AAI AMERICAN ANTITRUST INSTITUTE

March 15, 2019

Hon. Makan Delrahim
Assistant Attorney General
U.S. Department of Justice
950 Pennsylvania Ave., N.W.
Washington, DC 20530

Dear Assistant Attorney General Delrahim:

The American Antitrust Institute (AAI)[1] writes to object to the Antitrust Division's change of policy with respect to the problem of patent holdup in the standard-setting context, an issue that has long been a concern of ours.[2] Specifically, we object to the Justice Department's recent withdrawal from its 2013 joint policy statement with the Patent and Trademark Office (PTO),[3] and to the Division's guidance discouraging standard-setting organizations from clarifying their patent policies to limit holdup. We appreciate your willingness to change the Division's direction in certain areas of antitrust policy (such as being less receptive to accepting behavioral remedies in vertical merger challenges) and your outreach on other matters (such as the roundtable series on competition and deregulation). But, as this letter explains, the Division's change in policy on the issue of patent holdup is unsound and suffers from a lack of a developed record and consultation with stakeholders, experts, and other agencies, particularly the Federal Trade Commission (FTC).

I. Overview

The Justice Department's withdrawal from its 2013 joint policy statement with the PTO is not justified. The policy statement endorsed sensible limits on the issuance of exclusion orders by the International Trade Commission (ITC) against infringers of standard-essential patents (SEPs) that patent holders voluntarily committed to license on reasonable and non-discriminatory (RAND or FRAND) terms.[4] In your words, that statement—which also applies in principle to injunctions

[1] The American Antitrust Institute (AAI) is an independent, nonprofit organization devoted to promoting competition that protects consumers, businesses, and society. AAI serves the public through research, education, and advocacy on the benefits of competition and the use of antitrust enforcement as a vital component of national and international competition policy. AAI also seeks to ensure that intellectual property laws are interpreted and applied in a manner that reflects their ultimate goals of promoting innovation, competition, and consumer welfare.

[2] *See, e.g.,* Am. Antitrust Inst., Request for Joint Enforcement Guidelines on the Patent Policies of Standard Setting Organizations (May 23, 2013), https://www.antitrustinstitute.org/wp-content/uploads/2013/05/Request-for-Joint-Enforcement-Guidelines-on-the-Patent-Policies-of-Standard-Setting-Organizations.pdf [hereinafter AAI Petition]; Brief of Amici Curiae Am. Antitrust Inst. et al. in Support of Petition for Writ of Certiorari, *Fed. Trade Comm'n v. Rambus Inc.*, 555 U.S. 1171 (2009) (No. 08-694), https://www.antitrustinstitute.org/wp-content/uploads/2018/07/AAI-Rambus-Amicus.12.29.08_123020081711.pdf.

[3] 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 (Jan. 8, 2013) [hereinafter 2013 DOJ-PTO Policy Statement].

[4] "FRAND," which refers to "*fair*, reasonable, and non-discriminatory," is used interchangeably with "RAND" by the Department and commentators. *See id.* at 1 n.2.

issued by federal courts[5]—inappropriately "place[s] a thumb on the scale against an injunction in the case of FRAND-encumbered patents."[6] However, the policy statement is entirely consistent with patent law, antitrust law and the practices of private standard-setting organizations (SSOs).

We also object to the Antitrust Division's new skeptical approach towards SSOs when they clarify the meaning of FRAND commitments in ways that supposedly "favor implementers" but that are entirely consistent with patent law. The suggestion that such conduct by SSOs might result in an investigation or enforcement action by the Division is particularly alarming because the Division previously *encouraged* SSOs to clarify their patent policies and procedures to mitigate the risks of patent holdup. Moreover, the Division's effort to discourage SSOs from giving greater definition to FRAND and to open the door more widely for SEP holders to obtain injunctions and exclusion orders is inconsistent with your position that FRAND breaches should be resolved under contract law, not antitrust law. If the meaning of FRAND is ambiguous, then contractual enforcement can only be less effective, more uncertain, and more expensive.

More generally, we object to the Division's unilateral reversal of more than fifteen years of cooperative advocacy and policy development with the FTC about the competitive problem of patent holdup.[7] Your position that patent holdup is not only not an antitrust issue, but not really an issue at all, is an outlier.[8] The Division's approach breaks sharply with the bipartisan agency consensus about the appropriate balance between patent protection and competition in standard setting and in the economy more generally. As you point out, "It has long been the view of the Antitrust Division that the intellectual property laws provide important incentives for innovation and commercialization, which ultimately benefit consumers."[9] But at the same time, the Division has recognized that "both the enforcement of patent rights and appropriate limits on the patentee's ability to

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[5] *See id.* at 1 n.1.

[6] Makan Delrahim, Asst. Att'y Gen., "Telegraph Road": Incentivizing Innovation at the Intersection of Patent and Antitrust Law, Remarks at the 19th Annual Berkeley-Stanford Advanced Patent Law Institute 6 (Dec. 7, 2018) [hereinafter Telegraph Road].

[7] The joint policy statement defines the problem as follows: "[W]hen a standard incorporates patented technology owned by a participant in the standard-setting process, and the standard becomes established, it may be prohibitively difficult and expensive to switch to a different technology within the established standard or to a different standard entirely. As a result, the owner of that patented technology may gain market power and potentially take advantage of it by engaging in patent hold-up, which entails asserting the patent to exclude a competitor from a market or obtain a higher price for its use than would have been possible before the standard was set, when alternative technologies could have been chosen." 2013 DOJ-PTO Policy Statement, *supra* note 3, at 4.

[8] We disagree with your view that antitrust has little or no role to play in policing FRAND abuses, but do not address that here other than to note that your position is out of step with prevailing law, the public statements of prior Division officials, and the current and historical positions of the FTC. *See*, *e.g.*, Joseph Simons, Chairman, Federal Trade Commission, Prepared Remarks for the Georgetown Law Global Antitrust Enforcement Symposium 5-6 (Sep. 25, 2018) (noting "potential inconsistency" between Department's position and FTC's position that "breach [of FRAND commitment], fraud or deception [that] contribute[s] to the acquisition or maintenance of monopoly power in a properly-defined market" is actionable); *see also* D. Bruce Hoffman & Joseph J. Simons, *Known Unknowns: Uncertainty and its Implication for Antitrust Policy and Enforcement in the Standard-Setting Context*, 57 ANTITRUST BULL. 89, 101 (2012) ("conduct that violates the rules of an SSO is likely, in general, to reduce output by deterring participation in or raising the cost of standard-setting activities").

[9] Makan Delrahim, Asst. Att'y Gen., Take It to the Limit: Respecting Innovation Incentives in the Application of Antitrust Law, Remarks as Prepared for USC Gould School of Law—Application of Competition Policy to Technology and IP Licensing 1-2 (Nov. 10, 2017) [hereinafter Take it to the Limit].

exclude rivals have important roles to play in fostering innovation."[10] The consensus around the problem of patent holdup was built over many years of hearings, reports, and business review letters. And you have reversed course in a series of speeches,[11] without the benefit of any agency studies or hearings, or other meaningful engagement with scholars and stakeholders, and without the support of the FTC, other agencies of the U.S. government, or our international competition partners. Your views also appear to be odds with those of Attorney General Barr.[12]

Accordingly, as we explain in more detail in the following sections, we ask that you reconsider the Division's withdrawal from the joint policy statement, hold some form of public forum with the FTC to address whether and/or how the statement and the agencies' prior guidance on patent holdup issues should be modified, and clarify the Division's enforcement stance regarding SSO patent policies that give greater definition to FRAND.

