# 1AC

### 1AC – Harmonization

#### Conflicting federal antitrust standards on standard essential patents (SEPs) cause DOJ-FTC turf wars – drives industrial and international uncertainty which wrecks harmonization, and decimates growth

McGinnis and Sun, 21 – John O. McGinnis, Professor at Northwestern University and Linda Sun, Associate at Wilmer Pickering Hale & Dorr LLP and J.D. 2020 at Northwestern Pritzker School of Law, Winter, “Unifying Antitrust Enforcement for the Digital Age,” *78 Wash. & Lee L. Rev. 305*, p. Nexis – Iowa

1. Standard-Essential Patents: A Case Study in Incoherence

Turf battles aside, the FTC and the DOJ have promoted directly opposing policies regarding the application of antitrust law to technology.138 The contentious disagreement on the important issue of standard-essential patents shows the divergent treatment and uncertainty already generated by dual enforcement. The FTC believes violation of a SEP licensing agreement is potentially an antitrust violation.139 Standard-setting organizations often require patent holders to license SEPs for free or on fair, reasonable, and non-discriminatory (FRAND) terms.140 The FTC argues that a violation of these licensing terms can violate antitrust laws by enabling a patent holder to “parlay the standardization of its technology into a monopoly in standard-compliant products.”141 The DOJ disagrees, because it believes “it is not the duty or the proper role of antitrust law to referee what unilateral behavior is reasonable for patent holders in this context.”142 The DOJ argues that patent holders enjoy a government-granted monopoly over the item under patent.143 Thus, a violation of a SEP licensing agreement may raise an issue of contract law or other common law right, but not antitrust.144

SEPs are vital to technological innovation and economic growth, with billions of dollars at stake.145 To understand the importance of SEPs to technology, one must first understand the importance of a standard. A standard is a uniform practice around which a technology develops.146 For example, a standard could describe a specific design of a charging port. Once the standard is set, multiple devices, from cell phones to speakers, can be designed to work with that standard charging port. Standards enable uniformity and operability across manufacturers, devices, or platforms.147 We interact with and depend on countless technology standards such as USB, Bluetooth, HTML, and 3G in our everyday life. Their importance cannot be overstated: they provide the foundation for the development and implementation of technology.148

Despite their benefits, standards also present a dilemma: they are most beneficial when there is widespread adoption.149 But most entities, from companies to countries, want to have their own individual designs become standard so as to gain a competitive advantage.150 Thus, there must be some process that encourages collaboration and consensus even among competitors.151

Such collaboration is facilitated by a standards development organization (SDO) or standard setting organization (SSO), which creates, revises, and coordinates technical standards.152 Standards development organizations have rules and criteria to prevent a single interest from dominating the definition of a standard.153 Their rules govern how they approach patented technologies.154 For example, an SDO may require that only unpatented technologies can be adopted as standard. Thus, in deciding what charging port will be the industry standard, the SDO would reject any charging ports that were patented. While this is, in a sense, a procompetitive solution—no entity would have a monopoly over the standard technology that was decided upon—it is largely unrealistic in today’s world where most useful and current inventions are patented. Adopting an unpatented technology that is outdated as standard defeats the purpose of a standard, which is to facilitate the development and adoption of innovative technology.155

As a result, SDOs must contend with standard-essential patents (SEPs), patents that are necessary for the implementation of a standardized technology.156 SDOs typically require that if a proposed standard is encumbered by patents, those patents must be licensed on “fair, reasonable, and non-discriminatory” (FRAND) terms to those seeking to utilize the technology.157 This requirement is thought to facilitate the adoption of the standard in the industry while providing fair terms to all parties involved.158 Because standards are critical to almost everything that touches technology, standard-essential patents are as well. When a patent is essential to a standard, there is no way to comply with the standard without infringing or licensing the patent.159 A dispute over a single SEP can prevent a company from making its product compatible with the internet, computers, or mobile devices.160 For example, a typical cellphone charging port has SEPs that cover every part of its design, from the electronic circuitry to communication protocols. Methods that enable a mobile phone to stay connected to a 4G/LTE network are covered by a multitude of SEPs that are essential to the 4G/LTE standard.161 Qualcomm owns SEPs essential to widely adopted cellular communication standards such as CDMA and LTE.162

A competition problem arises when, despite any agreement made at the time a standard was chosen, SEPs are later not licensed at fair, reasonable, and non-discriminatory terms. When the owner of a SEP bars a competitor from utilizing a SEP and therefore a standard technology, this decision deals a huge blow to the competitor. The FTC believes that when a SEP-owner violates an agreement to license the SEP on fair, reasonable, and non-discriminatory terms, this is an anticompetitive action in violation of antitrust laws.163 In FTC v. Qualcomm,164 the FTC pursued action against Qualcomm under Section 5 of the FTC Act for refusing to license its SEPs to competitors.165

In contrast, the DOJ has taken the stance that SEP owners refusing to license on FRAND terms is not an anticompetitive antitrust violation.166 It is simply a patent owner exercising his or her earned right to exclude competitors. As dictated under patent law doctrine, a patent owner has the right to prevent anyone from utilizing his or her patented technology.167 Going forward, it is uncertain whether the government will pursue antitrust enforcement actions related to the licensing of SEPs.168

This disagreement between the DOJ and the FTC rippled out to cause concern in the legislative branch. Because of the DOJ’s disagreement with the FTC, Senators wrote to the DOJ urging the agency to clarify its policy and provide guidance to stakeholders.169 The uncertainty created by this bifurcated approach creates dissatisfaction in Congress and so undermines support for these agencies among those who control their funding.170

The disagreement between the DOJ and FTC has international implications as well. Divergence in treatment of FRAND agreements among countries already causes difficulties for companies operating under different national standards in the global economy.171 These international challenges are further exacerbated by the different policies of the two domestic antitrust enforcement agencies of the United States, still the most important commercial nation in the world.172 Companies are subject to potentially conflicting standards depending not only on the national identity of the enforcement agency but also on the identity of the agency with the United States. International harmonization becomes more difficult if the United States has internal disagreements. Therefore, the case of SEPs shows how dual enforcement has created uncertainty in the industry, in Congress, and internationally.

B. Dual Enforcement Causes Inefficiencies and Inconsistent Outcomes

Technology did not create, but only exacerbates long-standing problems of dual antitrust enforcement. In this subpart we briefly offer more general arguments against joint enforcement by the FTC and Antitrust Division. It wastes resources, and even in non-technological areas, it creates uncertainty. 173 Both waste and uncertainty are compounded by turf wars, as exemplified by conflicts over mergers. 174

Moreover, Congress never intended for a system of full dual enforcement. 175 Thus, eliminating it would not undermine a fully deliberated scheme. Single enforcement would additionally bring the United States in conformity with industrialized nations worldwide, which generally have a single antitrust enforcer. 176 Finally, we respond to the argument that single agency enforcement would not improve matters much because private actors can enforce antitrust. 177 Private enforcers are subject to heavy restrictions and do not have the same ability to direct antitrust policy as the agencies do.

#### **We’re at an accelerated breaking point**

McGinnis and Sun, 21 – John O. McGinnis, Professor at Northwestern University and Linda Sun, Associate at Wilmer Pickering Hale & Dorr LLP and J.D. 2020 at Northwestern Pritzker School of Law, Winter, “Unifying Antitrust Enforcement for the Digital Age,” *78 Wash. & Lee L. Rev. 305*, p. Nexis – Iowa

Dual antitrust enforcement by the DOJ and the FTC has always created some problems of waste and uncertainty by maintaining overlapping centers of interpretive authority. 402 But technology has made these costs intolerable and added others. Because there are so many difficult questions about how to apply antitrust law to emerging technology, different enforcement agencies confuse companies key to our economic growth as these agencies try to figure out the correct way forward. In the important case of standard-essential patents, the confusion is already rampant, as the DOJ and FTC are locked in fundamental conflict.

#### The US sheltering SEP monopolies from antitrust splinters coordination. Anti-trust prohibitions via SSOs are the best way to harmonize global standards

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In the last decade, the licensing of standard essential patents (SEPs) on fair, reasonable and non-discriminatory (FRAND) terms has been a thorny issue for SEP holders in the US and Europe on the one hand, and major SEP implementers in major Asian economies on the other, such as Japan, Korea, the PRC, Taiwan and even India. With the rise of the Fourth Industrial Revolution, driven by the Internet of Things (IoT), 5G, driverless vehicles, and artificial intelligence (AI), which relies even more on interconnectivity, more and more new standards and SEPs will emerge, and the issue of FRAND licensing of SEPs will be even hotter.

The situation is further exacerbated by national courts’ issuance of anti-suit/enforcement injunctions and even anti-anti-suit/enforcement injunctions. Since Microsoft v. Motorola in 2012, US courts have applied anti-suit injunctions broadly to prohibit litigants from initiating or continuing parallel SEP-related litigation in another jurisdiction. For example, in June 2015 the Northern District Court of California granted InterDigital’s motion for a preliminary injunction requiring Pegatron (a Taiwanese company) to dismiss its suit in Taiwan, and again in April 2018 it issued an anti-enforcement injunction in the Huawei v. Samsung case to enjoin Huawei from enforcing an injunction on Chinese SEPs entered by the Shenzhen Intermediate People’s Court. The England and Wales High Court also held that an anti-suit injunction could be permissible in Conversant (Singaporean company) v. Huawei and ZTE in 2018. Recently, after the Chinese Supreme People’s Court issued within two days an anti-enforcement injunction against Conversant in August 2020, prohibiting it from enforcing a decision rendered by the Dusseldorf District Court, the Wuhan Intermediate People’s Court has taken the whole world by surprise. It issued in September 2020 a global anti-suit injunction against InterDigital in its suit with Xiaomi (Chinese company) and then issued in March 2021 against Ericson in its suit with Samsung (Korean company) a global anti-suit (excluding even other Chinese courts) and anti-administrative complaint injunction.

As a response, the international community has started to look for alternatives. For example, since November 2015, the Munich IP Dispute Resolution Forum has worked on the role of Alternative Dispute Resolution (ADR) in solving disputes surrounding FRAND licensing of SEPs and proposed the “FRAND ADR Case Management Guidelines” in May 2018. The European Commission (EC) in its 2020 IP Action Plan vows to “improve transparency and predictability in SEP licensing via encouraging industry-led initiatives, in the most affected sectors, combined with possible reforms, including regulatory if and where needed, aiming to clarify and improve the SEPs framework and offer effective transparency tools,” to facilitate licensing and sharing of IP. Seemingly, ADR is one of the industry-led initiatives the EC has in mind.

However, ADR has its drawbacks, at least from the perspective of Asian industries, and can only work under a new construction.

One big drawback of ADR is that there is already an arbitration clause in almost every SEP license, which is almost always imposed by SEP holders and almost always designates the home turf of SEP holders or the headquarters of Standard Setting Organizations (SSOs) as the place for arbitration, which are almost always non-Asian. The result of such arbitration tends to take a formalistic and pure contract law approach to interpret SEP licenses; as Lord Justice Birss has said “it is not necessary to rely on competition law to enforce the FRAND undertaking.” Arbitrators will almost certainly ignore the dominant market power possessed by SEP licensors and its abuse. That is the reason why I have suggested that competition authorities in major Asian economies should promulgate guidelines to demand that SEP licensors limit the scope of arbitration to pure contractual disputes, and exclude those related to anti-trust from arbitration. The lack of competition law consideration during arbitration will not be mitigated by simply reminding that ideal candidates for arbitrators “would have specific expertise in the field of standardization and related competition law issues” as proposed by the FRAND ADR Case Management Guidelines. There are few such people, if any at all, and they will hardly be chosen by SEP holders.

The second drawback is that arbitration taking place elsewhere will preempt local antitrust law suits in major Asian economies, which have offered some practical help to SEP implementers. In the last decade, some standards for FRAND licensing of SEPs under antitrust laws have converged in major Asian jurisdictions. There are three Nos and one Yes. “No” to bundling non-SEPs with SEPs, “No” to continual payment of royalties after the expiration of SEPs, “No” to royalty-free cross-licensing, and “Yes” to the provisioning of patent lists by SEP holders. Failure to uphold the three Nos and one Yes by SEP holders could lead to antitrust issues of abuse of dominance by the SEP holders in these Asian jurisdictions.

The three Nos and one Yes standards take a per se illegal approach and might seem rigid. However, they provide bright-line rules and as a result certainty to SEP implementers in Asia. In addition, they mirror or resemble some of the “Nine No-Nos” that reigned in the US from 1970 to 1995, especially “No” mandatory package licenses and “No” royalty provisions not reasonably related to the licensee's sales. It took the US 25 years to transition to the Antitrust Guidelines for the Licensing of Intellectual Property, which looks at these issues from the perspectives of rule of reason. The three Nos and one Yes standards should therefore be treated with equal understanding and tolerance, as Asian economies might need time to evolve according to their changing conditions and mindsets. Why would Asian SEP implementers agree to throw away that level of antitrust law safeguard by embracing arbitration unconditionally?

On top of that, it is worth noting that oftentimes these three Nos and one Yes standards have also been accepted in the form of consented corrective measures and concrete undertakings made by SEP holders to different Asian competition authorities. Since the SEP holders are global conglomerates and operate internationally, these standards could have the potential of transcending national borders to become global standards. Otherwise, they would be “discriminatory” towards businesses located in other jurisdictions. If we were to promote arbitration beyond Asia, should these antitrust standards be not arbitrable?

The third drawback of ADR is that it lacks the positive externality of a litigation. Its results will not be published, and no teaching and research on and oversight over the licensing of SEPs will be possible. Relevant knowledge will not be accumulated for and disseminated to the public. The FRAND ADR Case Management Guidelines take notice of this concern and suggest that “public policy considerations have to be balanced with confidentiality as an established ADR-principle” and “at least the methods and principles adopted by the parties and the arbitral tribunal in the determination of FRAND terms and conditions should be made public.” Whether this will be acceptable to and practicable for ADR institutions remains highly uncertain.

On the contrary, arbitration by SSOs offers the most viable solution and can best avoid the above drawbacks. For three reasons FRAND licensing of SEPs needs ex ante regulation: increasing litigation worldwide indicates massive market failure; SEPs equal monopoly or joint monopoly; and SSOs from the private sector are replacing sovereign states in the development and adoption of new technical standards. The ex ante regulation is through light-handed control over the self-regulation by SSOs. SSOs are closest to all participants in the market, have professional knowledge about the standards and their major contributors, are not limited by national boundaries, and are therefore best positioned to tackle the problem at the roots.

In other words, SSOs should be asked by regulators to provide safeguards for the smooth implementation of the standards embodied in SEPs. Specifically, SSOs should conduct the essentiality check on the declared SEPs, be the depository of FRAND-compliant royalty rates that their members have signed, which will enable SSOs to concretize FRAND-compliant terms, and provide arbitration service to SEP owners and implementers. To be more feasible, SSOs should take the need for collective management of SEPs seriously. They can learn from the examples of the extended collective management of copyright by forming an umbrella organization to coordinate different arbitration cases to avoid royalty stacking and enhance transparency. That way, a global arbitration, as envisioned by Lord Justice Arnold, can be better achievable.

No single national competition agency can deal with all SSOs. Therefore, concerted action across national competition agencies is a must. Given that almost all SSOs are headquartered in the EU and US, and both the USFTC and EC have dealt with SSOs-related issues, coordination between the two would be a good start. More challenging, though, is to integrate competition authorities of other jurisdictions. It is only fair and appropriate to include at least the competition agencies of Taiwan, South Korea and the PRC, as they have dealt with FRAND licensing of SEPs issues, and their economies are leading the ICT industries. These five competition agencies can form a consortium to oversee the self-regulation of SSOs, including the arbitration service, in a way that best addresses the three drawbacks associated with traditional arbitration.

#### **Unified antitrust enforcement of SEP monopolies is make or break for growth**

McGinnis and Sun, 21 – John O. McGinnis, Professor at Northwestern University and Linda Sun, Associate at Wilmer Pickering Hale & Dorr LLP and J.D. 2020 at Northwestern Pritzker School of Law, Winter, “Unifying Antitrust Enforcement for the Digital Age,” *78 Wash. & Lee L. Rev. 305*, p. Nexis – Iowa

1. The Need for Certainty in Antitrust Regulation of Technology

A unified approach to antitrust regulation is especially important when it comes to the technology industry for three reasons. First, the rapidly growing technology industry is at the center of the U.S. economy: in 2018, the internet sector accounted for $2.1 trillion of the economy and 10 percent of the GDP. 48 Uncertainty about antitrust rules created by dual enforcement hinders economic growth.

