# 1NC --- Swing 2 Quarts

## OFF

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#### ‘Prohibition’ must ban all instances of anticompetitive behavior

James Lane Buckley 91, Judge on the United States Court of Appeals for the District of Columbia Court, BA and JD from Yale University, Former Undersecretary for Security Assistance at the State Department, Former United States Senator from New York, “Hazardous Waste Treatment Council v. Reilly”, United States Court of Appeals for the District of Columbia Circuit, 938 F.2d 1390, 1395-1396, 1991 U.S. App. LEXIS 16095, 7/26/1991, Lexis

Petitioners claim that the EPA considers a state law to "act as a prohibition" under the regulation only when it bans all treatment, storage, and disposal within a State, and they point to the ALJ's statement, based on his reading of the preamble to the regulations, 45 Fed. Reg. at 33,395, that the EPA "appears to have construed the phrase 'act as a prohibition' in [paragraph (b)] as equivalent to an outright ban or refusal to accept hazardous waste for treatment, storage, or disposal." ALJ Decision at 112. Petitioners contend that the regulation must embrace any law that would even indirectly, as in the instant case, prohibit any treatment facility; otherwise, a State could accomplish a total ban one facility at a time. Senate Bill 114, they charge, epitomizes the "NIMBY" syndrome: In response to the needs of the nation for treatment of hazardous waste, North Carolina has simply said, "Not in my backyard." By refusing to respond, petitioners urge, the EPA ignores its duty to monitor state programs.

Although, at oral argument, government counsel [\*\*13] attempted to defend the "ban on all treatment" position that petitioners ascribe to the EPA, that is not the basis on which the agency concluded that Senate Bill 114 did not act as a prohibition within the meaning of section 271.4(b). In explaining why the second condition of paragraph (b) had not been met, the Regional Administrator emphasized that of the 485 riparian miles available in North Carolina for a facility of the kind proposed by GSX, 333 remained available under the Act, and noted that a smaller plant could be built at the Laurinburg site. Final Decision at 2. We therefore construe the EPA's decision to mean that a state law "acts as a prohibition" on the treatment of hazardous wastes when it effects a total ban on a particular waste treatment technology within a State, and nothing more.

[\*1396] Such a construction is reasonable and merits deference. The language of paragraph (b), which uses the word "prohibit[]" rather than "impede[]" or "restrict[]" as in the case of paragraph (a), suggests that the former allows States greater latitude in regulating particular treatment facilities before a prohibition is found to exist. This is consistent with the preamble's expression of [\*\*14] a desire to encourage the development of state programs by avoiding the establishment of "very tight standards." See 45 Fed. Reg. at 33,385. Second, defining prohibition in terms of the ban of a particular technology falls well within the language of paragraph (b). Finally, we see nothing inconsistent between this construction and the language of the underlying statute, 42 U.S.C. § 6926(b), which merely asserts that a state program may not be authorized if "such program is not consistent with the Federal and State programs applicable in other States." This language allows the agency enormous latitude in structuring its own implementing regulations and in interpreting them.

#### Business practices are ongoing conduct defined by the behaviors of many market participants

Kerry Lynn Macintosh 97, Associate Professor of Law, Santa Clara University School of Law. B.A. 1978, Pomona College; J.D. 1982, Stanford University, “Liberty, Trade, and the Uniform Commercial Code: When Should Default Rules Be Based On Business Practices?,” 38 Wm. & Mary L. Rev. 1465, Lexis

These new and revised articles reflect a strong trend toward choosing default rules 4 that codify existing business practices. 5 [FOOTNOTE 5 BEGINS] In this Article, the term "business practices" is used to refer to practices that emerge over time as countless market participants exercise their freedom to engage in profitable transactions. For an account of the evolution of business practices, see infra Part II. As used here, "business practices" is broader and less technical than "trade usage," which the Code narrowly defines as "any practice or method of dealing having such regularity of observance in a place, vocation, or trade as to justify an expectation that it will be observed with respect to the transaction in question." U.C.C. 1-205(2). [FOOTNOTE 5 ENDS] This is particularly true of the recent revisions to Articles 3 (Negotiable Instruments), 4 (Bank Deposits and Collections) and 5 (Letters of Credit).

#### Limits and grounds --- Key to link uniqueness and preventing bi-directionality --- Their interp explodes limits through infinite standards

### OFF

#### Topical affs must increase prohibitions on the entire economy:

#### 1---“The” before a noun means whole

Webster’s 5 (Merriam Webster’s Online Dictionary, [http://www.m-w.com/cgi-bin/dictionary](about:blank))

The

4 -- used as a function word before a noun or a substantivized adjective to indicate reference to a group as a whole <the elite>

#### 2---“Private Sector” means all

Senate Manual 11 (Senate Document No. 112-1)//babcii

The term ``private sector'' means all persons or entities in the United States, including individuals, partnerships, associations, corporations, and educational and nonprofit institutions, but shall not include State, local, or tribal governments.112 S. Doc. 1

#### limits and grounds --- Subsets explodes the topic to thousands of affs, and removes core controversy

### OFF

#### “Antitrust laws” and “Prohibitions” can’t be courts

Kalbfleisch 61 – Kalbfleisch, District Court judge. [Paul M. Harrod Co. v. A. B. Dick Co., 194 F. Supp. 502 (N.D. Ohio 1961)]//babcii

Defendant asserts that the term ‘antitrust laws,’ as used in the above section and as defined in 15 U.S.C.A. § 12, does not include a judgment or decree entered in connection with an antitrust case filed by the Government. Plaintiff, on the other hand, asserts that ‘the violation of the earlier decree of this court in itself gives rise to an independent cause of action under Section 4 of the Clayton Act.’ 15 U.S.C.A. § 15. Plaintiff's Brief, p. 7. Plaintiff concedes that ‘as far as he has been able to ascertain, this contention raises issues which have never before been decided by any appellate court.’ Plaintiff's Brief, p. 5. In Nashville Milk Co. v. Carnation Co., 1958, 355 U.S. 373, 78 S.Ct. 352, 2 L.Ed.2d 340, the Supreme Court held that the Robinson-Patman Act, 15 U.S.C.A. §§ 13-13b, 21a, was not included among the ‘antitrust laws' defined in Section 1 of the Clayton Act (15 U.S.C.A. § 12) and that ‘the definition contained in § 1 of the Clayton Act is exclusive.’ Id., 355 U.S. at page 376, 78 S.Ct. at page 354. The definition of ‘antitrust laws' in 15 U.S.C.A. § 12, clearly embraces only the statutes described therein. Even without such a definition the term ‘antitrust laws' could not be construed as pertaining to a judgment or decree entered by a court in connection with an antitrust case filed by the Government. Such decrees do not necessarily reflect the prohibitions of the antitrust laws but may, by their terms, seek to dissipate the effects of the past conduct of the parties and, to this end, frequently enjoin performance of acts lawful in themselves. To permit a private party to recover damages for violation of any provision of such a decree is so obviously beyond the scope of the term ‘antitrust laws,’ as used in the statute, as to require no further discussion. Defendant's motion to dismiss that part of the complaint based on alleged violations of the 1948 consent decree in United States v. A.B. Dick Company will be sustained.