II. The Antitrust Division's Reversal of Its Position on Patent Holdup Is Inconsistent with Patent Law

The Division's withdrawal from the 2013 DOJ-PTO joint policy statement is based on its change of "position about when and how patent holders should be able to exclude competitors from practicing their technologies."[13] Unfortunately, the withdrawal does not further "the interest of clarity and predictability of the laws,"[14] as you would have it, but rather will only sow confusion. The withdrawal announcement is the culmination of your series of speeches minimizing the risk and harm of patent holdup. Those speeches are not only inconsistent with the Division's advocacy during the Obama administration but also diverge from the approach of the Division during the George W. Bush administration and the bipartisan approach of the FTC since then.

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[10] Brief for the United States as Amicus Curiae Supporting Plaintiffs-Appellants 14, *In re K-Dur Antitrust Litig.*, 686 F.3d 197 (3d Cir. 2012) (No. 10-2077). As the FTC noted in 2003, "ever greater intellectual property protection is not necessarily socially beneficial" and does not necessarily promote innovation. FED. TRADE COMM'N, TO PROMOTE INNOVATION: THE PROPER BALANCE OF COMPETITION AND PATENT LAW AND POLICY ch.1, at 14 (Oct. 2003) [hereinafter 2003 FTC IP REPORT]; *see Halo Elecs., Inc v. Pulse Elecs., Inc.*, 136 S. Ct. 1923, 1935 (2016) ("[P]atent law reflects 'a careful balance between the need to promote innovation' through patent protection, and the importance of facilitating the 'imitation and refinement through imitation' that are 'necessary to invention itself and the very lifeblood of a competitive economy.'" (quoting *Bonito Boats, Inc. v. Thunder Craft Boats, Inc.*, 489 U.S. 141, 146 (1989))).

[11] By our count, you have given seven speeches devoted to this topic in your first fifteen months in office. In addition to Take It to the Limit, *supra* note 9, and Telegraph Road, *supra* note 6, see Makan Delrahim, Asst. Att'y Gen., Competition, Intellectual Property, and Economic Prosperity, Remarks as Presented before the China Intellectual Property Law Society (Feb. 1, 2018) [hereinafter Economic Prosperity]; Makan Delrahim, Asst. Att'y Gen., The "New Madison" Approach to Antitrust and Intellectual Property Law, Remarks as Prepared for Delivery at University of Pennsylvania Law School (Mar. 16, 2018) [hereinafter New Madison]; Makan Delrahim, Asst. Att'y Gen., The Long Run: Maximizing Innovation Incentives Through Advocacy and Enforcement, (Apr. 10, 2018) [hereinafter Long Run]; Makan Delrahim, Asst. Att'y Gen., Antitrust Law and Patent Licensing in the New Wild West, Remarks as Prepared for the LeadershIP Conf. (Sep. 18, 2018) [hereinafter New Wild West]; Makan Delrahim, Protecting Free-Market Patent Bargaining, Competition, and the Right to Exclude, Remarks as Prepared for the Federal Circuit Bar Ass'n Global Series 2018 (Oct. 10, 2018) [hereinafter Free-Market Patent Bargaining].

[12] *See infra* note 22.

[13] Telegraph Road, *supra* note 6, at 7.

[14] *Id.* at 6.

A. History of DOJ and FTC Study of Patent Holdup

The Bush administration began to study the problem of patent holdup in 2002, when the Division and FTC held extensive hearings on patents and competition policy.[15] The hearings led to two important reports that addressed patent holdup, among other things. One, issued by the FTC in 2003, considered the "ways that hold-up can harm competition and innovation."[16] The other, issued jointly by the Division and the FTC in 2007, gave significant attention to the problem of holdup in the standard-setting context.[17] One chapter of the joint report examined "the potential for 'hold up' by the owner of patented technology after its technology has been chosen by the SSO as a standard and others have incurred sunk costs which effectively increase the relative cost of switching to an alternative standard."[18] The joint report explained:

> Before, or *ex ante*, multiple technologies may compete to be incorporated into the standard under consideration. Afterwards, or *ex post*, the chosen technology may lack effective substitutes precisely because the SSO chose it as the standard. Thus, *ex post*, the owner of a patented technology necessary to implement the standard may have the power to extract higher royalties or other licensing terms that reflect the absence of competitive alternatives. Consumers of the products using the standard would be harmed if those higher royalties were passed on in the form of higher prices.[19]

The joint report concluded that *avoiding* the risk and harm of holdup was sufficiently procompetitive to justify rule-of-reason treatment for joint *ex ante* licensing negotiations,[20] a position that the bipartisan Antitrust Modernization Commission also endorsed over your lone objection.[21]

The Obama administration continued to study the problem of patent holdup, with the FTC's hearings on the "Evolving Intellectual Property Marketplace" and a joint FTC, DOJ, and PTO workshop on "The Intersection of Competition Policy and Patent Policy: Implications for

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[15] *See* Commissioner Terrell McSweeney, Holding the Line on Patent Holdup: Why Antitrust Enforcement Matters (Mar. 21, 2018) (highlighting initiative of former FTC Chair Tim Muris and joint agency hearings in 2002 that featured over 300 panelists and more than 100 written comments).

[16] 2003 FTC IP REPORT, *supra* note 10, ch. 3, at 40; *see also id.*, ch. 2, at 28-29. The FTC's unanimous decision in *Rambus* also articulated the general "hold up" problem when industry members "find themselves 'locked-in' to the standardized technology once switching costs become prohibitive," and the owner of the standardized technology can "charge supracompetitive rates." Opinion of the Commission at 4, *In re Rambus, Inc.*, FTC No. 9302, 2006 WL 8266094 (July 31, 2006), *rev'd on other grounds*, *Rambus Inc. v. Fed. Trade Comm'n*, 522 F.3d 456 (D.C. Cir. 2008).

[17] U.S. DEP'T OF JUSTICE & FED. TRADE COMM'N, ANTITRUST ENFORCEMENT AND INTELLECTUAL PROPERTY RIGHTS: PROMOTING INNOVATION AND COMPETITION 6-8, 33-56 (April 2007) [hereinafter 2007 DOJ/FTC IP REPORT].

[18] *Id.* at 35. More than 25 experts with a wide range of perspectives discussed these topics at several sessions of the hearings. *See id.* at 39-40 n.29.

[19] *Id.* at 35-36.

[20] *Id.* at 53-56.

[21] ANTITRUST MODERNIZATION COMM'N, REPORT & RECOMMENDATIONS 121 (2007) [hereinafter AMC REPORT]. Commissioner Garza supported the recommendation with qualifications. *See id.*; *see also* Letter from Asst. Att'y Gen. Thomas O. Barnett to Robert A. Skitol, Esq. at 8 (Oct. 30, 2006) [hereinafter VITA Business Review Letter] (approving *ex ante* disclosure of license terms to avoid situation in which implementers "may be willing to license a patented technology included in the standard on more onerous terms than they would have been prior to the standard's adoption").

Promoting Innovation."[22] The hearings and workshop provided the basis for the FTC's highly regarded 2011 report on patent notice and remedies which, among other things, found that "[h]old-up in the standard setting context can be particularly acute" and "may have especially severe consequences for innovation and competition."[23] The FTC relied on the analysis of patent holdup in the 2011, 2007, and 2003 reports to advocate for strong limitations on the ability of SEP holders to obtain injunctions in federal court and exclusion orders at the ITC.[24] Likewise, the 2013 joint policy statement relied on the 2007 report.