Second, technological industries are especially sensitive to shifts in antitrust policy because antitrust actions can change the trajectory of fast-changing industries. For instance, the DOJ's antitrust enforcement action against the Bell System broke up the monopoly in telephony. 49 One court later summarized the effect as "an unprecedented flowering of innovation" in the telecom industry. 50 Agency antitrust action also played a large role in the growth of software, browser, and [\*318] web company competition. 51 In anticipation of a Justice Department antitrust suit, 52 IBM unbundled its software and hardware products in the 1960s, 53 dramatically changing the software market. Nearly overnight, software went from a typically free good to a commercial product. 54 Governmental antitrust enforcement is additionally credited for Microsoft's 1997 investment in its rival company Apple, which saved the then-nascent company from the brink of bankruptcy. 55 Microsoft likely acted in self-preservation because it faced antitrust scrutiny that came to a head in a DOJ suit the year after. 56 The [\*319] Microsoft settlement itself is "credited with giving web companies like Google--and browsers like Google Chrome . . . space to grow." 57 These actions changed the technological landscape, and future antitrust decisions regarding technology companies will have just as significant of an impact, if not more.

Moreover, antitrust policy is very important to the research and development that is the heart of innovation in tech, particularly as more research and development has moved from the public sector to the private sector. 58 Private companies are affected more directly by antitrust policies. 59 Even the financing of technology is dependent on antitrust law. Today, as discussed in more detail below, 60 the primary reason a tech start-up receives funding from investors is its acquisition potential; merger and acquisition policies play a significant role. 61 Once again, certainty here is important for investors, and [\*320] possible and actual conflicts between DOJ and the FTC reduce certainty.

Third, a unified approach to antitrust has become more important because the antitrust issues affecting tech are particularly complex; it is difficult to determine how best to apply antitrust law to emerging technologies. 62This challenge makes it more likely that DOJ and the FTC will proceed on different theories, increasing uncertainty. For instance, antitrust scholars and regulators have struggled to apply the traditional small but significant non-transitory increase in prices (SSNIP) test to zero-price tech markets. 63 The SSNIP test, used by both the FTC and DOJ, defines a relevant antitrust market as the "smallest grouping of products for which a hypothetical monopolist could profitably impose a 5% price increase." 64 However, many technology platforms offer their products at no monetary cost to customers. The lack of measurable price renders the SSNIP test difficult to operationalize. 65 This complexity makes it more likely that the DOJ and the FTC will apply the test differently, resulting in uneven and unfair outcomes. SSNIP is only one of many areas of debate regarding how antitrust is to be applied to technology.

#### Growth prevents extinction and the collapse of the rules-based order

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Broadly shared economic prosperity is a bedrock of America’s economic and political strength—both domestically and in the international arena. A strong and equitable recovery from the economic crisis created by COVID-19 would be a powerful testament to the resilience of the American system and its ability to create prosperity at a time of seismic change and persistent global crisis. Such a recovery could attack the profound economic inequities that have developed over the past several decades. Without bold action to help all workers access good jobs as the economy returns, the United States risks undermining the legitimacy of its institutions and its international standing. The outcome will be a key determinant of America’s national security for years to come.

An equitable recovery requires a national commitment to help all workers obtain good jobs—particularly the two-thirds of adults without a bachelor’s degree and people of color who have been most affected by the crisis and were denied opportunity before it. As the nation engages in a historic debate about how to accelerate economic recovery, ambitious public investment is necessary to put Americans back to work with dignity and opportunity. We need an intentional effort to make sure that the jobs that come back are good jobs with decent wages, benefits, and mobility and to empower workers to access these opportunities in a profoundly changed labor market.

To achieve these goals, American policy makers need to establish job growth strategies that address urgent public needs through major programs in green energy, infrastructure, and health. Alongside these job growth strategies, we need to recognize and develop the talents of workers by creating an adult learning system that meets workers’ needs and develops skills for the digital economy. The national security community must lend its support to this cause. And as it does so, it can bring home the lessons from the advances made in these areas in other countries, particularly our European allies, and consider this a realm of international cooperation and international engagement.

Shared Economic Prosperity Is a National Security Asset

A strong economy is essential to America’s security and diplomatic strategy. Economic strength increases our influence on the global stage, expands markets, and funds a strong and agile military and national defense. Yet it is not enough for America’s economy to be strong for some—prosperity must be broadly shared. Widespread belief in the ability of the American economic system to create economic security and mobility for all—the American Dream— creates credibility and legitimacy for America’s values, governance, and alliances around the world.

After World War II, the United States grew the middle class to historic size and strength. This achievement made America the model of the free world—setting the stage for decades of American political and economic leadership. Domestically, broad participation in the economy is core to the legitimacy of our democracy and the strength of our political institutions. A belief that the economic system works for millions is an important part of creating trust in a democratic government’s ability to meet the needs of the people.

The COVID-19 Crisis Puts Millions of American Workers at Risk

For the last several decades, the American Dream has been on the wane. Opportunity has been increasingly concentrated in the hands of a small share of workers able to access the knowledge economy. Too many Americans, particularly those without four-year degrees, experienced stagnant wages, less stability, and fewer opportunities for advancement.

Since COVID-19 hit, millions have lost their jobs or income and are struggling to meet their basic needs—including food, housing, and medical care.1 The crisis has impacted sectors like hospitality, leisure, and retail, which employ a large share of America’s most economically vulnerable workers, resulting in alarming disparities in unemployment rates along education and racial lines. In August, the unemployment rate for those with a high school degree or less was more than double the rate for those with a bachelor’s degree.2 Black and Hispanic Americans are experiencing disproportionately high unemployment, with the gulf widening as the crisis continues.3

The experience of the Great Recession shows that without intentional effort to drive an inclusive recovery, inequality may get worse: while workers with a high school education or less experienced the majority of job losses, nearly all new jobs went to workers with postsecondary education. Inequalities across racial lines also increased as workers of color worked in the hardest-hit sectors and were slower to recover earnings and income than White workers.4

The Case for an Inclusive Recovery

A recovery that promotes broad economic participation, renewed opportunity, and equity will strengthen American moral and political authority around the world. It will send a strong message about the strength and resilience of democratic government and the American people’s ability to adapt to a changing global economic landscape. An inclusive recovery will reaffirm American leadership as core to the success of our most critical international alliances, which are rooted in the notion of shared destiny and interdependence. For example, NATO, which has been a cornerstone of U.S. foreign policy and a force of global stability for decades, has suffered from American disengagement in recent years. A strong American recovery—coupled with a renewed openness to international collaboration—is core to NATO’s ability to solve shared geopolitical and security challenges. A renewed partnership with our European allies from a position of economic strength will enable us to address global crises such as climate change, global pandemics, and refugees. Together, the United States and Europe can pursue a commitment to investing in workers for shared economic competitiveness, innovation, and long-term prosperity.

The U.S. has unique advantages that give it the tools to emerge from the crisis with tremendous economic strength— including an entrepreneurial spirit and the technological and scientific infrastructure to lead global efforts in developing industries like green energy and biosciences that will shape the international economy for decades to come.

#### **Rules-based order caps escalation and is try or die for a range of existential risks**

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This international system, while not perfect, has proven to be more successful than any in human history at providing security, economic prosperity, and freedom. The evidence of this is apparent in the numbers. Before 1945, major powers frequently engaged in direct warfare on a massive scale, as in the Napoleonic Wars, World War I, and World War II. Since 1945, however, there have been zero great-power wars. As shown in Figure 1, the percentage of people killed in armed conflict has drastically declined in the post-World War II era. Armed conflict killed an average of 1–2 percent of the human population from 1600 to 1945. During the Cold War, an average of 0.4 percent of the world’s population perished due to war. Since the year 2000, less than one one-hundredth of 1 percent of people have died this way.8 Under a rules-based system, the world has continued to make progress in reducing deaths from all kinds of war, including often-intractable civil conflicts.9 Turning to economic prosperity, the global gross domestic product (GDP) per capita in 1945 was $4,079.10 Today it is $11,570.11 This drastic increase in global living standards is evident in Figure 2. The share of the global population living in poverty has dramatically decreased. In 1929, the number of people living in extreme poverty (defined as earning less than 1.90 international dollars per day) was 1.35 billion, almost two-thirds of the world population at the time. In 2015, that figure was 733.48 million, or slightly less than 10 percent of the world population.12 China itself has been one of the biggest beneficiaries of this system, as geopolitical stability in Asia and integration into the global economy helped to lift four hundred million Chinese out of poverty. In the realm of good governance, the number of democracies has substantially increased. With the end of World War II and decolonization, the number of democracies increased from seventeen to forty-eight between 1945 and 1989.13 That number further skyrocketed at the end of the Cold War, as countries formerly behind the Iron Curtain rushed to join the West. In the year 1900, there were twelve democracies in the world. Today there are ninety-six.14 The percentage of the world’s population living under democratic governments has also increased from about 12 percent in 1900 to more than 55 percent today.15 This trend is visible in Figure 3. To be sure, these outcomes are the result of an enormous and interconnected range of factors. International-relations scholars, for example, believe that nuclear deterrence and the absence of a multipolar distribution of power also contributed to great-power peace.16 In addition, globalization and economic development have been fueled by new technological developments. Further, global norms on democratic governance and human rights have come a long way since the early twentieth century.17 Still, it is doubtful whether this dramatic improvement in the human condition could have been achieved in the absence of the rules-based international system. Moreover, many of these other driving forces are themselves constitutive of, if not partially the result of, that system. Global bipolarity, and then unipolarity with the United States at its center, was critical for the postwar development of a rules-based system, which may not have been possible in a more multipolar distribution of international power, or with a non-democratic hegemon at the system’s apex. The splitting of the atom could have resulted in widespread nuclear-weapons proliferation and nuclear use had it not been for the NPT and extended US nuclear deterrence in Europe and Asia.18 The most important technological advances for globalization, including the Internet, occurred and flourished in the free world, defended by the United States and its democratic allies and partners.19 Finally, the United States and its democratic partners, along with nongovernmental organizations and individuals operating in these states, were the most important norm entrepreneurs propagating global norms around issues of good governance, democracy, and human rights. In sum, the rules-based international system that has been the defining feature of global order for the past seventy years has coincided with—and was almost certainly essential in bringing about—the most secure, prosperous, and well-governed world humanity has ever known. Despite this record of unprecedented and enduring success, the rules-based international system is currently besieged by a number of challenges unleashed by rapid and dramatic global change. Understanding the current strategic context, including global trends and threats both external and internal to the system’s democratic core, is a necessary first step toward devising a strategy to revitalize, adapt, and defend a rules-based international system. Global Trends The system is currently buffeted by several worldwide trends, including global shifts in the balance of power, the emergence of disruptive technology, the threat of nuclear proliferation, the rise of nonstate actors, and the consequences of climate change. Global Diffusion of Power. The international distribution of power, as defined by relative economic weight, is shifting away from the founders of the post-World War II system to other emerging economies. As recently as the 1990s, nearly 70 percent of global economic activity occurred in Europe and the Americas. By the 2040s, that number is expected to drop to roughly 40 percent. At the same time, the Asian share of global GDP will increase from 32 percent at present to 53 percent in 2050, meaning that, by that time, the majority of all economic activity on Earth will occur in Asia.20 While the United States remains the world’s most powerful state militarily and economically, it is declining relative to other rising powers, particularly China. When corrected for purchasing-power parity (PPP), China’s GDP has already surpassed the United States. The better metric for international power and influence, however, is real GDP; here, too, the US advantage is narrowing, but more slowly.21 At the conclusion of World War II, the United States possessed roughly 50 percent of global GDP.22 From the 1970s through today, that number has held steady at roughly 25 percent.23 Despite a common misperception, the United States’ share of global power is not declining in absolute terms. Rather, other powers—especially China—are rising. China’s share of global GDP rose from 4.6 percent in the 1990s to 15 percent today.24 Many economists predict that China could surpass the United States as the world’s largest economy by 2030. It is noteworthy, however, that in 2009, economists predicted that this transition would happen by 2020. That date has been pushed back a decade as Chinese growth has slowed. Future projections depend entirely on assumptions about growth rates in the United States and China that cannot be known with certainty. Still, most economists expect that China will, at some point, surpass the United States as the world’s largest economy. China is joined by other emerging economies with rapid growth rates, including India, Indonesia, and others. US allies, including Japan, Germany, and the United Kingdom, remain among the wealthiest nations on Earth, but their share of global power is also declining relative to the rise of the rest. This shift is significant because international orders function best when their formal attributes at least roughly reflect the underlying balance of power. While only one measure of global influence, economic power is central given the leverage it provides over trade and investment, and the resources it offers to sustain military and security advantages. It is also important to point out, however, that the United States and its formal treaty allies continue to possess a preponderance of power in the international system. As Figure 4 shows, the United States and its formal allies currently produce 59 percent of global GDP. When including other countries considered to be “democracies” by the widely used Polity scores, that number rises to 75 percent of global GDP. Democracies continue to retain global influence because more countries have transitioned to democracy since the end of the Cold War, and overall economic growth in democratic countries has outpaced that in autocratic states since 1991. The major shift since the dawn of the post-Cold War world, therefore, is not that the power of the United States and its democratic allies and partners has declined substantially. The major difference is that the share possessed by autocratic challengers, especially China, has grown. As Figure 4 shows, the world is approaching a more bipolar distribution of power, with more wealth concentrated in the democracies and in a grouping of autocratic challengers led by China. This means that, if they are able to work together more cohesively, the United States and its democratic allies and partners still have the power and influence necessary to significantly shape international outcomes. Moreover, if they are able to expand their ranks to court other nonaligned democracies like India, Indonesia, and Mexico, their influence on the international system can be even more decisive. Disruptive Technologies. New technologies—including artificial intelligence (AI), robotics, quantum computing, and biotech, among others—are being developed at an exponential pace, and have the promise to transform society. They will determine how people live and function in the twenty-first century, significantly shaping the global economy, international security, and the course of geopolitics. Throughout history, progress has been built on technological innovation, ranging from Thomas Edison’s light bulb to Henry Ford’s assembly line to the silicon chip, the personal computer, and the Internet. While new technology promises improved productivity and quality of life, it will bring serious downside risks, including economic dislocation and weapons proliferation. AI, for example, is already being widely adopted in the private sector to achieve great efficiencies and cost savings.25 At the same time, automation threatens to put millions out of work as jobs once performed by humans are replaced by machines. Moreover, AI is also being introduced into national militaries. A logical next step is fully autonomous weapons that can select and engage targets without a human in the decision-making loop. Some warn that these “killer robots” introduce many ethical and security risks, including the fear that they may turn on their creators and threaten humans’ very existence or, indeed, what it means to be human.26 Henry Kissinger warns, “We are in danger of losing the capacity that has been the essence of human cognition.”27 The existing international system was designed to deal with the most important dual-use technologies of the twentieth century, such as nuclear power, but it must be updated to deal with the technologies of the twenty-first century. As with nuclear energy, the international community needs an entirely new set of international norms, standards, and agreements for responsible uses of new technologies that mitigate their downside risks, while maximizing their upside potential. Since the time of Edison, the United States has been the world’s most innovative country, but it is at risk of losing that title to China and other countries that aim for the first-mover advantage in the next round of technological breakthroughs. Throughout history, technological progress and international leadership have gone hand in hand. Think of roads and aqueducts in ancient Rome, the steam engine in nineteenth-century Great Britain, and the Internet in the United States. If China or another country takes the lead in the new tech arms race, Beijing may be in a better position to rewrite the international system’s rules. Nuclear Proliferation. Even as the world grapples with the technological challenges of the twenty-first century, century-old technological challenges remain. The NPT may be the most successful treaty in history, but its future is uncertain. North Korea has become the only country in history to sign the treaty, withdraw, and build nuclear weapons. If North Korea is allowed to become an accepted nuclear-weapons state, it would pose a severe threat to international peace and security. Other members of the treaty may also reconsider their nuclear options. In particular, South Korea and Japan may be at risk of pursuing nuclear-weapons programs if the program in Pyongyang continues to advance and the United States is unwilling or unable to provide Seoul and Tokyo with adequate security assurances. Iran’s nuclear program was allowed to operate within strict limits according to the terms of the Joint Comprehensive Plan of Action (JCPOA), but the US withdrawal from that agreement may lead Tehran to accelerate its nuclear program or dash to achieve a nuclear weapon. A bomb in Iran could also instigate further regional nuclear proliferation.28 Officials in Saudi Arabia, for example, have declared that if Iran acquires nuclear weapons, Riyadh will follow suit. A proliferation cascade in East Asia or the Middle East would undermine the global nonproliferation regime and fuel regional insecurity. Moreover, new technologies such as additive manufacturing may make it easier for future proliferators to build nuclear-weapons programs, and harder for the international community to catch and stop them.29 The additional spread of a weapon that remains the ultimate instrument of military force could threaten the global security and stability necessary for the smooth functioning of the rules-based international system. Ecological Disaster. As with nuclear war, an ecological disaster could constitute a direct threat to humanity’s very existence. While states have made efforts to address climate change caused by carbon emissions, including in the Paris Climate Agreement, these steps will not be sufficient to keep emissions below the target levels set by leading scientific panels. Higher average global temperatures are leading to rising sea levels, drought, an increased frequency of violent storms, and forced migrations, all of which are threatening vulnerable societies, undermining already-weak national governments, and contributing to conflicts over natural resources.

