Dr. Litan makes a strong case for the decline in entrepreneurial activities in the United States despite the recovery from the 2007 financial crisis. This comment examines the role of antitrust enforcement, particularly in the high-technology sector, in shaping the entrepreneurial environment for startups. Two areas are particularly salient for reforming antitrust enforcement: competition in platform technologies and standard setting. I examine each in turn.

General purpose or platform technologies—such as electricity, computer operating systems, telecommunications, and the Internet—have long played a critical role in enabling many other technologies, industries, and firms to build and grow their businesses. In this way, platform technologies generate positive spillovers to the rest of the economy.

But these spillovers will not be maximized unless the platform is open to all comers, without discrimination. When the platform is a natural monopoly (such as an electricity provider, or, before AT&T was broken up and mobile phones and cable television were viable competitors to telephones, local telephone service), equal, nondiscriminatory access is ensured by regulation. In other contexts, such as desktop operating systems, antitrust enforcement has been called upon to police a level playing field, especially where the platform provider (for example, Microsoft’s operating system), also owns applications or services (Microsoft’s Internet Explorer) that compete with independent providers. In the current Internet retail economy, various platforms are or will be important hosts to startup activity, and some have taken actions that have already attracted the attention of U.S. and other antitrust authorities: Google’s search platform and the

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Android mobile operating system are under investigation by the European Union, and Apple’s e-book and music retailing systems are under investigation by the European Competition Commission. Other platforms for the sale of goods, crafts, and various kinds of labor services are also sure to be important.

The new platforms are of interest to antitrust authorities when they acquire market power, even short of monopoly, and of special interest when the same company that owns the platform also offers services on it. In such cases, conditions to mergers are likely to be required that ensure equal access to the platform by other competitors (such as the conditions imposed on Comcast when it acquired NBC, for example).

But preventing merging firms from leveraging their market power from a platform into an application is relatively easy from a procedural point of view compared to trying to stop a firm from abusing its power once it has started to do so. It can take a long time and a great deal of effort to prevent abuse under section 2 of the Sherman Act, which prohibits monopolies (which may be lawfully gained through a combination of innovation and luck) from engaging in “monopolization”—anticompetitive acts having no legitimate business justification. The roughly a decade of prosecutorial effort that went into the Department of Justice’s Microsoft and AT&T investigations are good examples of the difficulties.

Are there any ways of significantly reducing the delay and expense—for both sides (although defendants generally are not interested in quick resolution)—without compromising due process?

Given the central role that platform technologies play in providing new firms with access to consumers, especially in the information technology sector, vigilant enforcement of the
antimonopolization provisions of section 2 of the Sherman Act is essential. Consideration should be given to ways of speeding such litigation, especially when the government is the plaintiff.

The rules of federal civil procedure serve as policy tools for correcting enforcement problems under substantive federal law. Examples of such policy tools include judicial revision of standards for motion to dismiss, joinder rules for patent litigation, and attorney fee shifting. Procedural reform may strengthen weak enforcement of antitrust rules in the challenging and innovative regime of platform technologies. Potential areas to consider are the use of interlocutory appeals by antitrust defendants, settlement with the government, and the standard for dismissing private claims. Special procedural rules for antitrust enforcement may be worth considering although arguably difficult to implement institutionally.

Vigilance on section 2 enforcement, especially with respect to platform technologies, is key to supporting entrepreneurial activities. For example, recent research on the Microsoft case offers important lessons in the effectiveness of section 2 enforcement actions. These proceedings are not merely political with the goal of punishing business success, as some critics have claimed. Instead, antitrust scrutiny can help to identify anticompetitive practices and curb them before a market becomes too concentrated and rigid. It is important to distill the lessons recognized in the scholarly and policy literature and translate these lessons into blueprints for enforcement actions.