B. Economics of Patent Holdup

It is clear that you do not question the economics of patent holdup. Plainly, a patent holder is able to bargain for greater royalties *ex post*, after its technology has been incorporated into a popular standard, than *ex ante*, when SSOs and implementers have alternatives.[25] And this is particularly true when an SEP holder can wield the threat of an injunction.[26] But you apparently believe that

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[22] Attorney General Barr participated in the workshop to address the problem of patent holdup in ITC proceedings. Based on his experience as the former general counsel of Verizon, Mr. Barr criticized "any regime where you have the real threat of automatic injunctive relief upon showing infringement [because it] enables a system of holdup, where a non-practicing patent holder can use that sledgehammer of prospective relief to extract from industries that have expended a lot of resources and locked themselves into commercializing a particular technology . . . fees that are far in excess of the economic value of its intellectual property or its contribution to innovation." U.S. Patent & Trademark Office, U.S. Dep't of Justice, Fed. Trade Comm'n, Workshop on The Intersection of Competition Policy and Patent Policy: Implications for Promoting Innovation 124 (May 26, 2010). Mr. Barr, whose criticism of exclusion orders was not limited to cases of FRAND-encumbered patents, argued that such orders harmed innovation and raised constitutional problems. *Id.* at 142-43, 159.

[23] FED. TRADE COMM'N, THE EVOLVING IP MARKETPLACE: ALIGNING PATENT NOTICE AND REMEDIES WITH COMPETITION 191, 234 (March 2011) [hereinafter 2011 FTC IP REPORT]. The FTC hearings, which covered eight days, actually began under Chairman Kovacic in December 2008. The hearings and workshop involved over 140 participants with a wide range of expertise and viewpoints and the receipt of more than 50 written submissions. *Id.* at 2.

[24] *See* Third Party U.S. Fed. Trade Comm'n's Statement on the Public Interest, *In re Certain Gaming and Entertainment Consoles, Related Software, and Components Thereof*, Int. Trade Comm'n Inv. No. 337-TA-752 (June 6, 2012); Brief of Amicus Curiae Fed. Trade Comm'n Supporting Neither Party, *Apple Inc. v. Motorola, Inc.*, 757 F.3d 1286 (Fed. Cir. 2014) (No. 2012-1548) [hereinafter FTC Amicus Br.].

[25] *See, e.g.,* 2007 DOJ/FTC IP REPORT, *supra* note 17, at 38 ("Generally, the greater the cost of switching to an alternative standard, the more an IP holder can charge for a license."). You have noted, "that a patent holder can derive higher licensing fees through hold-up simply reflects basic commercial reality." New Madison, *supra* note 11, at 8.

[26] Under a threat of an injunction, "the patentee can credibly threaten to shut down the infringer's implementation of the standard" and "rationally demand a royalty approaching the full private value of practicing the standard to the accused infringer." Maureen K. Ohlhausen, *The Elusive Role of Competition in the Standard-Setting Debate*, 20 STAN. TECH. L. REV. 93, 126 (2017); *see* FTC Amicus Br., *supra* note 24, at 6 (noting that "resulting imbalance between the value of the patented technology and the rewards to the patentee may be especially acute where the injunction is based on a patent covering a minor component of a complex multicomponent product, as is often the case with standard-essential patents in information technology industries"). It must be acknowledged that the problem of holdup in the absence of a risk of injunctive relief (and risk aversion) depends on an assumption that a court's assessment of damages or reasonable royalties is likely to be excessive. *See Ohlhausen, supra,* at 126; 2011 FTC IP REPORT, *supra* note 23, at 191 n.61. There is some support for such an assumption. *See* William F. Lee & A. Douglas Melamed, *Breaking the Vicious Cycle of Patent Damages*, 101 CORNELL L. REV. 385, 428-433 (2016). The expense of litigation could also give patent holders leverage to bargain for excessive *ex post* royalties, as with patent trolls, but this distortion is an inevitable byproduct of a legal system that ordinarily does not shift attorneys' fees to the losing party. *Cf.* 2011 FTC IP REPORT, *supra* note 23, at 147 (high cost of litigation "does not justify unmooring damage calculations from an economic foundation rooted in the creation of a world but for infringement").

holdup is a feature, not a bug. You state, "Patent rights function best if an owner retains a right to exclude. That right ensures that any price paid for a patented product or license reflects the bargaining leverage that the patent regime bestows," and "A patent holder's right to seek an injunction against infringement gives it necessary leverage in a free market negotiation."[27] It appears that you see this leverage as necessary and appropriate even when a patent holder has promised to license its patents on FRAND terms.

To be sure, you state, "If a patent holder voluntarily negotiates away his or her right to an injunction for a particular patent, and then subsequently seeks an injunction for that same patent, then that action could give rise to a potential breach of contract claim or arbitration . . . (should the underlying SSO rules require)."[28] But you also seem to endorse the proposition that the "'threat of injunction . . . is likely part of the benefit of the bargain understood by a contributing member of the SSO at the time it decided to participate in the standard.'"[29] And, as discussed further below, you have warned SSOs against adopting "rules that severely restrict" the "right to exclude."[30]

C. Patent Law Principles

Your approach to patent holdup in the SSO context is inconsistent with the prevailing law and fundamental principles of patent remedies. The purpose of injunctions under the Patent Act is *not* to provide leverage for patent holders to increase royalties. *eBay* makes clear that the purpose, as with equitable relief generally, is to protect patent holders from harms that cannot be compensated by money damages.[31] As Justice Kennedy explained, an injunction should not be used "as a bargaining tool to charge exorbitant fees" or "for undue leverage in negotiations."[32] Likewise, it is *not* the policy of patent law to maximize the returns to holders of valid patents (SEPs or otherwise),[33] let

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[27] Free-Market Patent Bargaining, *supra* note 11, at 6, 8. Your repeated invocation of "the constitutional right to exclude" in this speech and others is baffling since the Constitution merely authorizes Congress to establish such a right, and *eBay* emphasizes that "the creation of a right is distinct from the provision of remedies for violations of that right." *eBay Inc. v. MercExchange, L.L.C.*, 547 U.S. 388, 392 (2006). Your equating of bargaining in the shadow of the right to exclude as "free-market bargaining" is also difficult to understand because the terms of patent law (and antitrust law, for that matter) will establish the parameters for any "free market" bargain.

[28] Free-Market Patent Bargaining, *supra* note 11, at 11 n.34.

[29] *Id.* at 8 n.24 (quoting Joanna Tsai & Joshua D. Wright, *Standard Setting, Intellectual Property Rights, and the Role of Antitrust in Regulating Incomplete Contracts*, 80 ANTITRUST L. J. 157, 182 (2015)).

[30] New Madison, *supra* note 11, at 5. You criticize court rulings and SSO policies as favoring "compulsory licensing" when they interpret or expressly provide that a FRAND commitment means that a SEP holder waives its right to seek injunctive relief as a condition for having its technology considered for inclusion in a standard. *See id.* at 5, 14. But that entirely ignores that patent holders make such a waiver voluntarily and in exchange for substantial benefits.

[31] *See eBay*, 547 U.S. at 391.