#### Resolving dual enforcement solves patent holdup, international signaling, and durable global interoperability

Alanko, 20 – Anita, Patent examiner at the United States Patent and Trademark Office and J.D. from The Catholic University of America, Columbus School of Law. “The New Madison Approach to Antitrust Law and Intellectual Property Law,” *28 Cath. U. J. L. & Tech. 219*, Spring, p. Nexis – Iowa

The DOJ-FTC have already issued joint "Antitrust Guidelines for the Licensing of Intellectual Property" in 2017 to guide the public about when anticompetitive conduct can be found in the licensing of intellectual property. 265 The guidelines state that intellectual property is considered the same as any other form of property for the antitrust analysis. 266 While patents can confer market power, market power does not violate antitrust law if that power derives from "a superior product, business acumen, or historic accident." 267 The guidelines describe the markets affected by licensing, and general principles and their application in evaluating license agreements using the rule of reason. 268 With respect to the fourth element of the New Madison Approach, the guidelines state, "Nor does such market power impose on the intellectual property owner an obligation to license the use of that property to others." 269 However, as discussed above, this is not a necessary result and exceptions may be possible. 270 Furthermore, the guidelines do not directly address standard-essential patents within the context of standard-setting organizations. As technology progresses and SSOs become more prevalent, clear policy is needed.

In response to the debate and withdrawal from the 2013 Joint Policy Statement, the USPTO, the National Institute of Standards and Technology [\*251] ("NIST"), and the DOJ Antitrust Division issued a new 2019 Policy Statement. 271 Good-faith negotiations between patent owners and licensees are expected, but injunctions should be available for patent infringement as the facts warrant, with no special rules for standard essential patents. 272 The 2019 Policy Statement reiterates that a balanced approach, accounting for all remedies, will preserve competition and provide incentives to innovate. 273A USPTO press release quotes Under Secretary of Commerce for Intellectual Property and Director of the USPTO Andrei Iancu stating, "The new joint statement effectively takes the government's thumb off the scale" and is meant to "incentivize technological development and growth of standards-based industries." 274

This is a fair debate, but the enforcement agencies are in a unique position to drive the discussion towards the best solution. A faithful effort now to gather public input will help ensure that any guidelines and policy statements are likely to be accepted. 275 That way, policy and guidelines can remain valuable and withstand the test of time. 276

By coming together with the DOJ, stakeholders can send a strong statement to the world that the patent system is strong and open to all inventors in the world. The role of antitrust law in the patent system must be clear. It is not one to be shuttered away but approached on a case-by-case basis, as the facts and circumstances demand.

America's inventors and those who invest in patented technology in America deserve clarity, a strong intellectual property system, and a strong antitrust system. Antitrust enforcers, innovators, and implementers can and must all work together to better our society.

IV. CONCLUSION

Intellectual property law and antitrust law can work together to promote innovation that increases consumer welfare. However, antitrust law should not [\*252] be short-sighted and look for short term rewards. Having a variety of remedies available, including injunctions, ensures that parties will negotiate in good faith and abide by their commitments over time. The New Madison Approach is a necessary debate; further discussion and analysis will ensure that policy and guidelines that stand the test of time can be developed. Innovation is necessary at the cutting edge, creating new products in an unpredictable time frame. This demands flexibility to ensure that the society can reap the greatest benefit possible. Antitrust law should also address patent hold-up and hold-out, injunctions, and unilateral refusal to license with clear policy. Ultimately, society will reap the benefits of an appropriate approach to these bodies of law.

### 1AC – Telecommunications

#### FRAND unraveling now – stricter antitrust application is key to prevent ex post monopolies prevents collapse of wireless telecommunications and US leadership

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Antitrust best achieves its purpose when it takes markets as it finds them, and then protects them from threats to competition. The antitrust tribunal must understand the market before it and the rationales and effects of its various rules. Then it considers whether a challenged restraint might operate anticompetitively so as to cause unnecessary consumer harm. For more than a century, antitrust jurisprudence has approached markets in this way. For example, Justice Brandeis’s opinion in the Board of Trade case3 began by describing the Board’s operation as a market. From that point the Court’s job was to ascertain whether the challenged rule operated anticompetitively to undermine this purpose.4 In the NCAA case nearly seventy years later it did the same thing—acknowledging the valuable market created by this joint venture of colleges to promote amateur intercollegiate athletics. It condemned a restraint on competition that reduced output and harmed consumers and was not central to the NCAA’s purpose.5 The list of cases in which the Supreme Court has followed this template so as to protect the competitive integrity of standard setting or other collaborative market processes is long.6 In a particularly myopic decision involving the FRAND process, the Ninth Circuit made no attempt to understand that process or how the antitrust laws could be used to protect it from anticompetitive restraints.7 That was not entirely the court’s fault. Part of the blame lies with the Antitrust Division of the Justice Department, which intervened in the proceeding and seemed more intent on protecting Qualcomm than the competitive integrity of the FRAND process.8 While the FRAND process has been highly productive, it is also fragile. Firms are tempted to make commitments at the beginning when the incentive to join is large, but renege on them later when they can profit by doing so. At least in this particular case, private FRAND enforcement had not worked very well. Qualcomm had been able to violate FRAND commitments in order to exclude rivals and obtain higher royalties than FRAND would permit, largely with impunity. Other firms will very likely follow Qualcomm’s lead. If that happens the FRAND system will fall apart, doing irreparable injury to the modern wireless telecommunications network or, at the very least, diminishing the leadership role of the United States in preserving effective network competition. While governments can be heavily involved in standard setting,9 the implementation of technical standards in information technologies is largely the work of private actors. Government involvement is limited mainly to enforcement of contract, intellectual property, or antitrust law. As private actors, those involved in standard setting or compliance are fully subject to the federal antitrust laws. This Article addresses one question: when is an SSO participant’s violation of a FRAND commitment an antitrust violation, and if it is, of what kind and what are the implications for remedies? It warns against two extremes. One is thinking that any violation of a FRAND commitment is an antitrust violation as well. In the first instance FRAND obligations are contractual, and most breaches of contract do not violate any antitrust law. The other extreme is thinking that, because a FRAND violation is a breach of contract, it cannot also be an antitrust violation. The question of an antitrust violation does not depend on whether the conduct breached a particular agreement but rather on whether it caused competitive harm. This can happen because the conduct restrained trade under section 1 of the Sherman Act, was unreasonably exclusionary under section 2 of the Sherman Act, or amounted to an anticompetitive condition or understanding as defined by section 3 of the Clayton Act.10 The end goal is to identify practices that harm competition, thereby injuring consumers. The Ninth Circuit’s Qualcomm decision will make antitrust violations in the context of FRAND licensing much more difficult to prove, even in cases where anticompetitive behavior and consumer harm seem clear.11 Indeed, in this case the court itself acknowledged the harm to consumers but appeared to think that they were not entitled to protection.12 If this decision stands, FRAND obligations will to a larger extent have to be settled through private litigation and the federal antitrust enforcement agencies will have a diminished role. Anticompetitive behavior by one firm that is not effectively disciplined will lead others to do the same thing. Not only did the Ninth Circuit reject application of the antitrust laws in this case, it also appeared to repudiate antitrust’s consumer welfare principle, saying: . . . [T]he district court correctly defined the relevant markets as “the market for CDMA modem chips and the market for premium LTE modem chips.” Nevertheless, its analysis of Qualcomm’s business practices and their anticompetitive impact looked beyond these markets to the much larger market of cellular services generally. Thus, a substantial portion of the district court’s ruling considered alleged economic harms to OEMs—who are Qualcomm’s customers, not its competitors—resulting in higher prices to consumers. These harms, even if real, are not “anticompetitive” in the antitrust sense— at least not directly—because they do not involve restraints on trade or exclusionary conduct in “the area of effective competition.”13 The quotation is from the Supreme Court’s decision in Ohio v. American Express Co.,14 where the Supreme Court said only that a relevant market is “the area of effective competition.” The Ninth Circuit panel apparently believed that antitrust harm could occur only to producers inside the relevant market, which typically excludes most customers. The Ninth Circuit did not quote the Supreme Court’s decision one year later in Apple v. Pepper,15 that “Ever since Congress overwhelmingly passed and President Benjamin Harrison signed the Sherman Act in 1890, ‘protecting consumers from monopoly prices” has been “the central concern of antitrust.’”16 The very reason we condemn restraints under the antitrust laws is because they result in lower output and higher prices, harming consumers. The Ninth Circuit panel appeared to believe that higher prices for OEMs—that is, the manufacturer customers who purchase chips for inclusion in their devices— is not the kind of injury that concerns the antitrust laws. Rather, it must be harm to competitors. Customers are often, even typically, not producers in the relevant market. Nevertheless, they are clearly antitrust’s protected class. For example, while exclusive dealing in the first instance might deny selling opportunities to a rival producer, we condemn it because it threatens price increases to their buyers and those who purchase from them. Indeed, the reason we have market power requirements in antitrust cases in the first place is to distinguish harms to rivals that are likely to result in market price increases from those that are not. Competitor exclusion in a competitive market is not an antitrust violation because, while it injures the competitor is does no consumer harm. That is the all-important difference between business torts and antitrust law. Patent holders who participate in SSOs generally agree to provide timely disclosure of their patents or patent applications that are reasonably expected to read on the participants’ technology. 17 They also agree in advance to license their patents thought to be essential to the standard on FRAND terms.18 The Patent Act itself does not impose this obligation. Patentees who are not involved in SSOs have no obligation other than market pressures to submit their patents to a standard or engage in FRAND licensing.19 In networked technologies, however, these market pressures can be substantial. For example, if a patentee refuses to commit its patented technology to an industry standard, the SSO is likely to adopt a different standard that is not believed to infringe those patents.20 Or if a patentee refuses to commit to license a patent to all comers on a nondiscriminatory basis, then the SSO may respond by seeking an alternative standard.21 These actions are driven by the SSO’s goal of competitive creation of a technology when interoperability among diverse producers is a necessary component. Just as any producer, firms involved in the implementation of networked technology seek to minimize their costs by avoiding unnecessary or unnecessarily costly patents. Such avoidance is a socially valuable form of cost minimization. The FRAND obligation generally requires patentees to license freely to all qualified participants, whether or not they are competitors of the patent holder.22 Further, they must settle royalty disputes in a reasonable manner—if necessary, through a third party, such as a court or arbitrator.23 If reference to an arbitrator is contractually specified, such agreements may also be subject to compulsory arbitration under the Federal Arbitration Act.24 The FRAND system facilitates competition by assuring new firms as well as existing ones that they will be able to operate on the networked technology. Royalties to the owners of these patents are generally measured by the value that the contributed patent makes to the standard.25 Importantly, tribunals seek to measure these values “ex ante,” or prior to the patent’s adoption into a standard and at a time when there is a fuller range of competitive alternatives.26 Once the standard is adopted and implementers have incorporated it into their own technologies, a standard essential patent is likely to be in a much stronger position, approaching monopoly in some cases.27 Patents that are committed in this way are described as “standard essential patents” (SEPs), or as being “FRAND encumbered.”28 Qualcomm was able to evade this “ex ante” requirement by insisting on purchaser acceptance of a license on its own terms before it would sell chips.29 Having a patent declared standard essential can increase its value considerably, mainly because the promise of a license at a reasonable rate steers developmental decision making in favor of that particular technology. When a firm makes a commitment to develop its products under a particular standard, it wants assurance that it will have a durable right to operate under that standard at reasonable royalty rates. This process naturally leads to the creation of considerable path dependence in standards. It encourages firms to develop their own technology in ways that ensure interoperability but that can be costly to reverse after the fact.30 This phenomenon of increased value for SEPs also motivates patent owning firms to “over-claim”—that is, to assert that patents are standard essential when subsequent litigation or evaluation determines that they are not. While FRAND agreements require participants to declare relevant patents thought to be essential, the rate of actual declaration far exceeds any rational boundary. As many as one-third to more than half of declared SEPs are very likely not essential to the standard for which they were declared,31 and allegations about the practice of over-declaring are currently being litigated as potential antitrust violations.32 In fact, overall infringement rates for SEP patents are not materially different from those for non-SEP patents.33 A declaration of non-infringement means that, although the patent might be valid, it does not in fact read on the defendant’s particular device or process. In effect, the patent is not a part of the defendant’s technology, and thus cannot be essential. The problem is exacerbated by the fact that, for the most part, SSOs have no process up front for reviewing or questioning individual participants’ declarations that a patent they are offering is in fact both valid and standard essential.34 Ex ante, a patent may offer one of many alternative technological paths to a certain goal. However, ex post, after a standard has been adopted and others have developed their technologies in reliance, the range of acceptable alternatives can decrease dramatically. As a result, the patent whose path is adopted becomes much more valuable.35 In that case, a firm’s ability to evade the FRAND obligation by charging selectively higher royalties to some licensees or conditioning licenses on the purchase of other technology can be extremely lucrative for the patentee but costly to implementers of the standard and disruptive of the SSO’s developmental goals.36 In its Qualcomm decision noted above, the Ninth Circuit did not indicate any awareness of these motivations or their potential for harm.37 In general, the goal of FRAND is to make patents available to participants at a price equivalent to what the patent would have been worth in the more competitive market prior to the time it was declared essential. The relevant question is what was the value of the patent’s contribution to the standard at a time when competitive alternatives may have been available, as opposed to a later time when other firms have dedicated themselves to the standard?38 This approach is simply a variant of the proposition that even a monopoly market can be made competitive if we require competing firms to bid for the opportunity to be the monopolist.39 Even though a natural monopoly entity such as a public utility has the market power of any monopolist, someone must still choose who gets to be the monopolist.40 The winner will be the firm that promises the most competitive behavior, provided that it can be held to that commitment. Once the auction is over and the winner has been selected, however, it will have an incentive to renege on its auction promise and charge whatever price its newly acquired monopoly status provides. FRAND creates similar incentives, as the Qualcomm case illustrates. Alternative proposals to the effect that the FRAND patentee and the licensee should split the difference between value to the patentee and value to the implementer41 improperly take an ex post rather than ex ante view of value and asks the royalty tribunal to divide evenly the difference between the seller’s (patentee’s) willingness to accept and the buyer’s (licensee’s) willingness to pay after FRAND status has been established. That may be a useful way of thinking about price in a bilateral monopoly,42 but only after the bilateral monopoly has formed. The competitive solution is to give the seller the price it would have obtained in a competitive market, which is manifestly not an even division of the surplus. Rather, it is a competitive return to the seller.43

#### US tech leadership via collaboration and the IOT is try or die for confronting several existential risks

Khan, 19 – Dr. Mehmood Khan is chair of the U.S. Council on Competitiveness and Vice Chairman and Chief Scientific Officer for Global Research & Development, PepsiCo. “MAINTAINING U.S. LEADERSHIP IN SCIENCE AND TECHNOLOGY,” excerpted from Dr. Mehmood Khan’s testimony before the House Committee on Science, Space and Technology on 6 March 2019. <https://insight.ieeeusa.org/articles/maintaining-u-s-leadership-in-science-and-technology/> -- Iowa