#### Limits and grounds --- Multiplies the # of aff’s by 2, removes any core checks on small aff’s, and allows the aff to circumvent any public backlash

### OFF

#### The plan is vague --- Reject it ---

#### 1. “reasonably necessary” is legally useless

TRG Law, 16 (TRG Law, TRG Law Limited (trading as TRG law) is a company registered in England & Wales , Oct 2016, accessed on 1-8-2022, Trglaw, ""Acting Reasonable"", http://www.trglaw.com/documents/TRGlaw-ActingReasonably.pdf)//Babcii

Introduction ‘Reasonable’ and ‘**reasonably’**. These must surely be any lawyer’s favourite words – they are used repeatedly in a number of different contexts: ‘consent not to be unreasonably withheld or delayed’, ‘reasonable endeavours’, ‘reasonable notice’, ‘reasonably implied’, ‘as may be **reasonably necessary’**; the list goes on. In one recent set of contract terms the word ‘reasonable/reasonably’ was used 77 times; in another it was used 201 times! So one would assume that everyone would have a good idea of what ‘reasonable’ and ‘**reasonably’** actually means? Unfortunately that may not always be **the case.** English law does not traditionally recognise any general obligation on a contracting party to ‘act reasonably’. It does not (unlike many continental European jurisdictions) impose a general obligation on contracting parties to act ‘in good faith’ towards each other – but more of that later. This may be one of the primary reasons why English lawyers in particular seem to like the word ‘reasonable’ quite so much for fear that the other contracting party might decide to act completely unreasonably. However, it would seem that the Courts do place some constraints on behaviour irrespective of what the written contract says.

#### 2. No card in the aff says what “enable creation of information technology standards” legally means --- No brightline for what companies need to do

#### Reject the team ---

#### 1. Presumption --- You don’t know what the plan does or if it solves --- Don’t allow the 2AC to weasel out of it --- The plan is the only thing we get to hold the aff to --- Key to fairness

#### 2. Circumvention --- Courts circumvent by creating useless standards

### OFF

#### The United States federal government should remove antitrust scrutiny on companies colluding against patent holders for information technology standards

#### The CP solves the aff without antitrust --- Collusion allows negotiation in concert that resolves anti-competitive practices --- The plans inclusion decks innovation

Schuster and Day 21 (W. Michael Schuster and Gregory Day – University of Georgia Terry College of Business Assistant Professors, Aug 13, 2021, “Colluding Against a Patent”, https://ssrn.com/abstract=3799477, accessed 8/30/21,)//Babcii

While courts and agencies have found that **antitrust is ill-equipped to identify anticompetitive patent practices**, the clearer antitrust offense may thus occur when licensees combine to negotiate against rightsholders. As a result, patent owners may enforce the antitrust laws to solidify their limited monopoly even though antitrust is meant to condemn monopolies. In light of this, the next Part explores the costs imposed by strategic patenting. It concludes with a simple, yet effective, proposal promising to foster innovation and harmonize the antitrust and patent laws.

III. THE NON-ANTITRUST SOLUTION

**The best remedy against abuses of patent rights is less antitrust**. This Part suggests that some firms have used the patent system to exclude competition rather than to protect original innovation. But we caution against enhancing antitrust enforcement as many policymakers and scholars have sought to do.187 **Using historical and economic analyses, we assert that firms should be able to collude against a monopolist or rightsholder, effectively balancing another’s market power.** **This would harmonize the patent and antitrust laws**, resolve the judicial split about bilateral monopolies, reduce litigation, and promote efficiency.

A. The Puzzle

The issue of whether antitrust should discipline rightsholders raises questions about the patent system’s efficacy. Federal **agencies, courts, and scholars have cautioned against involving antitrust within patent disputes** on the belief that **it would stymy innovation**.188 The theory is that the patent system must grant the right to exclude competition unfettered by antitrust review.189 This position, however, presumes that the exploitation of patent rights promotes R&D. But if patent abuses achieve the opposite result in predictable instances, then the deadweight loss may not warrant the per se insulation of patent rights sought by the DOJ and others. We ask, first, should the patent system go unaltered, or is enough competition and innovation impaired to demand a remedy? If the latter is true, then the issue is whether antitrust enforcement offers the best solution. We advocate for less antitrust. Based on economic theory, as well as support from the labor market and the Sherman Act’s legislative history, **allowing firms to combine against rightsholders and monopolists would help to discipline abusive practices and provide clear rules without costly litigation**. Helping to support our claim, we investigated whether patent owners do seek to impede competition and R&D without contributing innovation. It seems that as firms build large arsenals of low-value **patents**, rivals tend to reduce R&D and exit the market. That said, we also assert that **antitrust is the wrong remedy**. Further, we insist that **permitting firms to collude against a monopolist would redress ironic uses of antitrust law.** As discussed earlier, a patent owner may currently enforce the antitrust laws to charge monopoly prices as well as suppress competition and innovation.190 While patentees must be able to exercise exclusive rights, we think that they should rely on patent and contract remedies rather than antitrust enforcement. By taking antitrust out of patent law, it would provide holders with the proper scope of exclusive rights to foster innovation (**as well as preserve the incentives to innovate conferred in patent**, which Part IV explains in greater detail).

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#### The fifty states and all relevant territories should increase prohibitions on private sector conduct that is more restrictive of competition than reasonably necessary to enable creation of information technology standards

#### The federal judiciary should rule that federal preemption of state antitrust regulations of Standard Essential Patents and Standard Setting Organizations are unconstitutional

#### Solves – no risk of preemption

Waller, 03 (Spencer Weber Waller, Professor and Director of the Institute for Consumer Antitrust Studies, Loyola University Chicago School of Law, “The Incoherence of Punishment in Antitrust”, Chicago-Kent Law Review, April, 2003, https://scholarship.kentlaw.iit.edu/cklawreview/vol78/iss1/8/)//babcii

The remaining governmental enforcer is at the state rather than the federal level. The attorneys general of the fifty states, the District of Columbia, Puerto Rico, the Virgin Islands, Guam, and other United States dependencies and territories each enforce their own state or territorial level antitrust laws. 61 Most of these laws track the substance of the Sherman Act fairly closely, but each state has different exemptions, procedures, and remedies. The Supreme Court is quite clear that the states (and territories) are normally free to grant greater or lesser rights than the federal antitrust laws without preemption being an issue.6 One important difference is that federal antitrust law permits suit for treble damages only for direct purchasers-those who dealt directly with the unlawful price fixers or monopolists-while a substantial number of states permit suits by indirect purchasers under state antitrust law. 63 The states also frequently bring suit under the federal antitrust laws. First, the states purchase an enormous amount of goods and services. Where they are victims of antitrust violations in their capacity as purchasers they are entitled to treble damages like any other private plaintiff.64 Second, the states have been granted parens patriae powers to sue on behalf of any natural persons in their jurisdiction who have been injured by reason of any antitrust violation.65 The states have come under tremendous criticism for their more activist posture. Critics have argued that the states are merely free riders on federal enforcement efforts or, when the states pursue a separate agenda, they are doing so for narrow partisan political reasons unrelated to sound antitrust and competition policy.66 The states understandably disagree. Their ability to sue on their own behalf and on behalf of their citizens is enshrined in federal legislation. Their ability to enact their own state antitrust statutes and empower their officials and private parties to sue under them flows from their sovereign status under the Constitution. The states also dispute the free rider label, pointing to important antitrust litigation where either the states acted before the federal government, or where the federal government took no action at all.67 They point to the efficiency-enhancing aspects of pooling resources and of collective investigation and prosecution of nationwide cases. 68 Finally, the states have long argued that the state attorneys general are more sensitively attuned to the issues affecting the citizens of their states than the federal antitrust agencies could ever be. They can therefore better represent the public interest even at the risk of coming under the sway of interest groups representing competitors of a potential antitrust defendant.

