intended to compensate victims of antitrust violations for the time it takes to investigate and pursue potential antitrust violations.[204] Congress recognized that consumers would be less likely to spend the necessary resources to detect and challenge antitrust violations if they were not compensated for their investment in time. Although contract law alone does not deter patentholder deception and holdup,[205] Delrahim praises contract remedies specifically because contract law does not provide for treble damages.[206] He raises the threat of overdeterrence if antitrust law were in play. But there should be no meaningful risk of overdeterrence because the owner of a SEP can eliminate the prospect of antitrust litigation by adjudicating FRAND royalty rates ahead of time.

After disparaging antitrust law for allegedly providing too potent a remedy, Delrahim claims that antitrust immunity for FRAND violations somehow strengthens contract law as a remedy. In one of his more bizarre arguments, Delrahim asserts that "refraining from imposing antitrust penalties gives teeth to more appropriate common law remedies and allows SSOs to live up to their promise."[207] Delrahim never explains how shifting from a treble-damage remedy to a single-damage remedy "gives teeth" to the latter beyond forcing those harmed by a FRAND violation to pursue a single-damage contract claim rather than a treble-damage antitrust claim. Delrahim's assertion is patently

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203 *See* Am. Soc'y of Mech. Eng'rs, Inc. v. Hydrolevel Corp., 456 U.S. 556, 575 (1982) ("[Antitrust law's] treble damages were also designed to deter future antitrust violations.").

204 Reiter v. Sonotone Corp., 442 U.S. 330, 344 (1979) ("Congress created the treble-damages remedy . . . precisely for the purpose of encouraging *private* challenges to antitrust violations. These private suits provide a significant supplement to the limited resources available to the Department of Justice for enforcing the antitrust laws and deterring violations."); Quemos Theatre Co. v. Warner Bros. Pictures Inc., 35 F. Supp. 949, 950 (D.N.J. 1940) ("[T]he three-fold damage clause of the Sherman Act, was designed to supply an ancillary force of private investigators to supplement the Department of Justice in law enforcement . . . ."); *see also Am. Soc'y of Mech. Eng'rs, Inc.*, 456 U.S. at 575–76 ("[In antitrust,] treble damages serve as a means of deterring antitrust violations and of compensating victims.").

205 Farrell et al., *supra* note 22, at 660 ("Proper enforcement of FRAND terms may restore the competitive outcome but is unlikely to deter attempts at hold-up.").

206 Delrahim, Wild West, *supra* note 3, at 6 (arguing that FRAND violations "may warrant remedies under contract law, but the important difference is that contract remedies do not involve the threat of treble damages").

207 Delrahim, Take It to the Limit, *supra* note 3, at 9 ("In a breach of contract action, a party can litigate the facts regarding what constitutes a 'reasonable' or 'nondiscriminatory' rate or commitment. If there is a violation of a reasonableness standard, the factfinder can decide it, like they do in other instances of contract violations.").

false; he has no desire to strengthen contract remedies or claims based on FRAND violations.

While claiming to champion contract law as a mechanism to remedy FRAND violations, Delrahim seemingly seeks to simultaneously undermine any plaintiff's FRAND-related contract case. For example, he phrases the issue as "FRAND commitments that patent-holders *unilaterally* make to standard setting organizations."[208] He mischaracterizes the patent owner's promise as unilateral, which is important because contract law requires a bargained-for exchange. If the defendant's promise is truly unilaterally made, as Delrahim asserts, there is no contract and, thus, no breach of contract claim for refusing to license at a FRAND royalty. Delrahim, however, is wrong to describe the patentholder's promise as unilateral, because the patentholder is not making the commitment as a donative gift but rather as part of an exchange in which the patentholder is bargaining for the SSO to consider including its patented technology in the standard.[209] The Second Circuit has explained that because SSOs will omit technologies that are subject to patent holdup, "[F]RAND licenses are thus part of a *quid pro quo*, representing the consideration contributing parties give to standard-setting organizations in exchange for the competitive benefits they will receive from gaining industry-wide acceptance of their preferred technologies."[210] This is a two-way, bargained-for exchange, not a one-way promise that falls short of a legal contract.