Given the profound impact of science and technology on U.S. prosperity, standards of living, national security, modern society and geopolitical standing, every American should be concerned with the nation’s ability to lead in science, technology and innovation. More than any country in history, the United States has been the greatest driver and beneficiary of technology, innovation and a vibrant entrepreneurial spirit. In the 19th century, entrepreneurship and innovations surrounding agriculture, rail, oil, steel and electricity turned the United States into an industrial and economic powerhouse, laying the foundation for a manufacturing sector that provided middle class jobs and a higher standard of living for millions of Americans. In the 20th century, American inventions and advancements in vehicle and aircraft technology revolutionized transportation and changed society and the geographic face of the country. American-born digital technologies unleashed a revolutionary new age of computing, communications and information mobility, disrupting industries and business models, changing society and culture around the world, and creating enormous new wealth. This continuum of innovation has delivered prosperity and rising standards of living to Americans, and propelled the United States to global leadership. As we enter the third decade of the 21st Century, a new urgency, a new innovation reality, a new imperative faces the nation. Notwithstanding a currently robust economy – rising and strong economic, productivity and job growth; historically low unemployment; wage increases; an improved tax environment; etc. – the Council on Competitiveness believes U.S. leadership in technology and long-term competitiveness is under threat. This potential demands the urgent attention of our nation’s leaders, and a focused examination of our capabilities, investments and policies related to science, technology development and innovation. The Case for Ongoing Investment While the United States is enjoying an economic upswing on many fronts, U.S. leadership in technology is under renewed threat. In 1960, the United States dominated global research and development (R&D), accounting for 69 percent share of the world’s R&D investment. The United States could drive developments in technology globally by virtue of the size of its investment. Today, we have evolved into a multipolar science and technology world. As other nations have increased their R&D investments and capacity for innovation, the U.S. share of global R&D expenditures has dropped to 28 percent in 2016, diminishing the U.S. dominance and leverage over the direction of technology advancement. At the same time, China has risen to the account for a quarter of global R&D spending. In addition, America’s lead in venture capital is shrinking, further diminishing its role as a driver of technology and innovation globally. In 1992, U.S. investors represented 97 percent of the $2 billion in venture finance, and accounted for about three-quarters just a decade ago. However, in 2017, U.S. investors led 44 percent of a record $154 billion in venture finance, with Asian investors (with China leading) accounting for 40 percent. Moreover, while the absolute level of venture capital coming to the United States has increased substantially, the U.S. share of the growing global pool of venture capital – which has increased more than 200 percent since 2010 – has dropped sharply from 95 percent in the early 1990s to about half in 2017. While traditional U.S. competitors – such as Germany, Japan, France and the U.K. – continue to be strong R&D performers working at the leading edge of technology, many emerging economies seek to follow the path of the world’s innovators, transform to knowledge-based economies, and drive their economic growth with technology and innovation. A growing number of emerging economies are establishing government organizations and ministries focused on technology and innovation, adopting innovation-based growth strategies, boosting government R&D investments, and developing research parks and regional centers of innovation. Some of these economies are also working to increase their production of scientists and engineers. These actions are raising technology and development capabilities and innovation capacity around the world. A nation’s R&D intensity expressed as R&D expenditures as a percentage of GDP provides another gauge of national R&D performance. In this measure, the U.S. position globally has lagged in recent years, as other countries have expanded the range and scope of their R&D activities. Notably, South Korea, one of the world’s largest R&D performers and another formidable U.S. competitor, ranks at the top in this metric. At the same time, key U.S. science and technology infrastructure is eroding. Much like roads, rails and power plants were essential for the Industrial Age, infrastructure that supports knowledge creation and technology development is vital for the 21st century knowledge economy and U.S. success in innovation-based global competition. This includes laboratories, research and technology demonstration centers, supercomputers, test-beds, wind tunnels, propulsion and combustion facilities, simulators, accelerators and other user facilities. America’s national laboratory system is considered a distinctive and globally unique competitive asset. But, across the system, core scientific and technological capabilities are potentially at risk due to deficient and degrading infrastructure and repair hamstrung by chronic underfunding, and maintenance backlogs in the hundreds of millions of dollars. New Disrupters At the same time that competition in technology and innovation is rising around the world, and U.S. technology leadership is under threat, we are witnessing accelerated advancement of the greatest revolutions in science and technology; a new phase of the digital revolution characterized by vast deployment of sensors, the internet of things, artificial intelligence (AI), and the big data tsunami; biotechnology and gene editing; nanotechnology; and autonomous systems. Each of these technologies has numerous applications that cut-across industry sectors, society and human activities. Each is revolutionary; each is game-changing in its own right. But they are now colliding and converging on the global economy and society simultaneously, with profound implications for U.S. economic and national security. These technologies are crucial drivers of productivity and economic growth, altering the patterns of society and many dimensions of everyday life. For countries and companies, the ability to leverage these technologies for economic impact is fundamental to their competitiveness and economic success. In addition to their economic potential, these technologies could solve many of the world’s critical challenges surrounding areas such as health, energy and sustainability, clean water and the global food supply. Optimizing the Environment for Innovation Systems Since the early 2000s, new models of innovation have emerged, and others have matured in response to the transformation of the global competitive landscape that began in the 1980s. Multiple technology revolutions and their convergence, and the nature of global challenges require models of innovation built on internal resources, external collaboration and a larger, more diverse innovation skill set. For example, in a recent survey of U.S. manufacturing firms, of those firms that had innovated, 49 percent reported that the invention underlying their most important new product had originated from an outside source. These models of innovation have expanded the scope of participants in the innovation ecosystem, and the ways in which companies, innovators, and entrepreneurs pursue innovation. As companies have moved away from exploratory research toward nearer-term applied research and technology development that support business units, foundational technology breakthroughs increasingly come from universities, national laboratories and small start-up companies that are disproportionately supported by public R&D investments. While the public role in the innovation ecosystem has increased in importance, U.S. public investment has not kept pace. This government investment plays a key role as the seed for future applied research and technology development, and for training the next generation of scientists and engineers. However, with increasing democratization of innovation, a growing pool of innovators and problem solvers are largely disconnected from the research, development and training institutions this public investment supports. There are many factors that affect a country’s ability to innovate and compete. This includes levels of investment in R&D, the availability of capital including venture capital to fuel start-ups and innovation at critical stages, the availability of talent, the environment for entrepreneurship, and the general business environment including taxes and the level of business regulation. These elements are different in countries around the world, and can play a significant role in a country’s competitiveness and capacity for innovation. U.S. competitors around the world seek to build and strengthen knowledge and technology-based economies as the basis for advancing productivity, job creation, raising standards of living and, in some cases, advancing geopolitical goals. As a result, many deploy policies and programs to harness science, technology and innovation, and to create a business environment to achieve this impact. These countries are instituting their own distinctive innovation ecosystems, which may not be compatible or friendly with the U.S. innovation system. Can the U. S. Compete? We are seeing changes in technology, competition and the global economy, historic in terms of their size, speed and scope. The U.S. faces hyper competition, a potential new global superpower competitor in China, and the prospect of economic and social disruption brought about by the unrelenting and accelerating march of technology. Nevertheless, in a global economy ever more driven by technology and innovation, an enabling environment for innovation remains the advantage of only a few economies, with the United States in a position of significant strength: The U.S. remains the world’s epicenter for disruptive innovation, thanks to its exceptional research infrastructure and low barriers to entrepreneurs and start-ups. The U.S. remains the world leader in high-tech manufacturing. It has a 31-percent global share and its output is growing. China is closing the gap with a 24-percent share and its output is also growing, surpassing Japan and the EU. The U.S. remains the world’s largest investor in R&D for 28 percent of global R&D spending. It now invests half a trillion in R&D per year and has built up a globally unparalleled national stock of science and technology. Because the U.S. is by far the world’s largest innovator in basic research, it dominates patenting, sowing the seeds of future innovation, representing about one quarter of all international patent applications filed in 2016. The U.S. has distinctive assets – its national laboratories and top research universities. In the U.S. innovation ecosystem, industry, start-ups, national labs and universities collaborate on R&D across the spectrum of science and technology. Vast amount of venture capital is pouring in to commercialize advanced technologies. The U.S. is seen as the global technology leader. A recent survey asked researchers across the world which country they considered to be the global leader in 12 advanced industries. The U.S. was named most often in 11 of the 12 industries. Despite these significant U.S. strengths, the competitiveness of a wide range of nations – not to mention economic and technological change – is dynamic and ever transforming. A country’s comparative position can change rapidly. Conclusion The United States is at a critical moment in time in national innovation systems research and action. New, transformational models driven by the democratization and self-organization of innovation are emerging and taking root across the nation. But, at the same time, U.S. leadership is under threat. The United States faces now what are perhaps existential challenges to its global leadership in innovation. America’s role in technology advancement is diminishing globally—now accounting for only one-quarter of global research & development investments, down from two-thirds in 1960. Competitors are increasing their capacity for innovation. And rapid technological change and disruption have impacted the workforce and communities. When the U.S. controlled the direction of technology, we were positioned to control our economic destiny. That is no longer guaranteed. The United States must take stock. We must assess if our innovation ecosystems and investments are enough to maintain our global economic and technological leadership. And, as technology seeps into nearly every aspect of American life, our national leaders and our government at every level must bolster their knowledge and response capabilities to match the strengthening competition, technological change and disruptions that are coming.

#### Lack of FRAND certainty decks 5G, IoT, Autonomous Vehicles

Borgogno and Colangelo 2021, Giuseppe Colangelo University of Basilicata, Department of Mathematics, Computer Science and Economics; Stanford Law School; LUISS Guido Carli, Department of Business and Management Oscar Borgogno Bank of Italy, (4/16/2021 “SEPs licensing across the supply chain: an antitrust perspective” https://papers.ssrn.com/sol3/papers.cfm?abstract\_id=3766118)//ellie

The seemingly endless issue of the legal treatment of standard essential patents (SEPs) is clearly one of the most complex matters currently at the heart of intellectual property and competition law. At present, the standards are set to reinforce even further their role as building blocks of the modern global economy, playing a key role in ensuring interoperability and technical compatibility across a broad range of industries. Standards can facilitate the creation and integration of markets, foster positive feedback loops, reduce uncertainty in the marketplace, and lower costs and prices for downstream products.1 By ensuring interoperability, they make networks more valuable. As the holder of a patent included within a standard benefits from a significant increase in value of its legal title, if the standard is successfully adopted, firms may be incentivised to act opportunistically to influence the design of a standard and to maximise their resulting ex post benefits. Indeed, whereas at an early stage of standard definition alternative technologies compete for inclusion in the standard, once the selection has been carried out implementers are locked into the standard. Further, in some industries implementers invest into their products before the standard is chosen or before it is known whether a technology will violate an existing patent. This makes in turn switching prohibitively costly or impractical. High switching costs may create market power for the owners of patents that cover the standard. As a result, they can leverage their position demanding a royalty that reflects not only the value of the technology compared to alternatives, but also the value associated with investments made by producer to implement the standard. This issue is commonly known as hold-up problemand refers to the difference between patent holders’ pricing incentives ex ante (i.e. before the standard is set) and their pricing incentives ex post. At the same time, licensees may also engage in strategic practices refusing to agree on patent holders’ offers and exacerbating litigation in order to escape the payment of royalties or depress prices (reverse hold-up or hold-out). Until recently, the debate has centred on the nature of fair, reasonable and nondiscriminatory (FRAND) commitments and the mechanisms to avoid hold-up and reverse hold-up (or hold-out) problems between licensors and licensees. In order to prevent, or at least credibly reduce, the risks of patent hold-up and to increase the willingness of firms to participate in the development of a standard, Standard Setting Organisations (SSOs) typically adopt disclosure and licensing rules. Notably, with regard to the latter, SSOs require SEP holders to accept FRAND commitments. In general, by requiring a licence to be provided on fair and reasonable terms, the goal is to make SEPs available at a price equivalent to what the patents would have been worth on the market prior to being declared essential. Hence, the FRAND commitment aims to avoid or to reduce the extent of monopoly pricing by SEP holders. Similarly, the non-discrimination requirement is intended to prevent SEP holders from extracting monopoly premiums through selective licensing or “migrating their monopoly power from the FRAND-regulated market to unregulated standard-implementing product markets by licensing to only one or a few implementers or licensing to selected implementers on discriminatorily favorable terms.”2 However, it is debatable whether FRAND commitments can effectively prevent SEP holders from imposing excessive royalty obligations upon licensees, largely due to the unclear economic meaning of the FRAND acronym.3 In fact, there are no generally accepted tests to determine whether or not a particular licence satisfies a FRAND commitment. Furthermore, no consensus exists over its legal effects, notably in relation to whether or not FRAND commitments should imply a waiver of general legal remedies (more specifically, injunctions and other extraordinary remedies). Hence, while the implications of FRAND commitments are undoubtedly significant, their meaning is inherently ambiguous from both an economic and a legal perspective. It comes as no surprise that such broad uncertainty has led to a vast wave of litigation proceedings worldwide in recent years. Against this background, the rise of the Internet of Things (IoT) and the development of 5G are set to add an additional layer of complexity to the current practice of SEP licensing. Indeed, as new technologies are facilitating widespread interconnection between all sorts of devices, the smooth implementation of the 5G standard is crucial to the economic potential of the IoT. For instance, many of the impending disruptive technologies, such as AI-driven robots, personalised healthcare, autonomous driving, and augmented reality, would not be possible without the interconnection between physical and virtual objects enabled by the 5G standard. Therefore, in a break from the past, new standard implementers - which do not belong consistently to the ecosystem of mobile communications - will find themselves having to deal with the intellectual property complexities of this industry. For instance, the automotive industry is taking centre stage as the ecosystem in which the issue of FRAND licensing levels is raised to the highest degree. The market viability of new generation vehicles is closely dependent on their embedded connectivity with third parties and application platforms (such as Android and iOS).5 Therefore, as the industry's evolution hinges on advanced mobile telecommunication standards, automakers have been pledging to install connectivity solutions in all their new vehicles in the coming years. Notably, 5G-compliant mobile technologies are expected significantly to enhance the safety and functionality of vehicles, including vehicle-toeverything communication, allowing data to be transmitted from a car to another entity, including nearby vehicles.

#### Smooth 5g implementation allows for autonomous vehicles but maintaining FRAND standards are key

Woo et el 2019, Darryl M. Woo is an IP litigation partner at Goodwin Procter LLP in San Francisco, CA; and Raymond Millien is Vice President and Global Chief IP Counsel at Volvo Car Group in Gothenburg, Sweden, Darryl M. Woo, Goodwin Procter and Raymond Millien, Volvo Car Group (April 02, 2019 “5G and Autonomous Vehicles: Is FRAND Grand?” https://www.law.com/legaltechnews/2019/04/02/5g-and-autonomous-vehicles-is-frand-grand/)//ellie

With 5G, the promise of autonomous vehicles safely and efficiently gliding down roads and highways everywhere can become a reality. Such a promise, however, can only be achieved through the thoughtful setting of technology standards so that every vehicle is on the same page of a very complicated playbook of vehicle-to-vehicle, vehicle-to-network, vehicle-to-infrastructure, and vehicle-to-pedestrian communications, much of which will be covered by thousands and thousands of patents. If, for example, one OEM’s self-driving vehicle could not seamlessly and reliably communicate with another OEM’s self-driving vehicle, the promise of safer and more efficient personal transportation quickly falls apart. The questions of which patents cover the technology necessary to run this complicated communications playbook and how to license them represent a major issue for the automotive industry. Reminiscent of nineteenth-century settlers of Oklahoma, companies are already stockpiling patents on inventions that may be used to comply with 5G-related technical standards, positioning themselves for a modern-day land rush. In exchange for a standard setting body’s adoption of a company’s suite of patents, the company must contractually bind itself to refrain from seeking to enjoin unlicensed implementers, in favor of licensing them on terms deemed Fair, Reasonable and Non-Discriminatory (FRAND). FRAND by its literal terms suggests a desirable even-handedness. In a technology ecosystem that must implement standards to enable the ultimate goal of a network where vehicles communicate with each other as well as with road surfaces, traffic controls and other connected endpoints, FRAND licensing of standard essential patents (SEP) is an unquestionable prerequisite. If the past decade’s smartphone patent wars and the evolution of the mobile telephone market have taught us anything, it is that what is “fair” or “reasonable” to some, may be the antithesis of that to others. Non-discrimination sounds good until it is invoked to charge everyone—from an inexpensive 5G fitness bracelet to a more expensive autonomous drive vehicle—the same percentage of net sales. In the 4G LTE world of today, dominated by smartphones, tablets and handhelds, such a disparity among devices is not the issue it will be when 5G standards will be applicable to a much broader range of connected products. And yet, fights already exist between SEP owners and SEP implementers over a range of issues, including how to determine the essentiality of an alleged SEP, the reasonableness of a “reasonable” royalty, and what it means to be “non-discriminatory.”

#### **IOT-driven autonomous vehicle interoperability powers green mobility, which mitigates existential warming and environmental degradation**

Bahr et al, 8-26-21 – Roy Bahr, SINTEF Digital AS, Oslo, Norway, along with Reiner John (AVL List GmbH, Graz, Austria), Patrick Pype (NXP Semiconductors, Leuven, Belgium), Gerhard Mitic and Kai Kriegel (Siemens AG, Munich, Germany), Vincent Lorentz, Stefan Waldhör, and Steffen Bockrath (Fraunhofer IISB, Erlangen, Germany), Hans Erik Sand (NxTech AS, Fredrikstad, Norway). “Automotive Intelligence Embedded in Electric Connected Autonomous and Shared Vehicles Technology for Sustainable Green Mobility,” *Front. Future Transp.*, 26 August 2021, https://doi.org/10.3389/ffutr.2021.688482

Abstract

The automotive sector digitalization accelerates the technology convergence of perception, computing processing, connectivity, propulsion, and data fusion for electric connected autonomous and shared (ECAS) vehicles. This brings cutting-edge computing paradigms with embedded cognitive capabilities into vehicle domains and data infrastructure to provide holistic intrinsic and extrinsic intelligence for new mobility applications. Digital technologies are a significant enabler in achieving the sustainability goals of the green transformation of the mobility and transportation sectors. Innovation occurs predominantly in ECAS vehicles’ architecture, operations, intelligent functions, and automotive digital infrastructure. The traditional ownership model is moving toward multimodal and shared mobility services. The ECAS vehicle’s technology allows for the development of virtual automotive functions that run on shared hardware platforms with data unlocking value, and for introducing new, shared computing-based automotive features. Facilitating vehicle automation, vehicle electrification, vehicle-to-everything (V2X) communication is accomplished by the convergence of artificial intelligence (AI), cellular/wireless connectivity, edge computing, the Internet of things (IoT), the Internet of intelligent things (IoIT), digital twins (DTs), virtual/augmented reality (VR/AR) and distributed ledger technologies (DLTs). Vehicles become more intelligent, connected, functioning as edge micro servers on wheels, powered by sensors/actuators, hardware (HW), software (SW) and smart virtual functions that are integrated into the digital infrastructure. Electrification, automation, connectivity, digitalization, decarbonization, decentralization, and standardization are the main drivers that unlock intelligent vehicles' potential for sustainable green mobility applications. ECAS vehicles act as autonomous agents using swarm intelligence to communicate and exchange information, either directly or indirectly, with each other and the infrastructure, accessing independent services such as energy, high-definition maps, routes, infrastructure information, traffic lights, tolls, parking (micropayments), and finding emergent/intelligent solutions. The article gives an overview of the advances in AI technologies and applications to realize intelligent functions and optimize vehicle performance, control, and decision-making for future ECAS vehicles to support the acceleration of deployment in various mobility scenarios. ECAS vehicles, systems, sub-systems, and components are subjected to stringent regulatory frameworks, which set rigorous requirements for autonomous vehicles. An in-depth assessment of existing standards, regulations, and laws, including a thorough gap analysis, is required. Global guidelines must be provided on how to fulfill the requirements. ECAS vehicle technology trustworthiness, including AI-based HW/SW and algorithms, is necessary for developing ECAS systems across the entire automotive ecosystem. The safety and transparency of AI-based technology and the explainability of the purpose, use, benefits, and limitations of AI systems are critical for fulfilling trustworthiness requirements. The article presents ECAS vehicles’ evolution toward domain controller, zonal vehicle, and federated vehicle/edge/cloud-centric based on distributed intelligence in the vehicle and infrastructure level architectures and the role of AI techniques and methods to implement the different autonomous driving and optimization functions for sustainable green mobility.