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#### FTC’s increasing enforcement in privacy now---it’s focused on algorithmic bias.

James V. Fazio 21. Special counsel in the Intellectual Property Practice Group at Sheppard, Mullin, Richter & Hampton LLP, with Liisa M. Thomas, 3/11. “What Is FTC’s Course Under Biden?” https://www.natlawreview.com/article/what-ftc-s-course-under-biden

The new acting FTC chair, Rebecca Kelly Slaughter, recently signaled that the FTC may increase enforcement and penalties in the privacy and data security realm. Slaughter pointed to several areas of focus for the FTC this year, which companies will want to keep in mind: Notifying Consumers About FTC Allegations: Slaughter referred favorably to two recent cases: (1) the Everalbum biometric settlement from earlier this year (which we wrote about at the time); and (2) the Flo Health settlement over alleged deceptive data sharing practices (which we also wrote about at the time). In drawing on these two cases, Slaughter indicated that in future cases the FTC intends to include as part of any settlement a requirement to notify customers of any FTC allegations. This, she said, would allow consumers to “vote with their feet” and help them decide whether to recommend their services to others. FTC Intent to Plead All Relevant Violations: According to Slaughter, another lesson the FTC is taking from the Flo case is to include in the cases it brings all potentially applicable violations of all relevant privacy-related laws. In the Flo case, Slaughter said the FTC should have pleaded a violation of the Health Breach Notification Rule, which requires that vendors of personal health records notify consumers of data breaches. Focus on Ed Tech and COPPA: Given the explosive growth of education technology during COVID-19, the FTC is conducting an industry sweep of the industry. Related to this, the FTC is reviewing its Children’s Online Privacy Protection Act Rule. This goes beyond the refresh the agency did of their FAQs earlier in the pandemic (which we wrote about at the time). For now, Slaughter reminds companies that parental consent is needed before collecting information online from children under the age of 13. Examination of Health Apps: The FTC will take a closer look at health apps, including telehealth and contact tracing apps, as more and more consumers are relying on such apps to manage their health during the pandemic. Overlap Between Competition and Privacy: Slaughter also indicated that it is worth looking at situations where there may be not only privacy concerns, but antitrust as well. Because the FTC has a dual mission (consumer protection and competition) she notes that it has a “structural advantage” over other regulators in that it can look at these issues, especially since -she states- “many of the largest players in digital markets are as powerful as they are because of the breadth of their access to and control over consumer data.” Racial Equality and AI/Biometrics/Geotracking: Slaughter noted that COVID-19 is exacerbating racial inequities. She pointed to the unequal access to technology, as well as algorithmic discrimination (the idea that discrimination offline becomes embedded into algorithmic system logic). The FTC intends to focus on algorithmic discrimination, as well as on the discrimination potentially embedded into facial recognition technologies. (This mirrors concerns that gave rise to the recent Portland facial recognition law, which we recently wrote about). Finally, Slaughter commented on the use of location data to identify characteristics of Black Lives Matter protesters, and said she is concerned about the misuse of location data to track Americans engaged in constitutionally protected speech. Putting it Into Practice: Companies that operate health apps, that are in the education technology space, or that use algorithms or facial recognition tools will want to keep in mind that these are areas of focus for the FTC. And for everyone, keep in mind that the FTC has indicated it will beef up privacy law penalties and will ask for more notification to injured consumers.

**Antitrust enforcement saps up FTC resources and personnel, which are finite**

Tara L. **Reinhart, et al. 21**. \*\*Head of Skadden, Arps, Slate, Meagher & Flom LLP’s Antitrust/Competition Group. \*\*Steven C. Sunshine, Co-head of Skadden, Arps, Slat, Meagher & Flom LLP’s Antitrust/Competition Group. \*\*David P. Whales, antitrust lawyer with over 25 years of experience in both private and public sectors. \*\*Julia Y. York, partner at Skadden, Arps, Slat, Meagher & Flom LLP. \*\*Bre Jordan, associate at Skadden, Arps, Slat, Meagher & Flom LLP focusing on antitrust law. “Lina Khan’s Appointment as FTC Chair Reflects Biden Administration’s Aggressive Stance on Antitrust Enforcement.” 6/18/21. https://www.skadden.com/insights/publications/2021/06/lina-khans-appointment-as-ftc-chair

Second, like all antitrust enforcers, Ms. Khan and the FTC will face resource constraints. Bringing **antitrust litigation is an expensive and laborious process**, often requiring millions of dollars for expert fees and a large army of FTC staff attorneys and taking many months or even years to accomplish. Typically, the FTC can only litigate a **handful of antitrust matters** at a time. It seems likely that Congress will provide more funding to the FTC in the current environment, but even with these extra resources, the **FTC will still have to pick its cases carefully** and cannot challenge every deal or every instance of alleged unlawful conduct.

#### That trades off with the necessary resources for privacy enforcement.

John O. McGinnis\* and Linda Sun\*\* 20. \*George C. Dix Professor, Northwestern University, and Associate-Designate, Wilmer Pickering Hale & Dorr LLP. “Unifying Antitrust Enforcement for the Digital Age.” Northwestern Public Law Research Paper No. 20-20. https://papers.ssrn.com/sol3/papers.cfm?abstract\_id=3669087

The FTC needs more resources to adequately address the nation’s growing privacy concerns. Currently, the FTC oversees both consumer protection—encompassing privacy—and antitrust,249 making the FTC the chief federal agency on privacy policy and enforcement250 and the nation’s de-facto privacy agency.251 The agency has long-standing experience in enforcing privacy statutes252 and also has special privacy assets, such as an internet lab capable of high-quality tech forensics to track invasions of privacy.253 The FTC, however, has failed to keep pace with the massive growth of privacy concerns—a phenomenon also driven by modern technology. Very few Americans feel conﬁdent in the privacy of their information in the digital age.254 According to a 2019 study, over 80% of Americans feel that they have little to no control over the data collected on them by companies and the government.255 To adequately address privacy concerns, the FTC needs more resources.256 The agency has been explicit that it needs more manpower to police tech companies. In requesting increased funding from Congress, FTC Director Joseph Simons said the money would allow the agency to hire additional staff and bring more privacy cases.257 A former director of the FTC’s Bureau of Consumer Protection, which houses the privacy unit, has called the FTC “woefully understaffed.”258 As of the spring of 2019, the FTC had only forty employees dedicated to privacy and data security, compared to 500 and 110 employees at comparable agencies in the UK. and Ireland, respectively.259 Without more lawyers, investigators, and technologists, the FTC will be forced to conduct privacy investigations less thoroughly, and in some cases, forgo them altogether.260 Currently, the FT C’s resources are spread thin across multiple missions, to the detriment of its privacy efforts. Removing the agency’s antitrust responsibilities would reallocate resources from the antitrust department to its privacy unit and other areas of consumer protection. Further, it would free up the scarce time of the commissioners to oversee this essential effort.261