[32] *Id.* at 396-97 (Kennedy, J., concurring). Other cases are to the same effect. *See* FTC Amicus Br., *supra* note 24, at 14-15 (citing cases); *see also Apple Inc. v. Samsung Elecs. Co.*, 695 F.3d 1370, 1375 (Fed. Cir. 2012) (suggesting that injunction is inappropriate when "the patentee seeks to leverage its patent for competitive gain beyond that which the inventive contribution and value of the patent warrant").

[33] *See* New Wild West, *supra* note 11, at 10 (claiming that patent law seeks to promote innovation "by offering incentives for holders of valid patents to seek the greatest rewards possible for their inventions"). On the contrary, patent law limits the rewards to patent holders in numerous ways, not the least of which is the limited term. *See* A. Douglas Melamed & Carl Shapiro, *How Antitrust Law Can Make FRAND Commitments More Effective*, 127 YALE L.J. 2110, 2121 (2018) ("The patent laws are intended to limit, not maximize, the royalties to which patent holders are entitled."). Moreover, as the FTC has noted, "The availability of hold-up to patentees may indeed encourage invention and patenting activity, but that

alone "maximize innovation incentives."[34] Rather, as the FTC has explained, "[t]o align the patent system and competition policy, it is important that compensatory damages and injunctions be assessed in a manner that aligns a patentee's compensation with the invention's economic value."[35] And that value is, at most, the incremental value of the patented technology over the next best alternative at the time the technology was under consideration for inclusion in the standard.[36] Your suggestion to the contrary notwithstanding,[37] a reasonable royalty "must not include any value flowing to the patent from the standard's adoption."[38]

In short, the "free market" bargain to which you repeatedly refer is not the bargain that occurs between the patent holder and implementer *ex post* under the shadow of an injunction, but rather the hypothetical bargain that would have occurred *ex ante* before the patented holder's technology was included in the standard.[39] Excessive royalties in the standard-setting context not only harm consumers in the short run when they are passed on in the form of higher prices for standard-compliant products, but also in the long run by reducing the innovation incentives of implementers.[40] And excessive royalties obtained by a particular SEP holder tend to reduce the royalties available to holders of *other* patents that are essential to the same standard or otherwise read on standard-compliant products.[41]

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is not the same thing as encouraging the innovation necessary to bring new products to market." 2011 FTC IP REPORT, *supra* note 23, at 227.

[34] Take It to the Limit, *supra* note 9, at 3; *see also* Economic Prosperity, *supra* note 11, at 2. This ignores the cost side of the equation. *See generally* Richard M. Brunell, *Appropriability in Antitrust: How Much is Enough?*, 69 ANTITRUST L.J. 1, 23-26 (2001) (cataloging arguments that *weaker* patent rights and less appropriability best promote innovation).

[35] 2011 FTC IP REPORT, *supra* note 23, at 141.

[36] *See id.* at 191-94. The prospect of "royalty stacking" also limits the reasonable royalty. *See Ericsson, Inc. v. D-Link Sys., Inc.*, 773 F.3d 1201, 1209 (Fed. Cir. 2014) (FRAND commitment designed to address "two potential problems that could inhibit widespread adoption of the standard: patent hold-up and royalty stacking").

[37] You acknowledge that when patented technology is included in a standard, "that decision gives the patent holder some bargaining power in claiming a piece of the surplus created by standardization." New Madison, *supra* note 11, at 8. But you suggest that this is properly viewed as "a reward for an innovator's meritorious contribution," and that "[a]rguments that inclusion in a standard confers market power that could harm competition typically rest on the unreasonable assumption that the winning technology is no better than its rivals." *Id.* at 8-9. In fact, however, in the FRAND hypothetical bargain, as in reasonable-royalty calculations more generally, the patent holder's royalty *is* based on its superiority (in terms of quality and cost) compared to the next best alternative. The holdup value is the amount that the patent holder can bargain for in excess of this amount. As former acting FTC Chair Ohlhausen has explained, "the emerging consensus today is that a RAND-licensing assurance 'freezes' the SEP owner's licensing freedom to what it could have commanded ex ante, before the SSO and industry adopted the infringing standard." Ohlhausen, *supra* note 26, at 128.

[38] *CSIRO v. Cisco Sys., Inc.*, 809 F.3d 1295, 1305 (Fed. Cir. 2015); *see Ericsson*, 773 F.3d at 1232-33. To be sure, FRAND permits patent holders to enjoy some of the surplus from standardization insofar as it allows volume-based royalties. *See* Richard H. Stern, *Who Should Own the Benefits of Standardization and the Value It Creates?*, 19 MIN. J.L. SCI. & TECH. 107, 226 n. 449 (2018).

[39] This is consistent with the general *ex ante* approach to determining reasonable royalties. *See* 2011 FTC IP REPORT, *supra* note 23, at 160-176; *see also* 2007 DOJ/FTC REPORT, *supra* note 17, at 53 (endorsing *ex ante* licensing negotiations as procompetitive to "place an upper bound on a patent holder's RAND commitment").

[40] *See* 2011 FTC IP REPORT, *supra* note 23, at 145-147.

[41] *See* FTC Amicus Br., *supra* note 24, at 13 ("Injunctive relief should not be permitted to allow the owner of standard-essential patent[s] subject to a RAND obligation to appropriate for itself the value created by numerous other innovators that build on or contribute to the standard at issue.").

D. Injunctions and Holdout

Your desired approach to injunctions in the SSO context also runs counter to specific Federal Circuit law, which holds that a FRAND commitment "strongly suggest[s] that money damages are adequate to fully compensate [a patent holder] for any infringement."[42] Indeed, you recognize this.[43] But you criticize the prevailing law because, in your view, injunctions are necessary to prevent "holdout," i.e., implementers declining to take a license, or paying too little, because "without the threat of an injunction, the implementer can proceed to infringe without a license, knowing that it is only on the hook . . . for reasonable royalties."[44]

Assuming *arguendo* that holdout is legally relevant,[45] there are good reasons to doubt its significance. As the FTC, your predecessors at DOJ, and many critics have pointed out, implementers have strong incentives to negotiate a license. *First*, as you recognize, an infringer that fails to take a license may be liable for treble damages and attorneys' fees for willful infringement. While the Supreme Court emphasized in a recent case that willful infringement is reserved for "egregious cases of culpable behavior,"[46] that case made it significantly *easier* for patent holders to obtain enhanced dam-

[42] *Apple Inc. v. Motorola, Inc.*, 757 F.3d 1286, 1332 (Fed. Cir. 2014). Even without a FRAND commitment, a non-practicing entity that earns its revenues only through licensing would have great difficulty in obtaining an injunction because of the absence of irreparable harm. *See* FTC Amicus Br., *supra* note 24, at 10-11.

[43] *See* Take It to the Limit, *supra* note 9, at 12 (Federal Circuit ruling in *Apple v. Motorola* holds "that injunctive relief should be denied except in rare cases"); New Madison, *supra* note 11, at 13-14 (noting that "[u]nder current Federal Circuit law, a standard-essential patent holder faces significant difficulty in establishing a right to an injunction instead of damages," and that this is part of "worrisome trend" that is inconsistent with "the nature of patent rights"). *But cf.* Note by the United States, OECD Submission, Intellectual Property and Standard Setting ¶ 40, DAF/COMP/WD(2014)116 (Dec. 8, 2014) ("The Federal Circuit's decision is consistent with the FTC's *amicus curiae* brief in the case, in which the FTC advocated that 'a practice of widespread licensing . . . strongly militates against a finding of irreparable harm.'"); *see also* Ohlhausen, *supra* note 26, at 126-27 ("in the standard-setting world, it would be a mistake to make injunctions the default remedy").