The Supreme Court’s 2013 decision in FTC v. Actavis, Inc. is an example of judicial reform that eases section 2 enforcement against patent settlements. In allowing the FTC enforcement action against a settlement between a patent owner and a generic manufacturer, the Court removed certain implied immunities for patents from antitrust scrutiny. Settlement terms other than the reverse payments at issue in Actavis abound. Particularly troubling are settlements

\footnote{1 133 S. Ct. 2223 (2013).}
in the form of covenants not to sue required by intellectual property owners that may make it impossible to challenge the validity of patents or trademarks. The Supreme Court decision in Already, LLC v. Nike, Inc.\(^2\) illustrates how the grant of a covenant not to sue cuts off the ability of a competitor to sue the trademark owner and challenge the validity of a trademark. Similar practices can be identified in cases involving patent validity, both within the U.S. Patent and Trademark Office and in the courts. There is a strong argument against antitrust scrutiny of all settlements, under a generalized rule of reason standard. The challenge is identifying what settlements should give rise to antitrust scrutiny. One possible approach is to subject settlements that insulate patents or trademarks from validity challenges to heightened antitrust review, under the policies of Actavis and Lear, Inc. v. Adkins.\(^3\)

Section 1 enforcement is critical to ensure that standards-making bodies do not artificially prevent new and potentially disruptive entrants (such as in online education). In light of the 2015 Supreme Court decision in North Carolina State Board of Dental Examiners v. FTC,\(^4\) antitrust enforcers should provide greater scrutiny of trade and professional associations that may impose barriers to entry for startup companies. In its North Carolina decision, the Court denied antitrust immunity to a state licensing body because the state had delegated its authority without supervision or regulatory guidance to a private entity. State regulation was a mask for a private cartel entrusted with the licensing of new entrants. Antitrust law should scrutinize such private licensing arrangements whether disguised as a public regulatory body or dubbed a standard-setting body.

\(^2\) 133 S. Ct. 721 (2013).


In light of concerns over private industry cartels, Congress and enforcement entities should review judicial standards for enforcing fair, reasonable, and nondiscriminatory (FRAND) licensing and standard-essential patents to support the propagation of new technologies and the avoidance of royalty stacking and burdensome licensing terms with little procompetitive benefit. One model for judicial standards that balances the benefits of standard setting for innovation and the costs of cartel activity is found in the National Cooperative Research Act of 1984, which regulates joint ventures. The Act and subsequent court rulings impose a rule of reason for antitrust scrutiny of such ventures. Some attention should turn to whether the current rules governing joint ventures are effective in promoting startups and collaborative innovation. But the rule of reason approach allows for the careful balancing of costs and benefits necessary for effective review of standard-setting bodies in their practices of standards implementation and licensing.

Judicial rulings from 2013 and 2014 involving FRAND licensing in the information technology sector illustrate the fact-intensive inquiry required for effective policing of standard-setting bodies. Decisions involving Microsoft⁵ and Innovatio⁶ invite intensive review of the underlying patents, the innovative technology, and the licensing terms to fashion remedies that accurately measure the requisite amount of royalties necessary to compensate patent owners without burdening licensees with duplicative payment obligations (royalty stacking). The need for such broad and deep scrutiny may seemingly conflict with the recommendations for streamlined antitrust review discussed previously. One response is that review of FRAND licensing practices may be limited to a highly specialized and narrow set of cases that would not marginally increase the burden on enforcement authorities. Another possible response to the

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⁵ Microsoft Corp. v. Motorola, Inc., 696 F.3d 872 (9th Cir. 2012).
criticism of excessive enforcement costs is the need for greater enforcement authority to discover information about the technology and licensing practices from participants in standard-setting organizations and patent owners. More formalized rules about royalty rates based on industry practice and the nature of technology may ease any marginal increases in administrative costs from greater scrutiny of standard-setting organizations and their business practices.

There is a need to reassert the primacy of antitrust, especially when other agencies are involved—for example, in higher education certification, to make more room for truly disruptive innovations. What has changed is not antitrust principles but the nature of competition for information-based products. Such products trade not only on the price variable but also on quality variables, such as the quality of instruction to consumers and ease of use. Often the ability of firms to compete on nonprice variables is more important than finding the right price point. The implication is that scale effects may make oligopolistic competition, rather than perfect market competition, the ideal market arrangement. Furthermore, contractual licensing terms cover not only price and quantity, but other variables that deal with the quality of a product or service. Antitrust scrutiny needs to focus on the potential exclusionary effects of such quality terms.