#### Unchecked algorithmic bias risks massive inequality and extinction.

Mike Thomas 20. Quoting AI experts including MIT Physics Professors, Senior Features Writer for BuiltIn. THE FUTURE OF ARTIFICIAL INTELLIGENCE: 7 ways AI can change the world for better ... or worse, Updated: April 20, 2020, <https://builtin.com/artificial-intelligence/artificial-intelligence-future>

Klabjan also puts little stock in extreme scenarios — the type involving, say, murderous cyborgs that turn the earth into a smoldering hellscape. He’s much more concerned with machines — war robots, for instance — being fed faulty “incentives” by nefarious humans. As MIT physics professors and leading AI researcher Max Tegmark put it in a 2018 TED Talk, “The real threat from AI isn’t malice, like in silly Hollywood movies, but competence — AI accomplishing goals that just aren’t aligned with ours.” That’s Laird’s take, too. “I definitely don’t see the scenario where something wakes up and decides it wants to take over the world,” he says. “I think that’s science fiction and not the way it’s going to play out.” What Laird worries most about isn’t evil AI, per se, but “evil humans using AI as a sort of false force multiplier” for things like bank robbery and credit card fraud, among many other crimes. And so, while he’s often frustrated with the pace of progress, AI’s slow burn may actually be a blessing. “Time to understand what we’re creating and how we’re going to incorporate it into society,” Laird says, “might be exactly what we need.” But no one knows for sure. “There are several major breakthroughs that have to occur, and those could come very quickly,” Russell said during his Westminster talk. Referencing the rapid transformational effect of nuclear fission (atom splitting) by British physicist Ernest Rutherford in 1917, he added, “It’s very, very hard to predict when these conceptual breakthroughs are going to happen.” But whenever they do, if they do, he emphasized the importance of preparation. That means starting or continuing discussions about the ethical use of A.G.I. and whether it should be regulated. That means working to eliminate data bias, which has a corrupting effect on algorithms and is currently a fat fly in the AI ointment. That means working to invent and augment security measures capable of keeping the technology in check. And it means having the humility to realize that just because we can doesn’t mean we should. “Our situation with technology is complicated, but the big picture is rather simple,” Tegmark said during his TED Talk. “Most AGI researchers expect AGI within decades, and if we just bumble into this unprepared, it will probably be the biggest mistake in human history. It could enable brutal global dictatorship with unprecedented inequality, surveillance, suffering and maybe even human extinction. But if we steer carefully, we could end up in a fantastic future where everybody’s better off—the poor are richer, the rich are richer, everybody’s healthy and free to live out their dreams.”

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#### The aff is sua sponte – it makes a decision in absence of arguments presented before the court – that crushes court legitimacy

Milani & Smith 02 (Adam and Michael, both are Assistant Professors, Mercer University School of Law, “Playing God: A Critical Look at Sua Sponte Decisions by Appellate Courts,” 69 Tenn. L. Rev. 245, Winter, lexis)

The heart of the American legal system is the adversary process in which trained advocates present the parties’ facts and arguments to neutral decision makers. The fundamental premise of the adversary process is that these advocates will uncover and present more useful information and arguments to the decision maker than would be developed by a judicial officer acting on his own in an inquisitorial system.3 The adversary process is also said to “promote[] litigant and societal acceptance of decisions rendered by the courts”4 because a party who “is intimately involved in the adjudicatory process and feels that he has [they have] been given a fair opportunity to present his case . . . is likely to accept the results whether favorable or not.”5 Indeed, the Joint Conference on Responsibility of the American Bar Association and the Association of American Law Schools stated that “[i]n a very real sense it may be said that the integrity of the adjudicative process itself depends upon the participation of the advocate.”6 Accordingly, most lawyers probably never think about the possibility that a court will decide a case on an issue that the court itself raises and which was neither briefed nor argued by the parties. But we all know it happens. We even have a name for such a decision: [is] sua sponte. Translated from its original Latin, “sua sponte” means “on his or its own motion.”7 In the legal setting, sua sponte describes a decision or action undertaken by a court on its own motion8 as opposed to an action or decision done in response to a party’s request or argument. As such, the concept of “sua sponte” is an important exception to two basic [the] principles of our adversary system of adjudication: (1) that the parties will control the litigation, and (2) that the decision maker will be neutral and passive.9 One of the clearest manifestations of these principles is that the parties themselves, not the decision maker, determine what issues will be adjudicated. In the context of judicial decision making, a court deviates from its traditional “passive” role in the adjudicatory process when it raises an issue not identified by the parties but which it deems relevant to the legal controversy before it. Nonetheless, raising issues sua sponte is not an uncommon practice.10 In fact, legal scholars have identified several kinds of issues that are commonly raised by courts on their own. First, both trial and appellate courts often raise jurisdictional issues such as standing, subject matter jurisdiction, and mootness sua sponte.1

#### That corrodes rule of law via abdicating judicial legitimacy.

Donaldson ’17 [Michael J; Partner at Burnet, Duckworth & Palmer, LLP, Master of Laws from Columbia; 2017; “Justice in Full Is Time Well Spent: Why the Supreme Court Should Ban Sua Sponte Dismissals”; http://www.bdplaw.com/publications/justice-in-full-is-time-well-spent-why-the-supreme-court-should-ban-sua-sponte-dismissals/; Quinnipiac Law Review, Vol 36; accessed 9/15/21; TV]

There is a lot wrong with sua sponte dismissals. They are inconsistent with the adversary system, and change the judge's role from referee to contestant.85 They can undermine respect for the legal system. And they increase the likelihood of errors, leading to unnecessary appeals and a waste of judicial resources." But most importantly, they lack the very due process the courts are supposed to safeguard. A. Failure to Provide Due Process Sua sponte decisions are inconsistent with due process.89 Period. There is no other way to look at it. 90 Not only does a plaintiff surprised by a sua sponte dismissal not receive "due" process, she receives no process at all.91 She has no idea her lawsuit is in jeopardy of being dismissed, no idea what the reasons for that dismissal might be, and no opportunity to respond. 92 This is the case whether the court's dismissal decision is right or wrong. 93 As Allan Vestal puts it: When [issues are] considered sua sponte both parties are taken completely by surprise and the court decides the matter on grounds not urged by either. Neither has had any opportunity to consider the matter, and both are now bound by res judicata grounded on considerations which represent not well reasoned positions for the litigants, but rather only the fortuitous decision of a 94 wayward court. The reference to res judicata here is important. As Milani and Smith point out, the res judicata doctrine requires a party or its privy to be a participant in the former proceeding before the court can bind him to the consequences of that proceeding because, according to the Supreme Court, "The opportunity to be heard is an essential requisite of due process of law in judicial proceedings."95 If this is the standard applied to former proceedings, how can it not apply to proceedings currently before the court? Lon Fuller once wrote of sua sponte decisionmaking: [I]f the grounds for the decision fall completely outside the framework of the argument, making all that was discussed or proved at the hearing irrelevant ... the adjudicative process has become a sham, for the parties' participation in the decision has lost all meaning.9 6 The situation is even harder to defend when there is no hearing at all. 9 B. Undermining Respect for the Legal System The perception that the courts are regularly failing to provide due process cannot do anything but undermine respect for the legal system.9 8 Sir Robert Megarry, in the speech quoted at the beginning of this article,99 underlined the importance of sending the unsuccessful litigant away feeling as though he has had a fair hearing.' Justice Harlan was obviously cognizant of this problem in his dissent in Mapp, when he warned that the Court's sua sponte decision in that case was "not likely to promote respect ... for the court's adjudicatory process."o This is not a farfetched concern. Offenkrantz and Lichter note that in the Second Circuit's high-profile decision to "[sua sponte remove] Judge Shira Scheindlin from further proceedings in two stop-and-frisk cases," an order which left the Judge "completely blindsided," "newspapers were reporting that appellate courts had carte blanche to raise and decide important issues in a case without ever seeking the input of any of the parties to it."' 0 2 Megarry tells a story of a client of his who had a fatal flaw in his case, but insisted on going ahead anyway.10 3 Instead of seizing on the fatal flaw at the outset, the trial judge heard the case all the way through.1 0 4 The client won on his two collateral points, but, as expected, lost on the key issue. o Megarry tells the story of what happened next: The course taken by the judge must have prolonged the hearing by an hour or two. But the effect on the defeated tenant was striking. True, he had lost the last point and the case as a whole; but he had been victorious on the other two points. All that nonsense about the agent's lack of authority and the letter not having been received in time had been blown away by the judge. It was a pity about the wording of the letter, of course; but he had seen his case being put in full, and none of his grievances had been left unheard or unresolved. This is as it should be. Courts must not, as Megarry puts it, give in to "the temptation of brevity."'0 o Their very legitimacy hangs in the balance. A loss of respect for the courts marks the beginning of the unraveling of the rule of law. This is simply too high of a price to pay for efficiency.