Introduction

Climate change, global warming, ecological and environmental degradation are global existential threats. Consequently, the new European Green Deal (European Commission, 2019a) roadmap entails a growth strategy to transform Europe into a modern, resource-efficient, and competitive economy. The roadmap aims to transform the economy to achieve climate neutrality by 2050. The transformation can be done by “turning climate and environmental challenges into opportunities across all policy areas and making the transition just and inclusive for all” (European Commission, 2019a).

The European Green Deal is an essential part of the EC's strategy to implement the UN’s 2030 Agenda (United Nations, 2015a) and its sustainable development goals (United Nations, 2015b). To implement this strategy, the European Union has adopted a mobility action plan based on the Vision Zero and Safe System approach (European Commission, 2019b) (zero accidents, zero pollution, and zero congestion). The Green Deal defines four critical elements for sustainable mobility and the automotive industry: climate neutrality, zero pollution Europe, sustainable transport, and the transition to a circular economy. The circular economy action plan (European Commission, 2020) has detailed measures to make sure that sustainable products are the norm in the EU. This plan puts a primary focus on “digital technologies” such as electronics, ICT, and energy storage systems (e.g., batteries, supercapacitors, fuel cells, etc.), which can result in an increase in the lifetime, availability and usage of future vehicles based on AI-enabled technologies.

Digital technologies are a significant enabler for attaining the European Green Deal’s sustainability goals in many different sectors, including mobility and transportation. Digital technologies such as edge computing, IoT, AI, cellular/wireless connectivity, DTs, VR/AR and DLTs can accelerate and maximize the impact of policies that deal with climate change and protect the environment by developing new sustainable electronic component and systems technologies for future vehicles. Expanding automotive intelligence at the vehicle and mobility system level allows the Internet of Vehicles (IoV) and Internet of Energy (IoE) (Vermesan et al., 2011) to become the key enabling technologies to realize future autonomous driving scenarios that embed cognition and autonomous functions.

#### Warming causes extinction

Bryce, 20 – Emma, citing Nelson, Roman, and Kemp---Cassidy *Nelson* is Co-lead of the biosecurity team at Oxford), Sabin *Roman* earned a PhD in Complex Systems Simulation from the University of Southampton, and both Roman and Luke *Kemp* are research associates at the Cambridge University. "What Could Drive Humans to Extinction?" Real Clear Science, 7-27-2020, <https://www.realclearscience.com/articles/2020/07/27/what_could_drive_humans_to_extinction.html> -- Iowa

Nuclear war

An existential risk is different to what we might think of as a "regular" hazard or threat, explained Luke Kemp, a research associate at the Centre for the Study of Existential Risk at Cambridge University in the United Kingdom. Kemp studies historical civilizational collapse and the risk posed by climate change in the present day. "A risk in the typical terminology is supposed to be composed of a hazard, a vulnerability and an exposure," he told Live Science. "You can think about this in terms of an asteroid strike. So the hazard itself is the asteroid. The vulnerability is our inability to stop it from occurring — the lack of an intervention system. And our exposure is the fact that it actually hits the Earth in some way, shape or form."

Take nuclear war, which history and popular culture have etched onto our minds as one of the biggest potential risks to human survival. Our vulnerability to this threat grows if countries produce highly-enriched uranium, and as political tensions between nations escalate. That vulnerability determines our exposure.

As is the case for all existential risks, there aren't hard estimates available on how much of Earth's population a nuclear firestorm might eliminate. But it's expected that the effects of a large-scale nuclear winter — the period of freezing temperatures and limited food production that would follow a war, caused by a smoky nuclear haze blocking sunlight from reaching the Earth — would be profound. "From most of the modeling I've seen, it would be absolutely horrendous. It could lead to the death of large swathes of humanity. But it seems unlikely that it by itself would lead to extinction." Kemp said.

Pandemics The misuse of biotechnology is another existential risk that keeps researchers up at night. This is technology that harnesses biology to make new products. One in particular concerns Cassidy Nelson: the abuse of biotechnology to engineer deadly, quick-spreading pathogens. "I worry about a whole range of different pandemic scenarios. But I do think the ones that could be man-made are possibly the greatest threat we could have from biology this century," she said. As acting co-lead of the biosecurity team at the Future of Humanity Institute at the University of Oxford in the United Kingdom, Nelson researches biosecurity issues that face humanity, such as new infectious diseases, pandemics and biological weapons. She recognizes that a pathogen that's been specifically engineered to be as contagious and deadly as possible could be far more damaging than a natural pathogen, potentially dispatching large swathes of Earth's population in limited time. "Nature is pretty phenomenal at coming up with pathogens through natural selection. It's terrible when it does. But it doesn't have this kind of direct 'intent,'" Nelson explained. "My concern would be if you had a bad actor who intentionally tried to design a pathogen to have as much negative impact as possible, through how contagious it was, and how deadly it was.” But despite the fear that might create — especially in our currently pandemic-stricken world — she believes that the probability that this would occur is slim. (It's also worth mentioning that all evidence points to the fact that COVID-19 wasn't created in a lab.) While the scientific and technological advances are steadily lowering the threshold for people to be able to do this, "that also means that our capabilities for doing something about it are rising gradually," she said. "That gives me a sense of hope, that if we could actually get on top [of it], that risk balance could go in our favor." Still, the magnitude of the potential threat keeps researchers' attention trained on this risk.

From climate change to AI

A tour of the threats to human survival can hardly exclude climate change, a phenomenon that (is) already driving the decline and extinction of multiple species across the planet. Could it hurl humanity toward the same fate?

The accompaniments to climate change — food insecurity, water scarcity, and extreme weather events — are set to increasingly threaten human survival, at regional scales. But looking to the future, climate change is also what Kemp described as an "existential risk multiplier" at global scales, meaning that it amplifies other threats to humanity's survival. "It does appear to have all these relationships to both conflict as well as political change, which just makes the world a much more dangerous place to be." Imagine: food or water scarcity intensifying international tensions, and triggering nuclear wars with potentially enormous human fatalities.

This way of thinking about extinction highlights the interconnectedness of existential risks. As Kemp hinted before, it's unlikely that a mass extinction event would result from a single calamity like a nuclear war or pandemic. Rather, history shows us that most civilizational collapses are driven by several interwoven factors. And extinction as we typically imagine it — the rapid annihilation of everyone on Earth — is just one way it could play out.

#### Balanced antitrust approach is key

Hovenkamp 2020, Herbert J. a Fellow of the American Academy of Arts and Sciences, and in 2008 won the Justice Department’s John Sherman Award for his lifetime contributions to antitrust law (University of Pennsylvania Carey Law School “FRAND and Antitrust” https://scholarship.law.upenn.edu/cgi/viewcontent.cgi?article=3095&context=faculty\_scholarship)//ellie

While these various attempts to evade FRAND obligations very likely breach the patentee’s contractual obligations, only a subset also constitute antitrust violations. This does not mean that the standard-setting and FRAND process in which the conduct occurred is irrelevant to antitrust analysis. To the contrary, as in any antitrust case, it forms part of the market environment in which conduct must be evaluated. In her 2019 Qualcomm decision, Judge Lucy Koh addressed tying and exclusive dealing claims under general antitrust principles, and refusal to deal claims under the standards that the Supreme Court had developed in its Aspen47 and Trinko48 decisions.49 Although her opinion devoted considerable space to the importance of standard essential patents and the relevance of FRAND commitments, she addressed the antitrust claims by applying well established antitrust principles that require a showing of restraint of trade or anticompetitive exclusion.50 Nevertheless, anticompetitive effects become more transparent when one views the extent to which they undermined an output- and innovation-enhancing joint enterprise whose social value was not being called into question. SSOs operated by multiple firms are joint ventures.51 For bona fide joint ventures that are not simply fronts for cartels, the purpose of the antitrust laws is not to destroy the venture or undermine its purpose, but rather to evaluate how the challenged restraint operates within the venture and condemn unreasonably harmful restraints.52 For example, when the Supreme Court struck down the NCAA joint venture’s limitation on nationally televised football games, the purpose and effect were to make the NCAA behave more competitively, in the process increasing its output.53 SSOs should be addressed in the same manner. The goal of the standard setting venture is to facilitate competitive operation and entry, interoperability, as well as preserve appropriate competitive incentives for research and development. Antitrust analysis necessarily involves testing conduct against these goals, but only to the extent of looking for practices that are anticompetitive. This means it must identify practices that reduce market wide output unreasonably and increase prices, or that are unnecessarily exclusionary or harmful to consumers in other ways. A firm’s violation of its FRAND commitment is very likely a breach of contract, as several decisions have held.54 The FRAND contract is incomplete, in the sense that not every term is specified in detail. But participants are subject to a contractual duty to bargain in good faith, with some terms being filled in by courts or other tribunals as necessary. The breach of contract question does not depend on whether the conduct reduced market output or excluded a rival unreasonably. It certainly does not depend on the existence of any party’s market power. Remedies are ordinarily contract damages or an injunction. Nonparties to the contract will typically be able to obtain relief only to the extent that they are third-party beneficiaries. However, the courts have had little difficulty concluding that participating members of the SSO are third-party beneficiaries of FRAND commitments.55 In all events, challengers will not be able to obtain antitrust law’s treble damages unless they can prove an antitrust violation. Whether a firm’s breach of a FRAND commitment also violates the antitrust laws depends on whether the conduct in question causes competitive harm of a sort that the antitrust laws recognize.56 In the case of section 1 of the Sherman Act57 this requires a showing of a relevant agreement that is likely to reduce market output. If the conduct is reasonably ancillary to other arguably procompetitive activity, the court must also assess market power and anticompetitive effects. In the case of section 2 of the Sherman Act or section 3 of the Clayton Act, which reach mainly tying and exclusive dealing, it will require a showing of market power plus conduct that is unreasonably exclusionary. The antitrust harm results, not from the breach of the FRAND obligation per se. Rather, it results from the creation of monopoly and higher prices for consumers. The Ninth Circuit got this issue precisely wrong, holding that the district court incorrectly focused on downstream harm to buyers when it should have looked at harm to rivals.58 That confuses contract or tort law with antitrust law.

### 1AC – Plan

#### The United States federal government should increase prohibitions on anticompetitive business practices by standard-essential patent (SEP) owners by mandating that standard-setting organizations (SSOs) are in violation of the Sherman Act if the SSO fails to adopt and enforce rules that are effective to prevent SEP owners from exploiting the ex post monopoly power created by the standard.

### 1AC – Solvency

#### Applying Section 1 of Sherman prohibits patent holdup

Melamed and Shapiro, 18 – A. Douglas Melamed is Professor of the Practice of Law at Stanford Law School. Carl Shapiro is Professor of Business Strategy at the University of California at Berkeley. “How Antitrust Law Can Make FRAND Commitments More Effective,” Yale Law Journal 127:2110, <https://www.yalelawjournal.org/pdf/MelamedShapiro_12wf7fof.pdf> -- Iowa

Much attention has been paid in recent years to legal issues arising from standard setting, assertion of standard-essential patents, and the requirements imposed by standard-setting organizations that standard-essential patents be licensed on reasonable terms. This Feature argues that a fundamental aspect of the antitrust laws, heretofore overlooked in this context, can play an important role in ensuring that the rules established by standard-setting organizations are effective in preventing owners of standard-essential patents from engaging in patent holdup. It has long been a basic principle of antitrust law that when firms collaborate to engage in conduct that has efficiency benefits, like standard-setting, they violate the antitrust laws if their collaboration also harms competition more than necessary to obtain the efficiency benefits. Both standard-setting organizations and their members can violate Section 1 of the Sherman Act if the organization’s rules are ineffective in preventing owners of standard-essential patents from exploiting the monopoly power they gain as a result of the standard.

#### Flexible application of core antitrust law is a floor that checks monopolies but not a ceiling that caps innovation

Melamed and Shapiro, 18 – A. Douglas Melamed is Professor of the Practice of Law at Stanford Law School. Carl Shapiro is Professor of Business Strategy at the University of California at Berkeley. “How Antitrust Law Can Make FRAND Commitments More Effective,” Yale Law Journal 127:2110, <https://www.yalelawjournal.org/pdf/MelamedShapiro_12wf7fof.pdf> -- Iowa

As always, antitrust law can and should be flexible and attentive to the specific factual circumstances of each case. The best set of rules governing FRAND commitments for one SSO might not be best for another. Experience in the marketplace and the creativity of SSOs and their members can best determine which measures are most effective and efficient in any given case. Because one size does not fit all when it comes to FRAND rules, antitrust law should welcome competition among SSOs to solve the problem of ex post opportunism by SEP holders. The role of antitrust law is not to prescribe how SSOs should solve this problem, but simply to require that they solve it to the extent reasonably possible. Fundamental antitrust principles require SSOs and their members to implement effective solutions that minimize ex post opportunism based on market power they create, to the extent they can do so without sacrificing the many benefits associated with standard setting.

#### Section 2 of Sherman thumps but does not solve

Melamed and Shapiro, 18 – A. Douglas Melamed is Professor of the Practice of Law at Stanford Law School. Carl Shapiro is Professor of Business Strategy at the University of California at Berkeley. “How Antitrust Law Can Make FRAND Commitments More Effective,” Yale Law Journal 127:2110, <https://www.yalelawjournal.org/pdf/MelamedShapiro_12wf7fof.pdf> -- Iowa

Courts have already recognized that, in some situations, antitrust cases can be brought against SEP holders under Section 2 of the Sherman Act.44 For example, a SEP holder that makes a FRAND commitment without intending to comply, and thereby induces the SSO to include its technology in the standard, unlawfully obtains its monopoly and thus violates Section 2.45 In that situation, the SEP holder could be liable for damages to patent holders on technologies wrongfully excluded from the standard, and to implementers harmed by the SEP holder’s subsequent exercise of the unlawfully obtained monopoly power. 46 However, these kinds of Section 2 cases are unlikely to have a significant impact on the efficacy of measures designed to prevent ex post opportunism. This is because they require the plaintiff to prove both that the FRAND commitment was fraudulent when made and that it caused the inclusion of the patented technology in the standard and, thus, created the SEP holder’s monopoly. Both of these prongs are problematic and difficult to prove: a well-counseled firm can avoid creating discoverable materials showing that it never intended to abide by its FRAND commitment, and a plaintiff will have a difficult time proving at the time of trial several years later that a given standard would not have been adopted absent the SEP holder’s FRAND commitment.

#### **Interoperable standards via Section 1 of Sherman are key to every internal**

Melamed and Shapiro, 18 – A. Douglas Melamed is Professor of the Practice of Law at Stanford Law School. Carl Shapiro is Professor of Business Strategy at the University of California at Berkeley. “How Antitrust Law Can Make FRAND Commitments More Effective,” Yale Law Journal 127:2110, <https://www.yalelawjournal.org/pdf/MelamedShapiro_12wf7fof.pdf> -- Iowa

Compatibility standards comprise a critical part of the information and communications technology sector. From Wi-Fi and 4G cell phone standards to the ubiquitous JPEG and MPEG file formats, many of the benefits generated by the recent and dramatic advances in information technology would have been difficult or impossible to achieve without compatibility standards.

For the past twenty years, antitrust enforcement related to standard setting has focused largely on the interpretation and implementation of the commitments made by patent holders as part of the standard-setting process to license their Standard-Essential Patents (SEPs) on Fair, Reasonable and Non-Discriminatory (FRAND) terms. The Department of Justice (DOJ) and the Federal Trade Commission (FTC) devoted an entire chapter to this topic in their 2007 report on antitrust enforcement and intellectual property rights.1 The debate over FRAND commitments has continued undiminished in the ten years since the publication of that report.

With respect to SEPs, the most significant and immediate commercial and antitrust concern centers on the SEP owners’ command of substantial market power once the standard in question becomes widely adopted. Put simply: without some checks, SEP owners could opportunistically engage in patent holdup, taking advantage of the fact that the firms and users adopting the standard become individually and collectively locked in to the standard over time. Of course, it is precisely this danger of ex post opportunism that motivates market participants and standard-setting organizations (SSOs) to require participants in the standard-setting process to make FRAND commitments in the first place.