[44] Take It to the Limit, *supra* note 9, at 12; *see also* New Madison, *supra* note 11, at 14. You also argue that "implementer hold-out poses a more serious threat to innovation than innovator hold-up" because "innovators must make significant upfront investments in technology before they know whether it will pay off, whereas implementers can delay at least some of their investments in a technology until after royalty rates have been determined." New Madison, *supra* note 11, at 10-11. However, such uncertain upfront investments are the rule under our patent system, regardless of whether the technology may be applicable to an industry standard. *See* Melamed & Shapiro, *supra* note 33, at 2119.

[45] As Judge Posner has aptly noted, "the 'American rule' . . . does not deem damages an inadequate remedy just because, unless backed by a threat of injunction, it may induce a settlement for less than the damages rightly sought by the plaintiff." *Apple, Inc. v. Motorola, Inc.*, 869 F. Supp. 2d 901, 915 (N.D. Ill. 2012), *aff'd in part, rev'd in part*, 757 F.3d 1286 (Fed. Cir. 2014). Professor Contreras argues that "[r]aising the issue of holdout in response to concerns over hold-up is an example of the fallacious argumentation technique *ignoratio elenchi* (irrelevant conclusion)." *See* Jorge L. Contreras, *Much Ado About Hold-up*, 2019 UNIV. ILLINOIS LAW REV. (forthcoming 2019) (manuscript at 19 & n.102). Holdup is fundamentally different from holdout because the former "is integrally tied to the standardization process and the commitments made therein," while the latter is "simply willful patent infringement" or reflects the choice available to any alleged infringer to litigate rather than settle. *Id.* at 19.

[46] *Halo Elecs., Inc v. Pulse Elecs., Inc.*, 136 S. Ct. 1923, 1932 (2016). Courts can award attorneys' fees to a prevailing plaintiff even in the absence of willful infringement. *See Octane Fitness, LLC v. ICON Health & Fitness, Inc.*, 572 U.S. 545, 554 (2014) ("an 'exceptional' case [for which fees may be awarded] is simply one that stands out from others with respect to the substantive strength of a party's litigating position (considering both the governing law and the facts of the case) or the unreasonable manner in which the case was litigated").

ages when infringers lack a good faith belief that asserted patents are invalid or not infringed.[47] *Second*, implementers that take a license for a portfolio of patents should pay *less* than the royalty a court would order if it finds liability, because a reasonable negotiated FRAND rate will be discounted by the likelihood that some or all of the standard-essential patents at issue are invalid or not infringed.[48] *Third*, negotiating a license will reduce cost uncertainty.[49] And *fourth*, both implementers and patent holders have an incentive to negotiate a license to avoid the expense of litigation.[50]

In any event, patent law *does* take into account holdout insofar as an injunction may be appropriate for a FRAND-encumbered patent where "an infringer unilaterally refuses a FRAND royalty or unreasonably delays negotiations to the same effect."[51] The FTC's position has likewise allowed for injunctions against "unwilling licensees" under patent and antitrust law.[52] And so too did the 2013 joint policy statement. That statement expressly recognized that an exclusion order may be appropriate "where the putative licensee is unable or refuses to take a F/RAND license," for example where it "refuses to pay what has been determined to be a F/RAND royalty, or refuses to engage in a negotiation to determine F/RAND terms."[53] Indeed, the Federal Circuit cited to the joint policy statement in support of its articulation of the "unwilling licensee" exception, and both the

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[47] *Halo*, 136 S. Ct. at 1932, 1934 (holding that "objective recklessness" and proof by clear and convincing evidence are not required); *see also Apple Inc. v. Motorola, Inc.*, 757 F.3d 1286, 1334, 1342 (Fed. Cir. 2014) (Prost, J., concurring) ("[I]f a trial court believes that an infringer previously engaged in bad faith negotiations, it is entitled to increase the damages to account for any harm to the patentee as a result of that behavior.").

[48] *See* 2011 FTC IP REPORT, *supra* note 23, at 174, 194 n.75; Letter from Renata B. Hesse, Acting Asst. Att'y Gen. to Michael A. Lindsay, Esq. at 10 (Feb. 2, 2015) [hereinafter 2015 IEEE Business Review Letter].

[49] *See* 2015 IEEE Business Review Letter, *supra* note 48, at 10.

[50] *See id.* Some have suggested that litigation costs are skewed against SEP holders because patent infringement litigation can only consider a few patents at a time and cannot accommodate infringement claims involving a large portfolio of patents. Of course, infringement defendants will face the same costs if serial litigation ensues and they may be in a weaker position to incur those costs. And, in an infringement action, an SEP holder can assert the strongest patents in its portfolio first, thereby creating the greatest risk of a finding of willful infringement by the implementer. Moreover, SEP holders can bring a declaratory judgment action to determine whether their portfolio offer is consistent with FRAND. *See, e.g., HTC Corp. v. Telefonaktiebolaget LM Ericsson*, No. 6:18-cv-00243-JRG, 2018 WL 6617795 (E.D. Tex. Dec. 17, 2018) (refusing to dismiss SEP holder's counterclaim for a declaration that it did not breach its FRAND assurance); *Microsoft Corp. v. Motorola, Inc.*, No. C10-1823JLR, 2012 WL 395734 (W.D. Wash. Feb. 6, 2012) (similar).

[51] *Apple*, 757 F.3d at 1332.

[52] *See* FTC Amicus Br., *supra* note 24, at 9 n.8 ("where an infringer is unable or unwilling to pay an ongoing royalty, the harm to the patentee presumably cannot be compensated with damages"); Complaint ¶¶ 15-16, *In re Motorola Mobility LLC*, FTC Dkt. No. C-4410, 2013 WL 124100 (Jan. 3, 2012) (FRAND commitment bars seeking injunctive relief against a "willing licensee," which means a licensee that "manifests its willingness to accept terms that are determined to be FRAND, either because such terms have been voluntarily negotiated or have been determined to be FRAND by a court or other neutral third party").

[53] 2013 DOJ-PTO Policy Statement, *supra* note 3, at 7. The Statement also notes that "a refusal could take the form of a constructive refusal to negotiate, such as by insisting on terms clearly outside the bounds of what could reasonably be considered to be F/RAND terms in an attempt to evade the putative licensee's obligation to fairly compensate the patent holder. An exclusion order also could be appropriate if a putative licensee is not subject to the jurisdiction of a court that could award damages. This list is not an exhaustive one." *Id.* Similarly, the United States, as a member of the International Telecommunications Union, proposed that its patent policy provide that for patents subject to a RAND commitment, a patent holder "shall neither seek nor seek to enforce injunctive/exclusionary relief against a potential licensee willing to accept a license on RAND terms." U.S. Govt. Member Contribution, Int'l Telecomm. Union, Telecomm. Standardization Advisory Group Contribution 43, at 2, TSAG-C43-E Add. (June 2014).

Federal Circuit rule and the joint policy statement reflect a middle-ground approach.[54] A stricter approach actually makes more sense.[55]

III. The Antitrust Division's Heightened Scrutiny of SSOs Clarifying FRAND Is Deeply Misguided

The Division has long recognized that the vagueness of the FRAND promise is problematic[56] and thus has encouraged SSOs to give it more definition.[57] Indeed, you have emphasized "how indefinite a promise to license on FRAND terms is" in arguing against considering FRAND breaches as potential antitrust violations.[58] Yet, you contend "SSO rules purporting to clarify the meaning of 'reasonable and non-discriminatory' that skew the bargain in the direction of implementers warrant a close look to determine whether they are the product of collusive behavior within the SSO."[59]

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54 *See* Thomas Cotter, *DOJ Speech May Leave SEP Implementers in Dire Straights*, LAW360 (Dec. 10, 2018) (noting that DOJ's withdrawal is surprising because, "Far from being some radical anarchist tract, the statement bends over backwards to point out that injunctive relief remains very much on the table (as it should) when implementers are the ones engaging in bad-faith behavior.").