#### Extinction.

Davis and Morse ’18 [Christina and Julia; September 19; Professor of Government at Harvard University; Professor of Political Science at the University of California at Santa Barbara; International Studies Quarterly, “Protecting Trade by Legalizing Political Disputes: Why Countries Bring Cases to the International Court of Justice,” vol. 62]

Trade, Conflict, and Adjudication We argue that countries turn to international adjudication to protect trade flows under conditions of strong economic interdependence. This argument is built on two key assumptions. First, states believe that an international dispute over territory, fishing rights, or another salient issue could harm trade. Second, states view international adjudication as an effective way to end the dispute. Given the risk of harm to economic relations and the potential for courts to contribute to conflict resolution, states with high trade value vested in a relationship will be more willing to undertake costly litigation. This section elaborates on the general conditions of our theory and then explains why the ICJ is a good venue for testing the relationship between economic interdependence and international adjudication. The Adverse Impact of Conflict on Trade The premise that conflict disrupts trade is central to the theory of commercial peace. Russett and Oneal (2001) draw on the work of philosopher Immanuel Kant to argue that interdependence deters conflict by raising its costs. According to this reasoning, war interrupts trade while peace promotes stable commerce, leading states to calculate that the gains of peace are significant compared to the costs of war.4 Other perspectives focus on the informational role of interdependence to lower uncertainty between states (Reed 2003). Gartzke, Li, and Boehmer (2001) contend economic interdependence allows states to signal their resolve through their willingness to bear the economic costs of confrontation.5 A host of empirical studies supports the idea that conflict reduces trade (Keshk, Reuveny, and Pollins 2004; Long 2008). Several potential channels connect trade and conflict, including direct damage to infrastructure and transportation resulting from actual conflict, sanctions policies, and informal discrimination by governments or private actors. Glick and Taylor (2010) find that the effect of war on trade is significant and persistent. At a lower level, political tensions may also suppress trade (Pollins 1989; Fuchs and Klann 2013). Consumer boycotts and financial market reactions in some cases have led to adverse market impact (Fisman, Hamao, and Wang 2014; Heilmann 2016; Pandya 2016). Simmons (2005) finds that territorial disputes have a sizable negative impact on trade even in the absence of militarized action. Others suggest states anticipate the potential adverse impact of conflict on trade, and therefore trade less to begin with if they think that war is likely. In such a scenario, the marginal economic costs of war should be insufficient to change a state's calculation for going to war (Morrow 1999; Barbieri 2002). Gowa and Hicks (2017) contend that trade is largely diverted through third-party channels, which compensate for having less direct trade with the adversary. We assume that leaders and business constituencies on average believe that conflict damages trade relations. Political conflict could lead governments to adopt sanctions against an adversary or to restrict financial flows. Violence likely disrupts trading routes and slows the movement of goods. The potential for adverse financial market reactions and consumer response adds further unpredictability about the risk of spillover from political disagreement into economic harm. Substitution through third parties could alleviate the harm, but this would still increase trade costs. The expected harm to trade motivates states to pursue the resolution of disputes. Adjudication as a Conflict Resolution Mechanism When states want to resolve an interstate dispute, why would they choose adjudication rather than negotiations, economic sanctions, or militarized action? In some cases, the decision follows an episode of military conflict as part of an effort to normalize relations. In other disputes, countries may turn to a legal venue to prevent a problem from ever reaching the stage that could produce serious political tensions or threats of force. The literature offers three broad types of explanations for why states pursue adjudication: legitimacy, informational benefits, and domestic obstacles to settlement. At the systemic level, international norms support peaceful conflict resolution. Some contend that rule of law has come to shape the identities of states, forming norms about appropriate action in both the domestic and international spheres (Finnemore and Sikkink (1998, 902). When international law has been established through fair procedures and offers coherent principles, it forms a legitimate source of authority in international affairs that generates an independent “compliance pull” on state behavior (Franck 1990, 65). International courts combine both legitimacy and authority as they help states solve specific disputes about how to interpret international law; the growing role for international courts in international affairs represents an important trend (Alter 2014; Alter, Helfer, and Madsen 2016). Integration with national courts has reinforced states’ use of the European Court of Justice (ECJ), which stands out for its expansive caseload and impact on state behavior (Alter 1998). The ICJ has achieved a relatively strong record of compliance with rulings (Schulte 2004; Llamzon 2007; Mitchell and Hensel 2007; Johns 2012). Legal settlement can help states coordinate policies through the provision of information. Compared to bilateral negotiations or nonbinding third-party arbitration, adjudication conveys a government's willingness to reach an agreement (Helfer and Slaughter 2005; Gent and Shannon 2010). Having taken the public step to initiate legal action, a government would appear inconsistent and incur a reputational penalty if it also took unilateral measures such as sanctions or military actions before the legal process had reached a conclusion. This shapes the diplomatic context because participants know that the matter will neither escalate into violence nor disappear through neglect. A court ruling offers a focal point amidst uncertainty about how to interpret the terms of an agreement (Ginsburg and McAdams 2004; Huth, Croco, and Appel 2011). As the record-keeper of past actions, courts support systems of tit-for-tat and reputational enforcement (Milgrom, North, and Weingast 1990; Carrubba 2005; Mitchell and Hensel 2007). In these informational theories of courts, states may comply with court rulings in the absence of coercive measures or the threat of sanctions because the reputational costs of noncompliance are too high. Rather than simply interpret law, courts coordinate expectations about enforcement. Johns (2012) models the circumstances whereby mobilization of third-party actions in support of a court ruling generates endogenous enforcement that can affect outcomes. In this way, multilateral enforcement makes an international court different from the pressure available in bilateral negotiations. International courts also offer a way for states to frame settlements to appeal to domestic audiences (Fang 2008). Simmons notes that even when the same deal could be reached in negotiations or through a court decision, a negotiated settlement could be viewed as a sign of weakness while legal resolution would be a positive signal for future cooperation (Simmons 2002, 834). This dynamic occurs because “domestic groups will find it more attractive to make concessions to a disinterested institution than to a political adversary” (Simmons 2002, 834). In research on several prominent ICJ cases, Fischer (1982, 271) emphasizes the court has helped governments to save face. Consequently, those governments unable to reach agreements over domestic opposition may find it easier to do so with the involvement of a third-party ruling. Allee and Huth (2006a) show that governments with higher levels of domestic political constraints are more likely to choose adjudication over negotiation for settling territorial disputes. Domestic political constraints also increase the probability of filing complaints at the WTO (Davis 2012). The mobilization of domestic groups plays a critical role in litigation patterns at the ECJ (Alter and Vargas 2000).a