Ultimately, Delrahim's embrace of contract law as a remedy to FRAND violations is telling. This position concedes that the FRAND violator is breaching contractual obligations, which is not competition on the merits.[211] Delrahim's goal seems to be to replace a powerful remedy with a more anemic one that will allow the patentholder to engage in patent holdup, which, again, Delrahim seems to praise when championing contract law over antitrust law:

> Where contract law remedies exist to remedy and deter breaches of a FRAND commitment, the *additional* deterrence that Sherman Act remedies offer could deter lawful, pro-competitive conduct—that is,

208 Delrahim, Wild West, *supra* note 3, at 2 (emphasis added).

209 *See* Microsoft Corp. v. Motorola, Inc., 864 F. Supp. 2d 1023, 1032 (W.D. Wash. 2012).

210 Lotes Co. v. Hon Hai Precision Indus. Co., 753 F.3d 395, 400 (2d Cir. 2014).

211 Delrahim seems to acknowledge that the patentholder is ignoring its legal obligations. *See* Delrahim, Wild West, *supra* note 3, at 2 ("I would like to elaborate further on why an antitrust cause of action premised on a failure to abide by FRAND commitments would be inconsistent with Section 2 of the Sherman Act.").

> research and development by innovators who make careful cost-benefit calculations as to how much to invest in technologies that may not pay off. Demanding a high price for one's patented technology is permissible, and expected, conduct in a free market negotiation.[212]

With this statement, Delrahim has shown his hand. He does not think that there is anything wrong with patentholders demanding exorbitant royalties, even when they have committed to charging a FRAND royalty in exchange for having their patented technology included in a standard. Moreover, he mischaracterizes contract law as being about deterrence, when it is not.[213] Among the three bodies of law discussed as potential remedies for FRAND violations—antitrust law, patent law, and contract law—only antitrust law is designed to punish and deter anticompetitive misconduct by patentee-monopolists who disregard their FRAND commitments. And punishing a patentholder for deceptively entering into and subsequently abandoning a FRAND commitment does not deter a patentholder from either conducting research and development or from demanding a high price for patented technology that is not subject to a FRAND commitment.

CONCLUSION

The role of antitrust law in high-technology markets is one of the most hotly contested current debates among antitrust scholars, practitioners, and enforcement officials at the highest levels of antitrust enforcement. Whether the use of deception and breach of contract to monopolize a market and demand monopoly royalties violates antitrust law should not be controversial. Trump's Assistant Attorney General, Makan Delrahim, seems to think anything done by a patentholder is necessarily pro-competitive; he even describes bargaining by an SEP owner for a higher-than-FRAND royalty as "pro-competitive."[214] He doesn't condemn deception; he rationalizes it. This is an unfortunate change from the days of bipartisan support for wise and measured

212 *Id.* at 12.

213 Asher v. Unarco Material Handling, Inc., 862 F. Supp. 2d 551, 555 (E.D. Ky. 2012) ("Unlike in tort law, the purpose of damages in contract law is not deterrence and punishment."); Smith v. NBC Universal, 524 F. Supp. 2d 315, 331 (S.D.N.Y. 2007) ("[D]eterrence is not a goal of contract law . . . .").

214 Delrahim, Wild West, *supra* note 3, at 13 ("For purposes of Section 2, 'FRAND' is not sufficiently clear to allow courts to distinguish between lawful, pro-competitive bargaining conduct that patent rights allow and *unlawful*, anticompetitive licensing conduct that harms consumers without offering pro-competitive benefits.").

antitrust policy. In 2017, Tim Muris, a Republican-appointed former Chair of the FTC, observed the following:

> Under Republicans and Democrats, the antitrust agencies have pursued anticompetitive conduct. Despite disagreement on particular cases and on the underlying theory under which cases should proceed, there is widespread agreement on the importance of the issue [of patent holdup] and its suitability as an appropriate subject for antitrust enforcement.[215]

Delrahim has used his series of speeches to implore courts to weaken antitrust doctrine in this area.[216] Courts should decline Delrahim's invitation.

There was a time when the Department of Justice's Antitrust Division thought it was wrong to monopolize a market through deceit and breach of contract. It is important to create a record of the flawed arguments made by the current administration, so that eventually—and hopefully soon—we can return to that earlier time.

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215 TIMOTHY J. MURIS, BIPARTISAN PATENT REFORM AND COMPETITION POLICY 12 (Am. Enter. Inst. 2017), http://www.aei.org/wp-content/uploads/2017/05/Bipartisan-Patent-Reform-and-Competition-Policy.pdf [https://perma.cc/4G9M-6LKF].

216 Delrahim, Wild West, *supra* note 3, at 14 ("Statements of policy alone, however, do not change the law immediately. Courts themselves will be called upon to do the hard work of applying the principles of the Sherman Act in the context of genuine legal disputes.").