55 *See Apple*, 757 F.3d at 1343 (Prost, J., concurring) ("I see no reason . . . why a party's pre-litigation conduct in license negotiations should affect the availability of injunctive relief. Instead, an injunction might be appropriate where, although monetary damages *could* compensate for the patentee's injuries, the patentee is unable to collect the damages to which it is entitled.").

56 *See, e.g.,* Gerald F. Masoudi, Deputy Asst. Att'y Gen., Objective Standards and the Antitrust Analysis of SDO and Patent Pool Conduct, Address at the Annual Comprehensive Conf. on Standards Bodies and Patent Pools 18 (Oct. 11, 2007) ("Given the vagueness of RAND-FRAND licensing obligations, they can be difficult to enforce in an action for breach of contract."); Deborah Platt Majoras, Chairman, Fed. Trade Comm'n, Recognizing the Procompetitive Potential of Royalty Discussions in Standard Setting, Remarks Prepared for Stanford Conf. on Standardization and the Law 5 (Sep. 23, 2005) ("Experience has shown . . . that some agreements on RAND rates can be vague and may not fully protect industry participants from the risk of hold up."); *see also* R. Hewitt Pate, Asst. Att'y Gen., Competition and Intellectual Property in the U.S.: Licensing Freedom and the Limits of Antitrust, Address at the 2005 EU Competition Workshop 9 (June 3, 2005) ("A difficulty of RAND . . . is that the parties tend to disagree later about what level of royalty rate is 'reasonable.'").

57 *See, e.g.,* Renata B. Hesse, Deputy Asst. Att'y Gen., Six "Small" Proposals for SSOs Before Lunch, Remarks as Prepared for the ITU-T Patent Roundtable 6, 11 (Oct. 10, 2012) (noting that "[t]he division has advised that standards bodies that set forth well-defined patent policy rules that minimize ambiguity can effectively promote competition," and that "[i]t would seem to be in the interests of all for firms that benefit from standards to seize the opportunity to eliminate some of the ambiguity that requires difficult ex post deciphering of the scope of a F/RAND commitment"); Bill Baer, Asst. Att'y Gen., Reflections on the Role of Competition Agencies When Patents Become Essential, Remarks as Prepared for the 19th Annual Int'l Bar Ass'n Competition Conf. 8 (Sep. 11, 2015) (explaining that "SSOs are positioned to make standards-setting less susceptible to hold up by clarifying their patent licensing policies" and that "increasing the clarity in these policies can be good for competition and . . . consumers").

58 New Wild West, *supra* note 11, at 13; *see also* European Comm'n, Communication from the Commission to the European Parliament, the Council and the European Economic and Social Committee, Setting the EU Approach to Standard Essential Patents 6, COM(2017)712 final (Nov. 29, 2017) ("licensing is hampered by unclear and diverging interpretations of the meaning of FRAND").

59 Take It to the Limit, *supra* note 9, at 11; *see also* Telegraph Road, *supra* note 6, at 12 ("too restrictive for one side or the other"); New Madison, *supra* note 11, at 5 ("skew conditions for patented technologies' incorporation into a standard in favor of implementers"); Long Run, *supra* note 11, at 4 ("skewed towards one group or the other"). You have explained, "When there is evidence that participants in a standard-setting organization have engaged in collusion, which is the 'supreme evil' of antitrust law, according to the Supreme Court in *Trinko*, the Division will be inclined to investigate." Telegraph Road, *supra* note 6, at 7. However, any SSO policy is "collusive" insofar as competing firms agree to it; indeed, standardization is inherently "collusive." Agreements among competitors involved in legitimate standard-setting activi-

In particular, you have identified policies as "suspicious" if they require patent holders generally to forego injunctions,[60] "peg[the] definition of 'reasonable' royalties to a single *Georgia-Pacific* factor that heavily favors either implementers or innovators," or require the use of the "smallest saleable component rule."[61]

Your discouraging SSOs from clarifying their FRAND requirements to minimize *ex post* disputes is deeply misguided, particularly insofar as it comes with a threat of Section 1 enforcement. Ignore that SSOs that modified their patent policies in response to the Division's prior guidance are placed in an untenable position. Put aside the arguments that SSOs' *failure* to adopt policies that effectively prevent patent holdup violates Section 1,[62] and your own contention that "[a]ntitrust policy was not designed to be an instrument for fine-tuning the incentives created by patent law."[63] And disregard that SSO patent policies that are consistent with prevailing patent law cannot be characterized as unduly "skewing" or "shifting" the bargain in the direction of implementers.[64] The mere fact that a patent policy "has the effect of pushing royalty rates down"[65] does not suggest an antitrust problem. Patent policies often have distributional consequences between patent holders and licensees.[66] But policies designed to tie FRAND royalties to the hypothetical *ex ante* bargain are *neutral* and cannot be understood to favor either implementers or patent holders.[67]

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ties are nonetheless analyzed under the rule of reason because of the potential pro-competitive benefits. So, the question is not whether SSO patent policies are "collusive," but whether they are anticompetitive and, if so, whether the anticompetitive harm outweighs the procompetitive benefit. Using the rhetoric of "collusion" unnecessarily chills perfectly legitimate SSO behavior. *Cf.* Standards Development Organization Advancement Act of 2004, Pub. L. 108-237, 15 U.S.C. § 4301 et seq. (rule-of-reason treatment for "standards development activity, . . . including actions relating to the intellectual property policies of the standards development organization").

[60] *E.g.*, Take It to the Limit, *supra* note 9, at 12 ("If an SSO requires innovators to submit to [a compulsory licensing] scheme as a condition for inclusion in a standard, we should view the SSO's rule and the process leading to it with suspicion . . . ."); New Madison, *supra* note 11, at 5 (concern if "right to exclude . . . severely restrict[ed]").

[61] Take It to the Limit, *supra* note 9, at 11. As Professor Contreras notes, your "comments appear to be directed at IEEE's 2015 policy amendments." Jorge L. Contreras, *Taking it to the Limit: Shifting U.S. Antitrust Policy Toward Standards Development*, 103 MINN. L. REV. HEADNOTES 66, 73 (2018). Those amendments—which received a favorable business review letter from the Obama Justice Department—clarify that: a SEP holder that makes a RAND commitment agrees not to seek a "prohibitive order" except in narrow circumstances; the definition of a reasonable royalty excludes any value resulting from the inclusion of the patented technology in the standard; and a version of the "smallest saleable component" rule "should" be a relevant factor in determining RAND. 2015 IEEE Business Review Letter, *supra* note 48, at 9-14 (discussing key provisions); *see infra* note 78.

[62] *See* AAI Petition, *supra* note 2; Melamed & Shapiro, *supra* note 33, at 2128-37.

[63] Free-Market Patent Bargaining, *supra* note 11, at 5.

[64] *See* 2015 IEEE Business Review Letter, *supra* note 48, at 8 (explaining that "Update's specific provisions are not out of step with the direction of current U.S. law interpreting RAND commitments . . . or the evolution of U.S. patent damages law for complex products that incorporate many patented technologies, whether or not these patents are RAND-encumbered").