## Case

### Solvency

#### Antitrust alone fails and takes too long

**Kimmelman, 18** – President of Public Knowledge and former Chief Counsel in the Antitrust Division; and Charlotte Slaiman, Public Knowledge Policy Counsel

[Gene Kimmelman, "Antitrust Alone Won’t Save Us From the “Curse of Bigness”," Medium, 11-15-2018, https://publicknowledge.medium.com/antitrust-alone-wont-save-us-from-the-curse-of-bigness-c90e5334aa32, accessed 7-13-2021]

Tim Wu’s latest book, “The Curse of Bigness: Antitrust in the New Gilded Age,” describes the enormous dangers arising from concentrated economic power and sends a critical clarion call for challenging monopoly and oligopoly to preserve democracy. While Tim acknowledges the need for additional policy solutions, his focus on antitrust overstates its power to eliminate the full array of harms caused by highly concentrated markets. We also need regulation. The excessive market concentration and corporate power we see today resulted not only from conservative jurisprudence and lax antitrust enforcement, but also excessive deregulation. It will take much more than antitrust to rectify this.

I have tried to rein in the power of telecommunications, media and cable giants for more than 30 years. In these important industries, strong antitrust has only worked when paired with equally strong pro-competition market-opening regulations. One need not look further than to the makeup of the Supreme Court over the last few decades to understand how antitrust law’s broad language has been constrained substantially to limit enforcement. But even in the heyday of antitrust, it took the creation of and engagement by regulatory agencies to constrain the abuses of airline, pharmaceutical, and agricultural behemoths.

Antitrust alone is too narrow, often takes too long, and generally only seeks to correct harms after the fact — often long after enforcement can effectively address the competitive damage.

### Advantage 1

#### Anticompetitive impacts of holding multiple SEPs are limited and don’t undermine innovation --- Bargaining is sufficient

Spulber ’20 [Daniel; Elinor Hobbs Distinguished Professor of International Business, and Professor of Strategy, Strategy Department, Kellogg School of Management, Northwestern University, and Professor of Law (Courtesy), Pritzker School of Law, Northwestern University, Articles And Essay: Licensing Standard Essential Patents With Frand Commitments: Preparing For 5g Mobile Telecommunications, 18 Colo. Tech. L.J. 79, 81]

E. FRAND and the "Complements Problem"

Performance and interoperability are central to technology standards. Combining multiple technologies both within and among innovative products drives the need for interoperability. Multiple patented inventions provide complementary components in innovative products and production processes. The combination of complementary components often results in complex systems that generate benefits greater than can be achieved by separate groups of components. 272

SSOs do not intend for FRAND policies to address the "complements problem." The "complements problem" refers to the challenge of allocating the joint benefits of complementary inventions to the owners of those inventions. 273This problem is best solved by decentralized bilateral bargaining among patent holders and [\*138] implementers. 274SSOs rely on bargaining in the marketplace to address the allocation of the benefits of invention and innovation. I have demonstrated elsewhere that bilateral negotiation of patent license agreements guarantees that total royalties and royalties per unit of output are lower than those of a patent pool. 275

There are a number of public policy concerns associated with the "complements problem" including "royalty stacking," "patent thickets," and the "Tragedy of the Anti-Commons". 276These closely-related theoretical concepts suggest that with complementary patented inventions, total royalties will be "excessive" due to lack of coordination among licensors. 277These policy concerns are all based on an application of the classic complementary monopolies model of Antoine Cournot. 278

Cournot's theoretical analysis shows that monopolists supplying complementary inputs to competitive downstream producers will choose prices whose total is greater than what a monopolist would charge for a bundle of those inputs. 279This inefficiency is known as the "Cournot Effect". The "Cournot Effect" is a type of "free-rider problem," where each input monopolist chooses its price without taking into account the effect of its price on the demand for all of the complementary inputs. 280Because inputs are complements, an increase in the price of one input lowers demand for all of the inputs. The theoretical "Cournot Effect" is the result of assuming that complementary monopolists offer take-it-or-leave-it prices to producers. 281

Patent policy concerns based on the "complements problem" are misguided. In the patent context, patent holders negotiate patent license agreements with implementers. In contrast to take-it-or-leave-it price offers, negotiation eliminates the distortions associated with the "Cournot Effect". Negotiation results in lower total [\*139] royalties in comparison with a monopoly patent pool that offers licenses for the bundle of complementary inventions. 282

SSO FRAND policies predate by many decades any patent policy concerns related to the "complements problem". As with the "patent holdup" problem, SSO FRAND policies do not address these supposed problems either. SSO FRAND policies do not mention any phenomena resembling these theoretical concepts, and there is little evidence that these closely-related problems have ever been observed. 283The significant pace of technological change and widespread diffusion of advances in ICT provide substantial evidence that these problems do not occur.

#### Patent holdups’ are a lie. Antitrust policies are a greater threat --- prefer bargaining

Barnett ’18 [Jonathan, Ronald A. Cass, Richard A. Epstein, Douglas H. Ginsburg, Gus Hurwitz, David J. Kappos, Paul Michel, Adam Mossoff, Kristen Osenga, David J. Teece, and Joshua D. Wright; February 22; Professor at the USC Gould School of Law; Dean Emeritus of the Boston University School of Law; Law Professor at New York University; Senior Circuit Judge, United States Court of Appeals for the District of Columbia Circuit, Law Professor at George Mason University; Law Professor at the University of Nebraska; Former Under Secretary of Commerce and Director of the United States Patent & Trademark Office; Retired Chief Judge of the United States Court of Appeals for the Federal Circuit; Law Professor at George Mason University; Professor at the University of Richmond School of Law; Thomas W. Tusher Professor in Global Business at the University of California at Berkeley; Former Commissioner of the Federal Trade Commissioner, Law Professor at George Mason University; IP Watchdog, “Apply Evidence-based Approach to Antitrust Law Equally to Innovators and Implementers,” https://www.ipwatchdog.com/2018/02/22/evidence-based-application-antitrust-law/id=93755/]

As judges, former judges and government officials, legal academics and economists who are experts in antitrust and intellectual property law, we write to express our support for your recent announcement that the Antitrust Division of the Department of Justice will adopt an evidence-based approach in applying antitrust law equally to both innovators who develop and implementers who use technological standards in the innovation industries.