By its nature, standard setting involves collaboration among competitors and thus raises core antitrust issues. In this Feature, we argue that existing antitrust laws have an important role to play in ensuring that SSO rules are effective to prevent ex post opportunism. In Part I, we set forth the pertinent background regarding standard setting and the competitive process. In Part II, we explain why effective FRAND rules are needed to prevent exploitation by SEP holders of market power created by the standard-setting process, and we refute arguments that SEP-holder market power and holdup are not a serious problem. In Part III, we explain the important role that antitrust law can play in preventing and remedying anticompetitive violations of FRAND commitments and in ensuring that SSOs adopt effective FRAND rules. We explain in particular a heretofore overlooked reason why SSOs and their members can violate Section 1 of the Sherman Act2 if the SSO fails to adopt and enforce rules that are effective to prevent SEP owners from exploiting the ex post monopoly power created by the standard. This Section 1 liability facing SSO participants and SSOs works alongside liability under Section 2 of the Sherman Act for unilateral conduct by SEP owners.

#### **The aff has a ripple effect – solving patent hold-up drives interoperability, standardization, and innovation**

Singh, 20 – Dr. Manveen Singh is an Associate Professor and Associate Dean at Jindal Global Law School. “TRACING THE EVOLUTION OF STANDARDS AND STANDARD-SETTING ORGANIZATIONS IN THE ICT ERA,” 24 Marq. Intell. Prop. L. Rev. 217, 239-240, p. Nexis – Iowa

VI. Conclusion

From railway gauges to the most recent 5G technology, standards have come a long way in the past century and a half. Under the umbrella of SSOs, collaborative standard-setting has remodeled itself into an indomitable force in the innovation landscape, with standards acting as building blocks, fundamental in facilitating product compatibility and interoperability. 201 However, the success of any SSO or the standards coming through its ranks is largely governed by the care and caution exercised in structuring it from its very inception. 202 Whether it is a classic corporation or one with limited liability, an SSO must provide an effective platform supporting standardization activities, rather than impeding them. 203 Since the standard-setting process at SSOs involves participants from competing industries coming together to select interoperable technical standards, 204 there is an inherent risk of collusion on the part of certain market players in using the standardization process to drive their rivals out of the market. 205 Furthermore, technology included in standards is often the subject of patents, 206 thereby affording patent holders the opportunity to abuse the standardization process and assert their patents covering standardized technology, over implementers of such technology, and in the process, attracting scrutiny by competition agencies. 207 Despite the SSOs requiring patent holders to license their technologies on FRAND terms, competition concerns have arisen time and again, with patent holders likely to indulge in activities such as hold-up, royalty stacking and patent ambush, while at the same time, having to face the likelihood of hold-out from the implementers.

[\*240] Although collaborative standard-setting runs the risk of antitrust violation, the role of SSOs in driving technological innovation has been duly recognized by antitrust agencies. 208 Having said that, the task of balancing the varied interests of stakeholders is entrusted upon SSOs, which necessitates the creation of internal IPR policies. These policies are the focal point of all the standardization activity taking place in SSOs and play a key role in incentivizing the development of new technologies. 209 With changing standards, the SSOs also end up amending their IPR policies from time to time. Sometimes, these IPR policy amendments might come in the way of standardization and cause the standardization process to slow down, while on other occasions, they might run the risk of attracting antitrust scrutiny. In the era of highly complex telecommunications industries, various viewpoints have been put forward vis-a-vis IPR policies of SSOs, without any consensus being achieved. Since IPR policy changes have the potential of a ripple effect across innovation circles, it is essential to analyze these changes at a microscopic level.

# 2AC

### Case

#### Studies overwhelmingly conclude hold up is real – assumes neg arguments

Shapiro and Lemley 2020, Carl Shapiro is the Transamerica Professor of Business Strategy Emeritus at the Haas School of Business, University of California at Berkeley. Shapiro served as an expert witness in the FTC v. Qualcomm case discussed below. Lemley is the William H. Neukom Professor at Stanford Law School and a partner at Durie Tangri LLP. We thank Jorge Contreras, Tom Cotter, Joe Farrell, Doug Melamed, Steve Salop, and participants at a workshop at the University of Pennsylvania Carey Law School for comments on a prior draft. Our opinions are our own; no one has funded this Article. (University of Pennsylvania Law Review “THE ROLE OF ANTITRUST IN PREVENTING PATENT HOLDUP” https://faculty.haas.berkeley.edu/shapiro/patentholdup.pdf)//ellie

An impressive body of empirical work supports the general theory of holdup described above. Literally hundreds of papers have been published in peer-reviewed journals developing and testing the general theory of holdup. As Robert Gibbons, one of the editors of the Handbook of Organizational Economics, stated in his article on transaction cost economics, “the huge body of TCE literature is overwhelmingly empirical.”28 One extensive line of research uses transaction cost economics to explain the scope and incidence of vertical integration.29 Put differently, these papers use transaction cost economics to explain the “make vs. buy” decisions of firms. A closely related line of research uses transaction cost economics to explain how firms structure their contractual relationships. Shelanski and Klein provide an early survey of this literature.30 As they conclude, “Studies that examine the make-or-buy decision and the structure of long-term contracts, in particular, overwhelmingly confirm transaction cost economic predictions.”31 Masten assembles some of the best early empirical articles on vertical integration and vertical contracting.32 Whinston notes that “TCE predicts that any increase in quasi-rents will increase the likelihood of vertical integration (a finding that is so far consistent with nearly all of the existing empirical literature).”33 Macher and Richtman reviewed “over 3,500 abstracts from which [they] obtained approximately 900 articles that empirically test some aspect of TCE theory.”34 After recognizing considerable variability in the quality of the empirical work that they surveyed, they concluded, “[e]ven so, the volume of our findings lend considerable support overall for the main predictions of TCE.”35 In addition, there is an enormous amount of anecdotal evidence based on long-term contracts between sophisticated parties in situations where substantial specific investments are involved and the parties come to rely on each other. It is safe to say that anyone who has seen a good number of such contracts will confirm that they normally contain provisions by which one party obtains price and performance protections to limit opportunism by the other party. E. Actual Holdups Are Very Difficult to Measure As just noted, the extensive empirical support for the general theory of holdup consists primarily of studies showing that firms structure their relationships to avoid or minimize the adverse effects of holdup. Critically, the evidence does not involve quantifying the magnitude of actual ex post holdups.36 Indeed, the empirical literature on holdup has relatively few documented examples of large-scale actual holdups.37 This will be important below when we turn to evaluating the empirical evidence regarding patent holdup in particular. Anticipating the arguments being made by those who deny that the patent holdup problem is real and significant, it is instructive to ask why the empirical literature on the general holdup problem has not proceeded by measuring the frequency or magnitude of actual holdups. In part this is for a very good conceptual reason: the theory predicts that market participants will structure their affairs to avoid or mitigate actual holdups. As stressed above, the social costs caused by the holdup problem can be large even if large-scale holdups are very infrequent. The validity of the general theory of holdup, and the importance of the holdup problem, do not hinge on the frequency or magnitude of actual holdups. But practical considerations also play a big role in explaining why the very large empirical literature on the holdup problem includes few documented instances of actual holdups. Even in situations where such holdups take place, they are exceedingly difficult for researchers to reliably detect and quantify. To see why, denote the holdup (ex post monopoly) price by 𝑃𝐻 and the ex ante competitive price by 𝑃 ∗ . The (perunit) magnitude of the actual ex post holdup is equal to (𝑃𝐻 − 𝑃 ∗ ). Measuring either component of this difference can pose quite a challenge for researchers. Actual transaction prices in complex business-to-business transactions are rarely observable by researchers. Plus, even when a measure of price is available, it typically is confounded by other terms and conditions, making 𝑃𝐻 very hard to observe. Coming up with a good measure of the competitive benchmark price 𝑃 ∗ is even harder, since it reflects a counterfactual and since the transactions at issue are by nature idiosyncratic. Practical considerations also explain why the empirical literature on the holdup problem includes few documented instances in which the prospect of holdup has discouraged investment. The resulting reduction in investment typically will not normally be observable to researchers, much less attributable to holdup. For all of these reasons, scholars studying the holdup problem widely agree that the general theory of holdup is very well supported empirically without expecting, much less demanding, a body of empirical work measuring actual holdups. This same sensible approach should be applied to patent holdup. When we turn to look at patent holdup below, we will examine the two types of evidence used in the more general empirical literature on holdup. First, we look for evidence identifying situations in which the patent holdup problem is significant. The telltale marker that the patent holdup problem is significant in a given setting is the presence of substantial investments specific to a given patent or patent portfolio. Second, we look for evidence that the mechanisms used to manage the patent holdup problem are costly or imperfect. There is clear evidence that the mechanisms used by SSOs to manage SEP holdup are costly and imperfect.

### 2AC---T “Whole Economy”

#### 2. C/I---“Core antitrust laws” means Sherman, FTC, or Clayton.

Pfaffenroth et al. 21 (Sonia Kuester Pfaffenroth, Partner at Arnold and Porter with a JD from Stanford, former Deputy Assistant Attorney General for Civil and Criminal Operations at the Antitrust Division of the US Department of Justice (DOJ), [Justin Hedge, counsel at Arnold and Porter with a JD from the Catholic University of America,](https://www.mondaq.com/Home/Redirect/1536886?mode=author&article_id=1086194) [Monique N. Boyce](https://www.mondaq.com/Home/Redirect/2211240?mode=author&article_id=1086194), Senior Associate at Arnold and Porter with a JD from Georgetown, 7-2-2021, "A Comparison Of Proposed Antitrust Legislation In 2021: Federal And New York State," Mondaq, https://www.mondaq.com/unitedstates/antitrust-eu-competition-/1086194/a-comparison-of-proposed-antitrust-legislation-in-2021-federal-and-new-york-state)

At the federal level, there are three core antitrust laws: (1) the Sherman Act, in which Section 1 outlaws "every contract, combination, or conspiracy in [unreasonable] restraint of trade," and Section 2 outlaws any "monopolization, attempted monopolization, or conspiracy or combination to monopolize";1 (2) the Federal Trade Commission Act, which prohibits "unfair methods of competition" and "unfair or deceptive acts or practices";2 and (3) Section 7 of the Clayton Act, which prohibits mergers and acquisitions where the effect "may be substantially to lessen competition, or to tend to create a monopoly."3 Criminal violations of the Sherman Act carry a maximum penalty of a $100 million fine for corporations, and a maximum penalty of 10 years in prison and a $1 million fine for individuals. A prevailing plaintiff in a civil suit can recover treble damages and attorneys' fees. But federal law currently does not provide for civil penalties when the government brings an antitrust case, only injunctive relief.

#### 3. 1NC concedes there are always exempted sectors---means either we meet or no affirmative does---Iowa reads Green.

Gerber ’20 [David; October; Distinguished Professor of Law at Chicago-Kent College of Law, Illinois Institute of Technology; Oxford Scholarship Online, Competition Law and Antitrust, “What is It? Competition Law’s Veiled Identity,” Ch. 1, p. 14-15]

C. A Core Definition

The Guide uses the terms “competition law” and “antitrust law” to refer to a general domain of law whose object is to deter private restraints on competitive conduct. We look more closely at the terms:

1. “General”—The laws included are those that are applicable throughout an economy and thereby provide a framework for all market operations (there are **always** some exempted sectors). Laws dealing only with specific markets (e.g., telecommunication) do not play that role.

2. “Domain of Law” here refers to a politically authorized set of norms and the institutional arrangements used to enforce them.

Is it law—or is it policy? The relationship between “competition law” and “competition policy” is not always clear. Often the terms are used interchangeably, but there can be important differences between them. Both can refer to norms used to combat restraints on competition, but they represent two different ways of looking at the relevant laws, and the differences can influence how norms are interpreted and applied. “Law” implies that established methods of interpretation are used to interpret and apply the norms and that established procedures are the sole or primary means of enforcing and changing the norms. In this view, the norms are a relatively stable component of a legal system. Thinking of those same norms as “policy,” on the other hand, implies that they are a tool of whatever government is in power and that it can use and modify them as it wishes.

3. “Restraint” refers to any limitation imposed by one or more private actors that reduces the intensity of competition in a market.

4. “Competition” refers to a process by which firms in a market seek to maximize their profits by exploiting market opportunities more effectively than other firms in the market.

### AT: Patent CP

#### Only antitrust can solve patent holdup – contract law and patent law are hopeless

Melamed and Shapiro, 18 – A. Douglas Melamed is Professor of the Practice of Law at Stanford Law School. Carl Shapiro is Professor of Business Strategy at the University of California at Berkeley. “How Antitrust Law Can Make FRAND Commitments More Effective,” Yale Law Journal 127:2110, <https://www.yalelawjournal.org/pdf/MelamedShapiro_12wf7fof.pdf> -- Iowa

In this Part, we explain why contract and patent law are not sufficient to ensure that FRAND commitments are effective in preventing ex post opportunism. Antitrust law is also needed to constrain anticompetitive conduct by both SEP holders and SSOs.

Contract and patent law certainly play major roles in rendering FRAND commitments effective. Contract law principles can be employed to determine the FRAND rate and ensure royalties are collected. Contract law also can operate to enforce the “nondiscrimination” prong of a FRAND commitment and thereby prevent SEP owners from discriminating against certain implementers.36 Patent law operates, following eBay, by limiting the use of injunctions for SEP owners that have made FRAND commitments. Patent law also operates by setting reasonable royalties, in principle, at the level to which the SEP owner and the implementer would have agreed in a hypothetical negotiation prior to the establishment of the standard,37 based on the smallest saleable patent-practicing component of the infringing device.38

Experience and economic principles, however, teach that contract and patent law are not sufficient to guard against patent holdup. For a variety of reasons, both court-ordered patent remedies and licenses negotiated in the shadow of litigation tend to overcompensate patent holders, even when they purport to be based on the ex ante value of the patents.39 While the eBay case has limited the 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.40

#### PDB solves – there’s probably not a conflict, but if there is the patent law should yield to antitrust because the CP sucks

Cary et al, 11 – George S. – George S. Cary and Sistla are members of the California and District of Columbia Bars. Mark Nelson is a member of the New York and District of Columbia Bars. Steven Kaiser is a member of the New Jersey and District of Columbia Bars. “The Case For Antitrust Law To Police The Patent Holdup Problem In Standard Setting,” Antitrust Law Journal. Sep 2011, Vol. 77 Issue 3, p913-945, p. EBSCO – Iowa

Finally, as a policy matter, even if patent law and antitrust law have different short-term goals,104 that is not reason enough simply to displace antitrust law in favor of patent law.105 Even granting for a moment that the patent law objective of promoting innovation cannot be reconciled with antitrust's objective of preserving competition, that concept would not explain why the latter must give way in cases where the SSO-patent holdup results in harm to competition. Put another way, no one would dispute that the primary legal regime for addressing harm to competition is the antitrust laws. Thus, if one regime is going to "give way" here, where anticompetitive conduct beyond the scope of the patent grant is in play, it should be patent law.

In sum, any conclusion that the role of antitrust is to be reduced or eliminated should require a demonstration that Congress considered some conflicting goal of the patent laws to be more important than competition. But that is not the argument we have seen. Instead, the argument is that the patent law does a better job of promoting competition than antitrust. The argument remains as unsupported as it is implausible.

#### Patent law is woeful compared to antitrust – there’s zero standing to challenge antitrust violation for a range of plaintiffs

Cary et al, 11 – George S. – George S. Cary and Sistla are members of the California and District of Columbia Bars. Mark Nelson is a member of the New York and District of Columbia Bars. Steven Kaiser is a member of the New Jersey and District of Columbia Bars. “The Case For Antitrust Law To Police The Patent Holdup Problem In Standard Setting,” Antitrust Law Journal. Sep 2011, Vol. 77 Issue 3, p913-945, p. EBSCO – Iowa

One final point about patent remedies concerns standing: it is not just the type of harm that matters to antitrust, but whether anyone has a remedy to address it. Antitrust fills the gap left open by patent law by providing a remedy to those "outsiders"--consumers, competitors and others--who lack standing to seek relief under the patent laws. Consider Qualcomm: The use of equitable estoppel there was only available as a defense asserted by the alleged infringer. The elements of the defense discussed above, moreover, require that the infringer either be involved in the SSO process or have a specific basis for claiming that it was affirmatively misled by the patentee. No consumer injured by the wrongful acquisition of monopoly power in this context would meet these criteria, nor would other firms that have been excluded from the market due to the deception at issue. There is no government enforcement agency to protect such plaintiffs, because patent law has no provision for government enforcement intended to protect consumers from harm to competition.

In sum, the limitations of patent law would exclude many of the categories of potential plaintiffs suffering antitrust injury as a result of standard-setting abuse. We conclude that equitable estoppel is unequal to the task of policing monopolization through fraudulent conduct in the standard-setting process.