[65] *CPI Talks . . . with Makan Delrahim, an Interview by Judge Douglas Ginsburg* at 1, CPI ANTITRUST CHRONICLE (June 2018).

[66] JUSTUS BARON ET AL., JRC SCIENCE FOR POLICY REPORT, MAKING THE RULES: THE GOVERNANCE OF STANDARD DEVELOPMENT ORGANIZATIONS AND THEIR POLICIES ON INTELLECTUAL PROPERTY RIGHTS 154 (Mar. 2019).

[67] To the extent you mean to suggest that an SSO's patent policy might involve the exercise of monopsony power to drive royalty rates below the competitive level (rather than an effort to prevent the exercise of monopoly power conferred by the standardization process), that level is set by the hypothetical *ex ante* bargaining framework. *See supra* text and accompanying note 39; *see also* 2007 DOJ/FTC IP REPORT, *supra* note 17, at 53 (noting narrow circumstances in which monopsony may be a concern).

A. Policies that "Favor Implementers"

In any event, as a rule, patent policies that "favor implementers" are hardly suspect. The ubiquitous FRAND promise favors implementers insofar as it protects them from patent holdup,[68] and courts recognize that it is "crafted for the public interest."[69] A number of SSOs have policies that require SEP holders to commit to royalty-free licenses.[70] Some patent holders may choose *not* to license their patents under such terms and, as a result, the standard may be less effective, or perhaps may fail.[71] Ideally, as you suggest, SSOs should adopt policies "that are most likely to attract robust participation in standard setting,"[72] and SSOs have incentives to do so.[73] But why is it the Antitrust Division's duty to ensure that they do, on pain of violating Section 1?[74]

Another example of pro-competitive SSO policies that "favor implementers" are policies that foster *ex ante* licensing by requiring SEP holders to state their most restrictive licensing terms (including maximum royalties) before their technology may be considered for inclusion in a standard. Under Assistant Attorney General Barnett, the Division blessed such policies because they encourage "patent holders [to] compete to offer the most attractive combination of technology and licensing terms," enable SSOs to "make better informed decisions by considering potential licensing fees when weighing the relative costs of technological alternatives in addition to their technical merits," and "alleviate concern that commitments by patent holders to license on RAND terms are not sufficient to avoid disputes over licensing terms."[75] The Division recognized that some SSOs might

[68] *But see* Melamed & Shapiro, *supra* note 33, at 2133 (noting that FRAND rules of most SSOs are vague and in practice do not prevent ex post opportunism).

[69] *Microsoft Corp. v. Motorola, Inc.,* 795 F.3d 1024, 1052 n.22 (9th Cir. 2015).

[70] *See* Justus Baron & Daniel F. Spulber, *Technology Standards and Standards Setting Organizations: Introduction to the Searle Center Database*, 27 J. ECON. & MANAGEMENT STRAT. 462, 478-79, 482 (2018). ANSI, which accredits most American SSOs, requires accredited SSOs to have patent policies under which holders of essential patents must commit to license them under RAND *or* royalty-free terms. Am. Nat'l Standards Inst., ANSI Essential Requirements: Due Process Requirements for American National Standards § 3.1.1, at 10–11 (Jan. 2019).

[71] In fact, however, royalty-free licensing has been a success, particularly with respect to Internet standards. *See* Jorge L. Contreras, *A Tale of Two Layers: Patents, Standardization, and the Internet*, 93 DENVER L. REV. 853, 879-81 (2016).

[72] Long Run, *supra* note 11, at 8; *cf. Apple Inc. v. Motorola, Inc.*, 757 F.3d 1286, 1332 (Fed. Cir. 2014) ("[T]he public has an interest in encouraging participation in standard-setting organizations but also in ensuring that SEPs are not overvalued").

[73] *See* Tsai & Wright, *supra* note 29, at 181, 183 (explaining that "SSOs face complex tradeoffs in seeking to attract technology contributors and adopters to their standards," and that "SSOs do in fact change IPR policies in the direction of providing greater protection against holdup").

[74] It appears that you may have backed off from your enforcement warning to SSOs, as you have distinguished between the Division's "competition advocacy" and enforcement roles, and intimated that perhaps your early speeches regarding "skewed" patent policies fall into the category of the former rather than the latter. Long Run, *supra* note 11, at 8; *see* Contreras, *Taking it to the Limit*, *supra* note 61, at 77. You have appropriately recognized the problem that "industry leadership in standard setting could be stifled or undermined if business leaders are concerned that each decision they make will be called into question by antitrust enforcers in the context of an investigation." Long Run, *supra* note 11, at 7. Yet in a subsequent speech you reiterated your "New Madison" premise that standard setting organizations "should have a very high burden before they adopt rules that severely restrict" "the right to exclude." Free-Market Patent Bargaining, *supra* note 11, at 6 n.17.

[75] Letter from Thomas O. Barnett, Ass't Att'y General, to Michael A. Lindsay, Esq. at 10-12 (April 30, 2007) [hereinafter 2007 IEEE Business Review Letter]; *see also* VITA Business Review Letter, *supra* note 21, at 9 (SSO may legitimately decide that "a cheaper, less technologically elegant solution would be the best").

not wish to adopt such policies because the SSOs may conclude it "would decrease participation in standard-setting activities by patent holders."[76] But whether they do or not represents "free market" experimentation in action.[77]

Finally, the Division gave a favorable business letter for the 2015 IEEE patent policy revision—which, among other things, expressly restricts the ability of a SEP holder that has committed to license on FRAND terms from seeking a "prohibitive order"—notwithstanding criticism that it was skewed in favor of implementers.[78] You obviously consider the IEEE policy to be bad policy,[79] but the fact it arguably "favors implementers" is simply not a basis to question its legality under Section 1. As the leading IP and Antitrust treatise concludes, "standard-setting organization rules that restrict the exercise of intellectual property rights in a standard should generally be permissible."[80]

B. Due Process Safeguards

You correctly point out that due process safeguards are an important bulwark against potentially anticompetitive standard-setting behavior.[81] Indeed, you suggest that due process may serve as a safe harbor: "As long as an SSO's IP policies are the product of a consensus or a clear majority that includes both standard-essential patent holders and implementers, the Department of Justice should have no reason for concern."[82] But your conception of due process misses the mark. If you

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[76] 2007 IEEE Business Review Letter, *supra* note 75, at 12; *see* 2007 DOJ/FTC IP REPORT, *supra* note 17, at 55; *see also* Majoras, *supra* note 56, at 9 (noting that implementers have incentive to ensure that patent holders participate so that patents that might read on the standard are disclosed). In fact, the empirical evidence is that SSOs that adopted *ex ante* licensing policies did not suffer the defections predicted by the critics. *See* Jorge L Contreras, *Technical Standards and* Ex Ante *Disclosure: Results and Analysis of an Empirical Study*, 53 JURIMETRICS 163 (2013).