We disagree with the letter recently submitted to you on January 24, 2018 by other parties who expressed their misgivings with your announcement of your plan to return to this sound antitrust policy. Unfortunately, their January 24 letter perpetuates the long-standing misunderstanding held by some academics, policy activists, and companies, who baldly assert that one-sided “patent holdup” is a real-world problem in the high-tech industries. This claim rests entirely on questionable models that predict that opportunistic behavior in patent licensing transactions will result in higher consumer prices. These predictions are inconsistent with actual market data in any high-tech industry.

It bears emphasizing that no empirical study has demonstrated that a patent-owner’s request for injunctive relief after a finding of a defendant’s infringement of its property rights has ever resulted either in consumer harm or in slowing down the pace of technological innovation. Given the well understood role that innovation plays in facilitating economic growth and wellbeing, a heavy burden of proof rests on those who insist on the centrality of “patent holdup” to offer some tangible support for that view, which they have ultimately failed to supply in the decade or more since that theory was first propounded. Given the contrary conclusions in economic studies of the past decade, there is no sound empirical basis for claims of a systematic problem of opportunistic “patent holdup” by owners of patents on technological standards.

Several empirical studies demonstrate that the observed pattern in high-tech industries, especially in the smartphone industry, is one of constant lower quality-adjusted prices, increased entry and competition, and higher performance standards. These robust findings all contradict the testable implications of “patent holdup” theory. The best explanation for this disconnect between the flawed “patent holdup” theory and overwhelming weight of the evidence lies in the institutional features that surround industry licensing practices. These practices include bilateral licensing negotiations, and the reputation effects in long-term standards activities. Both support a feed-back mechanism that creates a system of natural checks and balances in the setting of royalty rates. The simplistic models of “patent holdup” ignore all these moderating effects.

Of even greater concern are the likely negative social welfare consequences of prior antitrust policies implemented based upon nothing more than the purely theoretical concern about opportunistic “patent holdup” behavior by owners of patented innovations incorporated 2 into technological standards. For example, those policies have resulted in demands to set royalty rates for technologies incorporated into standards in the smartphone industry according to particular components in a smartphone. This was a change to the longstanding industry practice of licensing at the end-user device level, which recognized that fundamental technologies incorporated into the cellular standards like 2G, 3G, etc., optimize the entire wireless system and network, and not just the specific chip or component of a chip inside a device.

#### Antitrust is a wrecking ball for innovation --- Spurs overdeterrence and uncertainty

Ginsburg ’15 [Douglas H. Ginsburg, Koren W. Wong-Ervin, & Joshua D. Wright; October; Retired Chief Judge of the DC Court of Appeals, Law Professor at George Mason University; former Counsel for Intellectual Property and International Antitrust at the U.S. Federal Trade Commission; Former Commissioner of the Federal Trade Commissioner, Law Professor at George Mason University; CPI Antitrust Chronicle, “The Troubling Use of Antitrust to Regulate FRAND Licensing,” ssrn.com/abstract=2674759]

Moreover, an antitrust sanction is not only unnecessary to protect consumer welfare given that the law of contracts is sufficient to provide optimal deterrence, 18 but is likely to be harmful.19 First, significant monetary sanctions are likely to over-deter procompetitive participation in SSOs; FRAND-encumbered SEP holders need the credible threat of an injunction if they are to recoup the value added by their patents and have no other adequate remedy against an infringing user. Indeed, excessive deterrence is particularly likely because, with liability turning upon whether the infringing user was truly a “willing licensee”20—a factual determination that may be far from clear in many cases—the outcome of an antitrust case will necessarily be uncertain. The prospect of penalizing a FRAND-encumbered SEP holder for seeking injunctive relief diminishes the value of its patents and hence reduces its incentive to innovate.

Second, the prospect of antitrust liability for a patentee seeking injunctive relief would enable an infringing user to negotiate in bad faith, knowing its exposure is capped at the FRAND royalty rate; in this way, an unscrupulous or a judgment-proof infringing user can force the SEP holder to take a below-FRAND rate. Indeed, when the worst penalty an SEP infringer faces is not an injunction but merely paying, after a neutral adjudication, the FRAND royalty that it should have agreed to pay when first asked, then reverse holdup and holdout give implementers a profitable way to defer payment—or if they are judgment proof, to avoid payment altogether— and puts SEP holders at a disadvantage that reduces the rewards from, and can only discourage innovation and participation in, standard setting.21

Third, antitrust liability is likely to deter patent holders from contributing their technology to an SSO under FRAND terms if doing so will require them to forfeit their right to protect their intellectual property by seeking an injunction against infringing users. These possibilities, far from protecting the public interest in competition and innovation, actually threaten to reduce the gains from innovation and standardization. V. CONCLUSION

The new antitrust rules are troubling not only because they are wholly unsupported by empirical evidence, but also because they threaten to deter participation in standard setting and reduce the incentive to innovate. Antitrust enforcers around the globe should be wary of upsetting the carefully balanced FRAND-ecosystem, and should consider the unintended consequences of their proposed solution to the largely theoretical problem of patent holdup.

### Advantage 2

#### No cyber impact

Lewis 20—(senior vice president and director of the Technology Policy Program at the Center for Strategic and International Studies). Lewis, James. 2020. “Dismissing Cyber Catastrophe.” Center for Strategic & International Studies. August 17, 2020. https://www.csis.org/analysis/dismissing-cyber-catastrophe.