### States

#### Agency inconsistency decks solvency

Osborn and Eckerley 19, Kathy Osborn is a commercial litigator and trial attorney who represents clients in complex antitrust, commercial contract, shareholder, corporate, class action, insurance, white collar, and high-wealth fiduciary/estate/probate matters. Kathy also is an active antitrust compliance counselor and co-chair of the firm’s antitrust and trade regulation practice. Alyssa Eckerley partners with companies to evaluate existing and emerging challenges and opportunities and devise high-impact strategies that protect and grow their intellectual property portfolios(11/13/19, “Standardize This: Senators Ask Feds for Clarity on Standard Essential Patent Licensing Policy” https://www.faegredrinker.com/en/insights/publications/2019/11/standardize-this-senators-ask-feds-for-clarity-on-standard-essential-patent-licensing-policy)//ellie

United States Senators Thom Tillis (R-NC) and Chris Coons (D-DE) recently sent a bipartisan letter to the U.S. Department of Justice (DOJ) requesting clarity surrounding the DOJ’s antitrust enforcement policy against holders of standard essential patents (SEPs), specifically around the licensing of such patents on fair, reasonable and nondiscriminatory (FRAND) terms. According to the senators, inconsistencies in how different agencies enforce antitrust actions against patent holders has created an uncertain, volatile environment for holders of SEPs. The senators have requested that the DOJ work with the U.S. Patent and Trademark Office (USPTO) to develop a new policy statement surrounding the licensing of such patents. The patent system exists to encourage the disclosure of innovation in exchange for a limited “monopoly” for the disclosed (and claimed) invention. Specifically, patent ownership provides exclusive right to the holding party to use, make, distribute, import or sell the claimed technology within the patent for 20 years from the date the patent was filed, although foreign countries may have their own temporal and other patent law nuances. SEPs claim technologies that are essential to meet technological standards set by standard setting organizations. These organizations choose such standards based in part on the agreement of the patent holder to license the required patents on FRAND terms, without necessarily disclosing the exact terms beyond the statement that the terms are fair, reasonable and nondiscriminatory. Once the standard is set, negotiation related to the exact definition of the FRAND terms begins between the SEP holder and the organizations requiring licenses. The patent system alone creates tension with U.S. antitrust policies. SEPs exacerbate this tension because the technology claimed within an SEP is required to meet the set standard, giving SEP holders significant leverage when negotiating the licensing of these technologies. However, the DOJ and Federal Trade Commission (FTC) may find that SEP holders violate antitrust laws, under the Sherman Act and other competition laws, when refusing to license their patents to competitors or charging exceedingly high fees for such licenses (in other words, when they do not license the patent on FRAND terms after making a commitment to do so). The policies surrounding SEPs tend to vary between, and even within, antitrust agencies. The FTC and the DOJ often have expressed incompatible positions. In 2013, the USPTO and DOJ issued joint SEP guidance that was rescinded by the DOJ alone last year for suggesting that an SEP holder’s constitutional rights related to exclusion may be negatively impacted by FRAND commitments. The DOJ has expressed concern that antitrust actions will stifle innovation, while the FTC has stated a much more aggressive approach in enforcement policy against SEP holders. Recently, the DOJ has suggested that antitrust law should not govern SEP licensing, but instead that such enforcement is better suited under contract law. The current division between agencies surrounding the licensing of SEPs creates an uncertain environment for SEP holders and the competitors of SEP holders alike. Until all involved agencies agree upon, issue and consistently enforce an SEP policy, the FTC and the DOJ likely will continue to hold opposing positions and act individually on antitrust enforcement against SEP holders for FRAND-related licensing issues.

#### Pre-emption – it’s inevitable absent a change to federal statutes

Samp 14—Richard A. Samp, Chief Counsel, Washington Legal Foundation (“The Role of State Antitrust Law in the Aftermath of *Actavis*,” *Minnesota Journal of Law, Science & Technology*, Vol. 15, No. 1, Article 14, https://scholarship.law.umn.edu/cgi/viewcontent.cgi?article=1062&context=mjlst)

As noted above, there is precedent for a finding that state antitrust law is preempted to the extent that it conflicts with the policy underlying a federal statute.76 Moreover, in the context of patent law, federal courts have not hesitated to preempt state laws that the courts deem to stand as an obstacle to accomplishing Congress’s objectives (i.e., encouraging efforts to develop new and useful products).77 To the extent that any portions of Actavis’s holding can be deemed to reflect the Court’s perception of Congress’s new-product-development objectives, a state law is preempted if it is inconsistent with that holding and seeks to impose a greater degree of antitrust liability on the parties to a reverse payment settlement.

Actavis’s treatment of settlements involving a compromise entry date appears to meet that description. Actavis held that federal antitrust liability could not arise from a settlement in which the generic manufacturer agrees not compete for a number of years and in return is rewarded with an exclusive license to market its product several years in advance of the patent’s expiration date.78 Accordingly, states are not permitted to impose antitrust liability under similar circumstances because doing so would upset the balance that, according to Actavis, Congress sought to achieve between antitrust and patent law.

#### Empirics prove

Martino et al. 20, \*[Matthew M. Martino](https://www.skadden.com/professionals/m/martino-matthew-m) [Tara L. Reinhart](https://www.skadden.com/professionals/r/reinhart-tara-l) [Steven C. Sunshine](https://www.skadden.com/professionals/s/sunshine-steven-c) [Julia K. York](https://www.skadden.com/professionals/y/york-julia-k), works with clients at Skadden, Arps, Slate, Meagher & Flom LLP; (August 14th, 2020, “Ninth Circuit Strikes Down Sweeping Injunction Against Qualcomm and Reins In Expansive Interpretation of Sherman Act”, https://www.skadden.com/insights/publications/2020/08/ninth-circuit-strikes-down-sweeping-injunction)

In its highly anticipated decision, the Ninth Circuit panel unanimously rejected the lower court’s reasoning, vacating the judgment and reversing the worldwide injunction against Qualcomm. The panel concluded that the district court had erroneously imposed the antitrust duty to deal on Qualcomm, had impermissibly looked outside the relevant antitrust market in order to infer an anticompetitive act and had relied on outdated evidence of agreements that were terminated before the suit was filed to justify a broad, forward-looking global injunction. The Ninth Circuit further rejected the argument that a SEP holder’s violation of FRAND commitments could independently create antitrust liability, instead pointing to patent and contract law as sources for potential remedies. The decision reflects a considered effort to rei

n in the district court’s expansive interpretation of general antitrust principles and their specific application to SEP holders, as well as recognition that the antitrust laws aim to preserve companies’ incentives to innovate and compete. Recognizing that while “[a]nticompetitive behavior is illegal under federal antitrust law[,]” the panel was adamant that “[h]ypercompetitive behavior is not.”[7](https://www.skadden.com/insights/publications/2020/08/ninth-circuit-strikes-down-sweeping-injunction" \l "ftn7)

Rejection of District Court’s Expansive Interpretation of Antitrust Laws

The Ninth Circuit decision contains several notable conclusions regarding the scope of Section 2 of the Sherman Act and what constitutes cognizable antitrust harm.

### 2AC – Con Con

#### Links to the NB

John A. **Eidsmoe 92**. 1992 Prof of Law @ Thomas Goode Jones School of Law, United States Air Force Academy Journal of Legal Studies, “A New Constitutional Convention? Critical Look at Questions Answered, and Not Answered, by Article Five of the United States Constitution”, Lexis.

It is no wonder, then, that Lawrence tribe, Professor of constitutional Law at Harvard, warns that a new constitutional convention could lead to domestic political confrontations of “nightmarish dimension” between Congress and the Convention, between Congress and the Supreme Court, and between Congress and the states-not to mention between the Supreme Court and the Convention. Tribe continues, Particularly in a period of recovery form a decade ruptured by war, political assassination, near impeachment and economic upheaval, and particularly in a time when such recovery has already been interrupted by new domestic and international crises, it is vital that the means we choose fro amending the Constitution be generally understood and, above all, widely understood as legitimate. An Article V convention, however, would today provoke controversy and debate unparalleled in recent constitutional history. For the device is shrouded in legal mysteries of the most fundamental sort, mysteries yielding to no ready mechanism of solution. Given the significance of the United States Constitution both for our nation and for others, it would not be surprising if a convention of this magnitude were to result in serious economic instability at home and abroad, as well as substantial disruption of America’s relations abroad.

#### Delay –

**Duggin 5** (Sarah, Professor of Law – Catholic University of America, and Mary Collins, Law Clerk, Boston University Law Review, February, 85 B.U.L. Rev. 53, Lexis)

The process of amending the Constitution is often a lengthy one – the Twenty-seventh Amendment was adopted more than two hundred years after it was first proposed. 513 Recent Congresses have generally provided self-executing, seven-year sunset provisions in the resolutions proposing constitutional amendments, 514 but even an amendment on the fast track is likely to take several years to become part of the Constitution. Preparations for Presidential elections begin long before the actual events, and the threat of a national crisis is all too immediate. Congress should take interim measures to decrease the impact of the uncertainty created by the natural born citizenship proviso over the eligibility of Congressional leaders and cabinet members to assume the office of Acting President.

#### Far right substantively and procedurally coopts the CP---extinction.

Branko **Marcetic 18**. Staff Writer at Jacobin, holds an M.A. in History from the University of Auckland (New Zealand). 11-16-18. “Can Republicans Rewrite the Constitution?.” Jacobin. [https://jacobinmag.com/2018/11/gop-constitutional-convention-state-legislatures-balanced-budget-amendment/](about:blank)

In coverage of the midterms, we’ve heard a lot about the House, the Senate, governorships, and even ballot measures, but almost nothing about state legislatures. That may soon change, because the Democrats’ meager gains in this department will be crucial to stopping corporate America’s next strategy to further roll back the twentieth century. The weekend before election day, a little-noticed article was run by the Associated Press, detailing plans by right-wing groups to push for a constitutional convention after the midterms to alter the United States’ founding document. This itself is nothing new: the Right has spent the past few decades pushing for just such a thing. But with a historically radical GOP in power, and with the Democratic takeover of the House frustrating right-wing congressional legislation for the foreseeable future, the next couple of years could well see the Right go all in on circumventing Congress entirely by simply rewriting the Constitution. “Having a divided Congress may cause the proponents to feel even more committed to this idea,” says Michael Leachman, senior director of state fiscal research at the Center on Budget and Policy Priorities. “They might imagine that this is the only way they’re going to win the radical changes to the Constitution that they want.” There’s good news and, obviously, bad news to this. The bad news is, this is a scary prospect that would not only be a disaster for any future left-wing project — a Bernie Sanders presidency, for example — but would severely hobble efforts to mitigate rapidly intensifying environmental collapse. The good news is, it can be stopped. But first let’s back up for a second. For the last few decades, the Right has been gradually setting the table to pass a particular constitutional amendment (more on the details below). The most familiar way of doing this is to get two-thirds of both houses of Congress to approve it, before convincing three-fourths of all state legislatures — or thirty-eight of them — to ratify it. Congress actually came perilously close to doing this in 1995, when the amendment in question failed by one vote in the Senate. Now, with Democrats controlling the House and a thinning GOP majority in the Senate, this is a non-starter. But there is another way to pass an amendment: have two-thirds of all states, or thirty-four of them, adopt resolutions calling for a constitutional convention on just this issue. The proposed measure is the fabled balanced budget amendment. While its exact mechanics differ depending on who writes the language — in some versions Congress is simply barred from raising the debt ceiling, other times a supermajority is required to do so — the basic idea is to make it extremely hard, if not impossible, for the federal government to spend more than it takes in. It’s not hard to see why this measure would be disastrous. The strict spending limit would serve as a constant, ready-made pretext to slash social spending. It would debilitate any effort to forestall catastrophic climate change, such as through unprecedented, large-scale investment in infrastructure. And it would magnify the impact of economic crises by taking away the government’s ability to stabilize the economy through spending. According to a couple of different estimates, balancing the budget in the face of the Great Recession would have sent GDP plunging by 22 percentage points and doubled the unemployment rate to 18 percent. But wait, you say. Couldn’t a future Democratic president use this to jack up taxes on the rich? The answer is, not if the Right crams through any other constitutional amendments, such as an abolition of the federal income tax or a ceiling on federal spending, making brutal spending cuts the only avenue for meeting this legal standard. The Koch-funded American Legislative Exchange Council, one of the right-wing groups most aggressively engaged in this fight, included wording that would open the door to such limits in its model legislation in 2016. And that brings us to the other terrifying thing about an Article V convention, so-named after the constitutional provision that governs it: there’s a good chance it could see the entire Constitution rewritten amid an orgy of corporate spending and lobbying. This might sound like an exaggeration, but consider that the last time a constitutional convention met was in 1787. Originally called to simply amend the Articles of Confederation that then served as the country’s supreme legal document, the convention decided to rewrite the whole thing instead. Far from “the greatest document ever written,” the 1787 constitution — “the Constitution” — was the product of mess of bickering, wheeling and dealing, and bitter compromise that initially barely passed, and some of whose authors doubted would survive more than a couple of decades. Now imagine that already chaotic, rancorous process re-done, except with an army of lobbyists with bottomless wallets deployed to put their clients’ stamp on the process. Imagine every form of legalized bribery dangled in front of hapless delegates to ensure they vote in line with corporate America, from generous campaign donations to the prospect of cushy, well-paid corporate jobs just through the revolving door. “Ethics and campaign finance rules don’t apply to these delegates,” says Jay Riestenberg, who manages Common Cause’s campaign work on this issue. “I think Article V will work similar to ALEC — corporations and legislatures sitting around the table as equals.” “This would be the mother of all opportunities for powerful interests to change the country’s Constitution,” says Leachman. In such an environment, there’s no telling how many items on the Right’s long-term wishlist would be stuffed into a new founding document. One additional possibility mentioned in the AP report is a repeal of direct election of senators by voters, rather than selection by state legislatures, another anti-democratic bulwark against the GOP’s gradually fading electoral fortunes. There’s also no telling how the rules might be tilted to ensure the Right’s agenda passes. Republican dominance of the states guarantees the party would choose most of the delegates, and there’s no legal guidance as to how such a convention is supposed to work, from drafting all the way to voting. The ratification process could even be radically changed, as in 1787, when the convention straight up ignored the existing process and decided to make ratification substantially easier. But the sky would really be the limit. When 137 state legislators got together in 2016 to simulate such a convention, some of the drafted amendments required a congressional supermajority to raise taxes, empowered three-fifths of states to nullify federal laws, let congress override regulations, and limited the commerce clause of the constitution, which has been used to authorize everything from Obamacare to the Civil Rights Act. And it’s easy to imagine even more radical amendments being made: a constitutional ban on abortion, for instance, or all manner of language limiting government power at a time when large corporations, some industries in particular, are increasingly spooked about their future bottom lines.

### 2ac Innovation DA

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#### Patent holdup decks innovation

Carrier 2021, Distinguished Professor of Law, leading authority in antitrust and intellectual property law with expertise in the pharmaceutical, high-technology, and music industries (Michael A. Carrier, 1/26/21 “Rescuing Antitrust’s Role in Patent Holdup” https://www.pennlawreview.com/2021/02/05/rescuing-antitrusts-role-in-patent-holdup/)//ellie

Standards, common platforms allowing products to work together, are ubiquitous in our economy. They allow consumers to know that their plugs will fit into outlets and that their phones will connect to wireless networks. But imagine that a company (1) has a patent needed to use a standard, (2) promises to license the patent on reasonable terms, and then (3) reverses course, seeking to block the product or charge an exorbitant price. In such a case, the users of the standard are stuck. They have invested in technologies based on the standard. And they may be forced to pay a price reflecting not the added value of the technology but the costs of switching to a new technology. In other words, they are subject to “patent holdup.” The concerns threatened by patent holdup have consistently been acknowledged by officials in Republican and Democratic administrations. A unanimously adopted 2007 report of the antitrust agencies explained the difference between a patentee’s power ex ante—when “multiple technologies may compete to be incorporated into the standard”—and ex post—when “the chosen technology may lack effective substitutes,” allowing patentees to “extract higher royalties.” Similarly, the Federal Trade Commission (FTC) unanimously endorsed a 2011 report that highlighted how “an entire industry” could be “susceptible” to the “particularly acute” concern of holdup, which can result in “higher prices” and “discourage standard setting activities and collaboration, which can delay innovation.”