[77] *See* Hill B. Wellford, Counsel to the Asst. Att'y Gen., Antitrust Issues in Standard Setting, Remarks at 2d Annual Seminar on IT Standardization and Intellectual Property, China Electronics Standardization Inst. 16 (March 29, 2007) ("As an SDO experiments with ex ante patent policies, members should be free to leave if they disagree, and they should be free to set up a competing SDO that seeks a different path."). As noted above, the Division has recognized that implementers may even bargain jointly with a patent holder *ex ante* without running afoul of the antitrust laws, *see supra* text accompanying note 20, although such joint negotiation could raise monopsonization concerns in some settings. *See* 2007 DOJ/FTC IP REPORT, *supra* note 17, at 53 (noting that joint "negotiations might be unreasonable if there were no viable alternatives to a particular patented technology that is incorporated into a standard, the IP holder's market power was not enhanced by the standard, and all potential licensees refuse to license that particular patented technology except on agreed-upon licensing terms").

[78] *See supra* note 61.

[79] The revised IEEE policy has resulted in some patent-focused firms submitting more "negative assurances," i.e. refusing to commit to licensing SEPs on FRAND terms as defined under the new policy. *See* Keith Mallinson, WiseHarbor, Development of Innovative New Standards Jeopardised by IEEE Patent Policy, 4iP Council (Sep. 2017). However, it does not appear to have adversely affected IEEE standard setting. *See, e.g.,* IPLYTICS, EMPIRICAL ANALYSIS OF TECHNICAL CONTRIBUTIONS TO IEEE 802 STANDARDS (Jan. 2019) (finding increased technical contributions since policy update).

[80] HERBERT HOVENKAMP ET AL., IP AND ANTITRUST: AN ANALYSIS OF ANTITRUST PRINCIPLES APPLIED TO INTELLECTUAL PROPERTY LAW § 35.06[C][3] (2018).

[81] Telegraph Road, *supra* note 6, at 9-12; *see also* 2015 IEEE Business Review Letter, *supra* note 48, at 7 ("The Department takes seriously . . . concerns [about bias]. If a standards-setting process is biased in favor of one set of interests, there is a danger of anticompetitive effects and antitrust liability.").

[82] New Madison, *supra* note 11, at 12. In contrast, "if an SSO's policymaking decisions appear to be dominated by implementers, *and* the resulting policies or standards appear to heavily skewed towards implementers and away from inno-

mean to suggest that firms whose business model primarily involves licensing of patents must approve of any patent policy that "favors implementers," then your suggested safe harbor is illusory and inconsistent with the Division's prior treatment of due process issues. Any patent policy that affects the distribution of the returns from standardization will be contested by members that are adversely affected; it is simply unrealistic to expect their consent.[83] What should count for due process purposes is whether the decisionmakers make an informed decision that reflects the best interests of the SSO as a whole[84] in the widespread adoption of its standard.[85]

Thus, in its 2015 IEEE business review letter, the Division rejected claims that the IEEE's change in its patent policy was "the product of a closed and biased process antithetical to the consensus-based goals of open SSOs."[86] The Division emphasized the "numerous opportunities for presenting divergent views as part of the multiple-level review process" and the fact that the decision makers at each level "have a fiduciary duty to IEEE and can be expected to vote in the best interests of IEEE."[87] That firms with business models that depend primarily on patent royalties were overruled did not call into question the adequacy of the process.

IV. Conclusion

We urge the Division to reconsider its withdrawal from the 2013 joint policy statement. Failing that, as you consider drafting a new statement, we urge you to seek agreement not merely with the PTO, but also with the FTC. And in doing so, we request that you hold a public roundtable, workshop, or hearings with the other agencies and a cross section of legal and economic academics, affected stakeholders, and former agency officials to address whether developments in economic theory, empirical studies, or other factors warrant a change in policy.[88] You state that you

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vators, that's already two strikes." *Id.* Of course, as others have pointed out, implementers are innovators too and may also be SEP holders as well. *See, e.g.,* BARON ET AL., *supra* note 66, at 37 n.13.

[83] *See* BARON ET AL., *supra* note 66, at 154; *cf.* OMB Circular A-119, Federal Participation in the Development and Use of Voluntary Consensus Standards and in Conformity Assessment Activities (rev. 2016) ("Consensus" is defined as "general agreement, but not necessarily unanimity," and requires that "comments and objections are considered using fair, impartial, open and transparent processes").

[84] Legitimate joint ventures that pursue the interests of the venture as a whole are likely to satisfy the rule of reason under Section 1. *See* Herbert Hovenkamp, *Exclusive Joint Ventures and Antitrust Policy*, 1995 COLUM. BUS. L. REV. 1, 28 (noting that exclusion of conduit in *Allied Tube* was inconsistent with the interests of the venture as a whole). Indeed, they operate like a "single firm" in such circumstances. *Id.* at 9; *cf.* Mark Patterson, *Antitrust and the Costs of Standard-Setting: A Comment on Teece and Sherry*, 87 MINN. L. REV. 1995, 2015 (2003) (where the SSO negotiates "on behalf of the standard, rather than on behalf of its members" the organization's activities may be viewed as unilateral).

[85] The popularity of a standard, like other goods, is presumably a function of its price and quality. *Cf.* 2007 DOJ/FTC IP REPORT, *supra* note 17, at 52 (noting that standards "can promote competition by lowering prices, increasing consumer choice, or improving quality").

[86] 2015 IEEE Business Review Letter, *supra* note 48, at 7. While recognizing the importance of the process issue, the Department did not view it as dispositive one way or another. The adequacy of the process was not a safe harbor, but neither would a biased process have necessarily resulted in an enforcement challenge. *See id.* at 8 n.31 (noting that harm to competition is a necessary element of an antitrust claim).

[87] *Id.* at 8. The policy was approved by votes of the SSO's governing board (9-3), the standards board (14-5), and the patent committee of the standards board (3-2). *Id.* at 5. Following receipt of the favorable business review letter, the policy was also approved by the IEEE's board of directors by an 80% majority vote. *See* BARON ET AL., *supra* note 66, at 102.

have “been encouraged to see the voluminous commentary—receptive and some critical—that [your new approach] has generated both in the United States and abroad,” and “have endeavored to take all of those views into account.”[89] But letters and commentary (such as this one) are not a substitute for developing a record with forums, roundtables, or hearings.[90]

We also request that you clarify the Division’s enforcement stance towards SSO patent policies. In particular, we urge you to make clear that SSOs face little enforcement risk for adopting patent policies that apply prospectively, are not part of a group boycott, and are designed to promote the widespread adoption of their standards.

Respectfully,

Diana L. Moss, Ph.D.
President
American Antitrust Institute
1025 Connecticut Ave., NW
Suite 1000
Washington DC 20036
202-828-1226 (office)
720-233-5971 (mobile)
dmoss@antitrustinstitute.org

Richard M. Brunell
General Counsel
American Antitrust Institute
1025 Connecticut Ave., NW
Suite 1000
Washington DC 20036
202-600-9640
rbrunell@antitrustinstitute.org

cc: Hon. Joseph Simons
Chairman, Federal Trade Commission

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[89] New Wild West, *supra* note 11, at 14.

[90] In other contexts, you have recognized the importance of making significant policy decisions on a fully developed record with stakeholder input. *See, e.g.,* U.S. DEP’T OF JUSTICE, ANTITRUST DIVISION, ROUNDTABLE DISCUSSION SERIES ON COMPETITION & REGULATION (2018) (noting that “roundtables [on competition and regulation] were an example of how seriously the Antitrust Division takes having the opportunity to have in depth conversations from a range of constituents and viewpoints and to get feedback on possible future initiatives”); *cf.* Separate Statement of Commissioner Delrahim, AMC REPORT, *supra* note 21, at 403 (criticizing AMC’s recommendations on Antitrust and Patents because “the Commission does not have the benefit of the full and fair record and deliberation [the recommendations] warrant”).