#### Aff k2 innovation

Hovenkamp 2020, Herbert J. a Fellow of the American Academy of Arts and Sciences, and in 2008 won the Justice Department’s John Sherman Award for his lifetime contributions to antitrust law (University of Pennsylvania Carey Law School “FRAND and Antitrust” https://scholarship.law.upenn.edu/cgi/viewcontent.cgi?article=3095&context=faculty\_scholarship)//ellie

Oversight of FRAND obligations is one area where it is critical for the courts to keep an eye on longer run concerns for innovation. FRAND has evolved into a highly successful but nevertheless vulnerable mechanism for facilitating joint innovation and product development. Indeed, for networked technologies such as cellular phones it is difficult to see how coordinated development by numerous competitive firms could be achieved without the significant coordination and technology sharing that FRAND enables. That system will be undermined, however, if one firm is able to renege on its voluntarily entered obligations, because others will then do the same. The regime of collaborative innovation that FRAND contemplates would very likely fall apart, and at great harm to competition and economic welfare. The Ninth Circuit’s 2020 Qualcomm decision indicates that this fear is more than fanciful. Unless corrected, Congress may have to intervene in order to protect a system that has been an important driver of innovation and economic growth. Among the various legal tools for policing the FRAND process antitrust is only one, but it is an important one and has its own unique requirements and tools for analysis. As a result, the existence of FRAND obligations is hardly irrelevant to antitrust claims. Antitrust law takes markets as it finds them. For example, in the numerous antitrust decisions involving the NCAA,301 a very large joint venture, the antitrust courts do not pretend that the joint venture does not exist. Rather, they assume that the venture itself performs a socially valuable function. Then they begin with its rules and the investments and commitments that its structure creates and considers how antitrust can be used to make the market function competitively on those assumptions. FRAND is no different. While it has its flaws, the standard setting process and the use of standard essential patents is well settled and has produced significant benefits within a competitive environment. In that case the best use of antitrust law is to police the competitive process within that system.

### 2AC – AT: Infrastructure DA

#### 1. Debt ceiling tanks infrastructure – even Dems privately concede they’ll be blown off course

Everett, 9-12-2021, Burgess, "Dems hurtle toward a new fiscal cliff," POLITICO, <https://www.politico.com/news/2021/09/12/dems-toil-to-avoid-default-shutdown-in-pivotal-fall-511158> -- Iowa

Democrats’ internal wrangling over a massive new social spending plan will soon be eclipsed by much more urgent problems: avoiding an economic collapse and a government shutdown. There is growing worry among some rank-and-file Democrats that their tunnel-vision mentality on a $3.5 trillion budget reconciliation bill could provoke economic blowback if Republicans hold the line and tank efforts to lift the debt ceiling. And Democrats' threadbare majorities in Congress are leaving the party with little time to wriggle out of a dangerous economic morass that could overwhelm their other priorities, from voting rights to tax increases on the wealthy to a sweeping expansion of the social safety net. Top Democrats insist they have a plan — they just don’t want to talk about it yet. And they are urging calm before a calamitous month of legislating. "Nobody blinks in the short run. But at the end of the day, we have to raise the debt limit," said Rep. Don Beyer (D-Va.), who chairs the Joint Economic Committee. "But it could be after dinner on Sept. 30." Government funding runs out in just 18 days, and the Biden administration says the debt ceiling must be raised shortly after that — with Senate Republican votes that GOP leaders say they will not provide. What’s more, the House doesn’t come back until Sept. 20, which leaves precious little time to keep the trains running, all as President Joe Biden faces the worst approval ratings of his young presidency. House Democrats are planning a vote the week of Sept. 20 to likely extend government funding until Dec. 10 and have discussed rolling the debt ceiling, disaster aid and assistance for the Afghanistan withdrawal into it, according to aides. They hope pairing the debt limit with a bill to avoid a government shutdown, as well as disaster relief, makes it impossible for Republicans from impacted areas like Louisiana and Mississippi to vote no. No final decision has been made, and success is far from guaranteed. But even with unilateral power to deal with the debt ceiling themselves, Democrats say they don’t want to set the precedent that one party is expected to address the debt limit when they are in charge. Republicans “voted in many cases for the programs and tax cuts that they gave under the Trump administration that contributed to the debt. So they have to be equally as responsible," said Sen. Bob Menendez (D-N.J.) "Because if we start at a process in which both sides won't come together to deal with the debt ceiling, then whenever there is a different majority they will face the same challenge." Speaker Nancy Pelosi and Senate Majority Leader Chuck Schumer (D-N.Y.) have vaguely referred to having several options to raise the debt ceiling, but have been adamant that they won't stick it in a bill that passes on party lines via budget reconciliation. Instead, they will demand GOP support, which Republicans say simply won’t materialize because of Democrats’ big spending agenda. Rather, Senate Republicans say Democrats should just increase the debt ceiling on party lines as part of their plans to spend as much as $3.5 trillion on education, climate change and health care while raising taxes on the wealthy. But that solution isn’t workable at the moment either: Several moderate Democratic senators are not willing to support a unilateral increase in the debt, according to a Democratic aide. Those Democrats want Republicans to own increasing the debt, too, considering significant spending was wracked up under former President Donald Trump. And Democratic leaders nixed the idea of coupling the reconciliation bill and the debt ceiling last month amid worries that it would further hamper passage of their already labyrinthine social spending plan. Democrats’ options include tying the debt ceiling increase to a short-term government funding bill — marrying it with hurricane aid and help for Afghani refugees — or holding a standalone vote and daring Republicans to reject it. They could also try negotiating with the GOP to combine some Republican priorities, such as defense spending, with a debt ceiling increase. When they were in the minority, Democrats helped former President Donald Trump lift the debt ceiling by cutting larger budget deals with the Republicans. “I would hope that the Republicans would act in a similarly responsible way,” Pelosi told reporters. “People say, ‘Oh, you just want to spend money.’ No, we're paying the credit card, the Trump credit card, with what we would do to lift the debt ceiling.” But Republicans are holding their hard-line stance as Congress prepares to end its lengthy August recess. In an interview with the Louisville Courier-Journal this week, Senate Minority Leader Mitch McConnell (R-Ky.) said: “The debt ceiling needs to be raised. The issue is who should do it.” “Under these uniquely unprecedented circumstances, it’s [Democrats] obligation to do it. And they have the votes to do it, and they will do it at some point,” McConnell said. Schumer called McConnell’s position “the height of irresponsibility.” “We Democrats, when Trump was president … three times voted to raise the debt ceiling. We could have played the same game. But we realized that we have some obligations to the country and to the financial strength of this country, and not just by politics,” Schumer told reporters. For Democratic leaders, the collision of deadlines approaching at the end of this month promises a September showdown that rivals any previous shutdown threats and funding headaches Congress has faced. Democrats are quickly trying to advance their massive social spending plan, a key plank of Biden’s domestic policy agenda, before turning to the more routine work of funding the government and covering the nation’s debt obligations. Pelosi and her leadership team are trying to balance the demands of the caucus’ two competing factions — the progressives and the centrists — as they work to enact both the sweeping social plan and the Senate-passed bipartisan infrastructure bill later this month. Progressives have vowed not to support the Senate's infrastructure bill during an expected vote on Sept. 27 unless the much larger social policy legislation is also teed up for a vote. Democrats publicly insist they’re on track to vote for the up to $3.5 trillion bill in the House later this month. But senior Democratic aides are already privately predicting that timeline is likely to slip several weeks as House leaders continue to face off with Senate Democrats and the White House over major policy disagreements. And, as they face those internal challenges, a major partisan confrontation with Republicans awaits on the debt. “The full faith and credit of the United States is on the line, and we need to do our jobs,” said Sen. Tammy Baldwin (D-Wis.), who like many senators has been focused more on the social spending bill over the August recess than the upcoming deadlines. “I’m not as well-versed in what vehicle would be the best. But the job needs to be done.”

#### 2. No infrastructure – progressives, Manchin, Afghanistan, and insufficient PC

Westwood, 9-3 – SARAH WESTWOOD, THE WASHINGTON EXAMINER. “Working With the Taliban?; Infrastructure Bill; President Biden Visits Hurricane Damaged Areas; Interview With Sen. Bill Cassidy (R-LA),” Fox News Network YOUR WORLD WITH NEIL CAVUTO 4:00 PM EST, p. Nexis Uni – Iowa

The $3.5 trillion infrastructure package is primarily social programs, things that really have nothing to do with what we're seeing, and yet you do see the left using the Hurricane Ida damage the forest fires out West to argue that climate change is urgent enough to require the passage of the $3.5 trillion bill.

What is sort of ironic, though, is that the same progressives that are putting pressure on lawmakers to pass this bill on the basis of climate change are also trying to pressure lawmakers to withhold their vote on the bipartisan bill that would actually do something to solve the problems that we're seeing on the TV right now, if they don't get a bill that's really unrelated.

And so I think, obviously, this is just another pretext that's being used for the $3.5 trillion bill, and President Biden losing a lot of the political capital right now because of Afghanistan and other reasons that he might have used to sell the $3.5 trillion bill. And then with Manchin obviously coming out with his opposition, the chances for that getting passed at the levels that are set are getting lower and lower.

#### Winners win

Benen 8/23/21 (Steve, “Will 9 moderate House Dems derail Biden's domestic agenda?” https://www.msnbc.com/rachel-maddow-show/will-9-moderate-house-dems-derail-biden-s-domestic-agenda-n1277453

It's Political Science 101: in the United States, the more political capital a president has, the more likely he/she is to win important fights. And as a Democratic-led Congress looks ahead to the fall, and President Joe Biden's domestic agenda hangs in the balance, the New York Times reports that the White House is running low on political capital at an inopportune time. With President Biden facing a political crisis that has shaken his standing in his party, Democrats across the country are increasingly worried about their ability to maintain power in Washington, as his administration struggles to defend its chaotic withdrawal from Afghanistan and stanch a resurgent pandemic that appeared to be waning only weeks ago. All things considered, I think "political crisis" is probably overstating matters, but it's nevertheless true that the president was in a stronger position a few weeks ago. Coverage of developments in Afghanistan has been brutal; Biden's approval rating has dipped below 50% for the first time; and even public support for his handling of the pandemic has fallen, despite the obvious fact that the surge in COVID-19 infections is not his fault. But presidential political capital is not some ephemeral thing that exists in an unreachable vacuum. If congressional Democrats want Biden to be in a stronger position, even for their own benefit, they can give him more capital by passing his agenda. And to an extraordinary degree, a small handful of moderate House Dems -- whose own political fortunes appear to be tied to Biden's -- appear ready to make things dramatically worse for the White House. As the New York Times explained in a separate report: House Democrats will end their summer break on Monday, amid finger-pointing and rising tensions, to try to pave the legislative way for the most ambitious expansion of the nation's social safety net in a half century. But the divisions emerging over an arcane budget measure needed to shield a $3.5 trillion social policy bill from a filibuster are exposing deep strains in the Democratic Party over ideology, generational divides and the fruits of power and incumbency. As House members return to work, let's recap how we arrived at this point by circling back to our earlier coverage. The Democratic road map to legislative success was relatively clear. The Senate recently approved a $3.5 trillion budget resolution with unanimous support from the Democratic conference. The plan was for the House to approve the same budget blueprint, at which point the party could flesh out an ambitious intra-party compromise. Two weeks ago, nine House Democrats -- whom Jon Chait nicknamed the "Suicide Squad" -- announced they'd defeat the budget resolution, effectively crushing Biden's entire domestic agenda, unless the House first passes the Senate's bipartisan infrastructure plan. The rebellion is being led by Rep. Josh Gottheimer (D-N.J.), who's joined by Reps. Carolyn Bourdeaux (D-Ga.), Filemon Vela (D-Texas), Jared Golden (D-Maine), Henry Cueller (D-Texas), Vicente Gonzales (D-Texas), Ed Case (D-Hawaii), Jim Costa (D-Calif.), and Kurt Schrader (D-Ore.). These nine moderates -- representing roughly 4% of the House Democratic conference -- are well aware of their party's plan. The process envisioned by House Democratic leaders and the vast majority of progressive members has been unchanged from the outset: The chamber will tackle the $3.5 trillion measure, and once it passes, the House can then approve the Senate's bipartisan infrastructure legislation, sending both parts of the two-track package to the White House for Biden's signature. It's the same plan that has the president's enthusiastic support.

#### 4. No link – antitrust doesn’t cost PC

**CADELAGO and McGraw**, 7-19-**21**

(Christopher and Meredith, “‘It’s ceding a lot of terrain to us’: Biden goes populist with little pushback,” accessed 8-5-21, <https://www.politico.com/news/2021/07/19/biden-populist-antimonopoly-500100>) JFN

**When** President Joe **Biden unveiled a series of sweeping executive orders to combat monopoly power, the response from Republicans was** notable — because there was **barely one at all.** Not long ago, a Democratic administration taking unilateral action to rein in corporations on everything from non-compete agreements to prescription drug affordability would have engendered fury from elected conservatives. Yet over the last week, **few Republicans were warning that Biden’s actions would severely kneecap business or slow the economic recovery**. And inside the White House, the relative silence was not just noticed but seen as vindication. “If you're against competition, then what are you for?” said Bharat Ramamurti, deputy director of the National Economic Council. “Big business charging people whatever they want. You’re for businesses being able to offer workers low wages because there's no other competitor in town to offer something better. I mean, it's very hard to be against competition.” **The right’s muted response to Biden’s orders underscores the remarkable ideological shift that’s occurring in Washington**, D.C. **A Republican Party once closely allied with corporate America finds itself increasingly less so in the** Donald **Trump era**. Indeed, in the aftermath of Biden’s orders, even officials in Trump’s orbit were saying the politics were smart. “Both [Biden and Trump] have elements in their constituencies that want this, and, by the way, they’re on solid ground with the rest of America,” said a Trump adviser. “America has a love-hate relationship with these companies.”

### 2AC FTC DA

#### Biden’s XO solves---he’s devoting all resources on deck to prosecuting antitrust.

Posner 21, professor at the University of Chicago Law School (Eric, 7-21-2021, "The Antitrust War’s Opening Salvo", Project Syndicate, <https://www.project-syndicate.org/commentary/biden-antitrust-executive-order-what-it-does-by-eric-posner-2021-07>. Accessed 7-22-21)

The executive order is ambitious in its scope and style. In strongly worded passages, it accuses businesses of monopolistic and unfair practices in major industries, including technology, agriculture, health care, and telecommunications. It laments the decline of government antitrust enforcement, and identifies numerous harms that have resulted – including economic stagnation and rising inequality.

The order also establishes a new bureaucratic organization in the White House to lead the anti-monopoly effort. Demanding a “whole-of-government” approach, it calls on the vast resources of numerous agencies, and not just the two that traditionally oversee antitrust (the Department of Justice and the Federal Trade Commission).

#### Agencies are wrecked

MFEM 8/19, Masuda, Funai, Eifert & Mitchell, Ltd., "The Implications of President Biden's ‘Executive Order on Promoting Competition in the American Economy’," Mondaq, 08/19/2021, https://www.mondaq.com/unitedstates/antitrust-eu-competition-/1103288/the-implications-of-president-biden39s-executive-order-on-promoting-competition-in-the-american-economy.

On July 9, 2021, President Joe Biden signed a sweeping executive order titled the “Executive Order on Promoting Competition in the American Economy” (the “Order”), affirming the policy of the Biden administration to “enforce the antitrust laws to combat the excessive concentration of industry, the abuses of market power, and the harmful effects of monopoly and monopsony.” To achieve this, the Order, among other things, directs regulatory agencies to assert oversight over certain business practices and encourages regulatory agencies to develop and/or strengthen rules. The Order includes 72 initiatives by more than a dozen federal agencies.

The Order specifically cites the areas of “labor markets, agricultural markets, Internet platform industries, healthcare markets (including insurance, hospital, and prescription drug markets), repair markets, and United States markets directly affected by foreign cartel activity.” The scope of this order is broad. On the other hand, the Order itself does not create new regulations or laws, leaving the specific implications of it vague.

Although the implications of the Order are not limited to the area of antitrust, the Order reflects the Biden Administration's emphasis on it. For example, the Order encourages the DOJ and other agencies responsible for banking to update guidelines on banking mergers to provide heightened scrutiny of mergers. The Order also encourages the DOJ and the FTC to challenge prior “bad mergers,” meaning that mergers that went unchallenged under previous administrations may be challenged in the future. Another specific area that the Order focuses on is the right to repair; it encourages the FTC to limit equipment manufacturers from limiting consumer's rights to repair.

Other affected areas of law include, but are not limited to, labor and employment (e.g. non-compete agreements) and consumer protection (e.g. financial data portability). Corporations with any significant activity in the United States should assess the impact that the Order would have on their businesses and prepare for the materialization of the specific initiatives included in the Order.

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#### Shifts patents + thumps SEPs

Bultman 21, (Matthew , July 26, 2021 “Biden Signals Shift Toward Tech on Standard Essential Patents” https://news.bloomberglaw.com/ip-law/biden-signals-shift-toward-tech-on-standard-essential-patents)//ellie

President Joe Biden’s administration has made several moves breaking from the previous administration’s approach to standard-essential patents, charting a course more favorable to Apple Inc. and other companies wanting to pay lower royalties on critical technologies. Makan Delrahim, the Justice Department’s head of antitrust under Donald Trump, was an ally to patent owners, taking the view that antitrust law has a limited role in licensing disputes over patents essential to telecommunications and other industry standards. The pendulum is starting to swing back toward companies that use the patented technologies and toward efforts to make standard-essential patents more accessible. There are several signs of change, including the call in Biden’s executive order on competition that asks the Justice and Commerce departments to reconsider the previous administration’s stance that patent holders have a right to seek injunctions against potential licensees in cases involving standard-essential patents, or SEPs. “On balance the new administration is likely to be more receptive to implementer complaints that they have to pay too much,” said Nicholas Matich, an attorney at McKool Smith PC in Washington and former acting general counsel at the U.S. Patent and Trademark Office.