A catastrophic cyberattack was first predicted in the mid-1990s. Since then, predictions of a catastrophe have appeared regularly and have entered the popular consciousness. As a trope, a cyber catastrophe captures our imagination, but as analysis, it remains entirely imaginary and is of dubious value as a basis for policymaking. There has never been a catastrophic cyberattack. To qualify as a catastrophe, an event must produce damaging mass effect, including casualties and destruction. The fires that swept across California last summer were a catastrophe. Covid-19 has been a catastrophe, especially in countries with inadequate responses. With man-made actions, however, a catastrophe is harder to produce than it may seem, and for cyberattacks a catastrophe requires organizational and technical skills most actors still do not possess. It requires planning, reconnaissance to find vulnerabilities, and then acquiring or building attack tools—things that require resources and experience. To achieve mass effect, either a few central targets (like an electrical grid) need to be hit or multiple targets would have to be hit simultaneously (as is the case with urban water systems), something that is itself an operational challenge. It is easier to imagine a catastrophe than to produce it. The 2003 East Coast blackout is the archetype for an attack on the U.S. electrical grid. No one died in this blackout, and services were restored in a few days. As electric production is digitized, vulnerability increases, but many electrical companies have made cybersecurity a priority. Similarly, at water treatment plants, the chemicals used to purify water are controlled in ways that make mass releases difficult. In any case, it would take a massive amount of chemicals to poison large rivers or lakes, more than most companies keep on hand, and any release would quickly be diluted. More importantly, there are powerful strategic constraints on those who have the ability to launch catastrophe attacks. We have more than two decades of experience with the use of cyber techniques and operations for coercive and criminal purposes and have a clear understanding of motives, capabilities, and intentions. We can be guided by the methods of the Strategic Bombing Survey, which used interviews and observation (rather than hypotheses) to determine effect. These methods apply equally to cyberattacks. The conclusions we can draw from this are: Nonstate actors and most states lack the capability to launch attacks that cause physical damage at any level, much less a catastrophe. There have been regular predictions every year for over a decade that nonstate actors will acquire these high-end cyber capabilities in two or three years in what has become a cycle of repetition. The monetary return is negligible, which dissuades the skilled cybercriminals (mostly Russian speaking) who might have the necessary skills. One mystery is why these groups have not been used as mercenaries, and this may reflect either a degree of control by the Russian state (if it has forbidden mercenary acts) or a degree of caution by criminals. There is enough uncertainty among potential attackers about the United States’ ability to attribute that they are unwilling to risk massive retaliation in response to a catastrophic attack. (They are perfectly willing to take the risk of attribution for espionage and coercive cyber actions.) No one has ever died from a cyberattack, and only a handful of these attacks have produced physical damage. A cyberattack is not a nuclear weapon, and it is intellectually lazy to equate them to nuclear weapons. Using a tactical nuclear weapon against an urban center would produce several hundred thousand casualties, while a strategic nuclear exchange would cause tens of millions of casualties and immense physical destruction. These are catastrophes that some hack cannot duplicate. The shadow of nuclear war distorts discussion of cyber warfare. State use of cyber operations is consistent with their broad national strategies and interests. Their primary emphasis is on espionage and political coercion. The United States has opponents and is in conflict with them, but they have no interest in launching a catastrophic cyberattack since it would certainly produce an equally catastrophic retaliation. Their goal is to stay below the “use-of-force” threshold and undertake damaging cyber actions against the United States, not start a war. This has implications for the discussion of inadvertent escalation, something that has also never occurred. The concern over escalation deserves a longer discussion, as there are both technological and strategic constraints that shape and limit risk in cyber operations, and the absence of inadvertent escalation suggests a high degree of control for cyber capabilities by advanced states. Attackers, particularly among the United States’ major opponents for whom cyber is just one of the tools for confrontation, seek to avoid actions that could trigger escalation. The United States has two opponents (China and Russia) who are capable of damaging cyberattacks. Russia has demonstrated its attack skills on the Ukrainian power grid, but neither Russia nor China would be well served by a similar attack on the United States. Iran is improving and may reach the point where it could use cyberattacks to cause major damage, but it would only do so when it has decided to engage in a major armed conflict with the United States. Iran might attack targets outside the United States and its allies with less risk and continues to experiment with cyberattacks against Israeli critical infrastructure. North Korea has not yet developed this kind of capability. One major failing of catastrophe scenarios is that they discount the robustness and resilience of modern economies. These economies present multiple targets and configurations; they are harder to damage through cyberattack than they look, given the growing (albeit incomplete) attention to cybersecurity; and experience shows that people compensate for damage and quickly repair or rebuild. This was one of the counterintuitive lessons of the Strategic Bombing Survey. Pre-war planning assumed that civilian morale and production would crumple under aerial bombardment. In fact, the opposite occurred. Resistance hardened and production was restored.1 This is a short overview of why catastrophe is unlikely. Several longer CSIS reports go into the reasons in some detail. Past performance may not necessarily predict the future, but after 25 years without a single catastrophic cyberattack, we should invoke the concept cautiously, if at all. Why then, it is raised so often? Some of the explanation for the emphasis on cyber catastrophe is hortatory. When the author of one of the first reports (in the 1990s) to sound the alarm over cyber catastrophe was asked later why he had warned of a cyber Pearl Harbor when it was clear this was not going to happen, his reply was that he hoped to scare people into action. "Catastrophe is nigh; we must act" was possibly a reasonable strategy 22 years ago, but no longer. The resilience of historical events to remain culturally significant must be taken into account for an objective assessment of cyber warfare, and this will require the United States to discard some hypothetical scenarios. The long experience of living under the shadow of nuclear annihilation still shapes American thinking and conditions the United States to expect extreme outcomes. American thinking is also shaped by the experience of 9/11, a wrenching attack that caught the United States by surprise. Fears of another 9/11 reinforce the memory of nuclear war in driving the catastrophe trope, but when applied to cyberattack, these scenarios do not track with operational requirements or the nature of opponent strategy and planning. The contours of cyber warfare are emerging, but they are not always what we discuss. Better policy will require greater objectivity.

#### No nuclear hacks

Green, MA, 2 (Joshua, Editor, Washington Monthly, “The Myth of Cyberterrorism”, November, http://www.washingtonmonthly.com/features/2001/0211.green.html)

When ordinary people imagine cyberterrorism, they tend to think along Hollywood plot lines, doomsday scenarios in which terrorists hijack nuclear weapons, airliners, or military computers from halfway around the world. Given the colorful history of federal boondoggles--billion-dollar weapons systems that misfire, $600 toilet seats--that's an understandable concern. But, with few exceptions, it's not one that applies to preparedness for a cyberattack. "The government is miles ahead of the private sector when it comes to cybersecurity," says Michael Cheek, director of intelligence for iDefense, a Virginia-based computer security company with government and private-sector clients. "Particularly the most sensitive military systems." Serious effort and plain good fortune have combined to bring this about. Take nuclear weapons. The biggest fallacy about their vulnerability, promoted in action thrillers like WarGames, is that they're designed for remote operation. "[The movie] is premised on the assumption that there's a modem bank hanging on the side of the computer that controls the missiles," says Martin Libicki, a defense analyst at the RAND Corporation. "I assure you, there isn't." Rather, nuclear weapons and other sensitive military systems enjoy the most basic form of Internet security: they're "air-gapped," meaning that they're not physically connected to the Internet and are therefore inaccessible to outside hackers. (Nuclear weapons also contain "permissive action links," mechanisms to prevent weapons from being armed without inputting codes carried by the president.) A retired military official was somewhat indignant at the mere suggestion: "As a general principle, we've been looking at this thing for 20 years. What cave have you been living in if you haven't considered this [threat]?" When it comes to cyberthreats, the Defense Department has been particularly vigilant to protect key systems by isolating them from the Net and even from the Pentagon's internal network. All new software must be submitted to the National Security Agency for security testing. "Terrorists could not gain control of our spacecraft, nuclear weapons, or any other type of high-consequence asset," says Air Force Chief Information Officer John Gilligan. For more than a year, Pentagon CIO John Stenbit has enforced a moratorium on new wireless networks, which are often easy to hack into, as well as common wireless devices such as PDAs, BlackBerrys, and even wireless or infrared copiers and faxes.

# 2NC

## 2NC --- Advantage 1

### 2NC --- UQ Top

#### Every empirical study finds that SEP innovation is metro boomin AND prices are low

Sidak ’18 [Gregory; 2018; Chairman of Criterion Economics, Formerly Ronald Coase Professor of Law and Economics at Tilburg University, Formerly Visiting Professor of Law at Georgetown University, Formerly Senior Lecturer at the Yale School of Management at Yale University, Formerly Deputy General Counsel to the Federal Communications Commission, Founding Editor of the Journal of Competition Law & Economics; Criterion Journal on Innovation, “Is Patent Holdup a Hoax?” Volum 3, https://www.criterioneconomics.com/sidak-is-patent-holdup-a-hoax.html]

Furthermore, economists who have empirically tested the predictions of the patent-holdup conjecture have found that their findings contradict those predictions.109 For example, the proponents of the patent-holdup conjecture predict that holdup in SEP licensing would result in “higher prices, less product choice and less investment [in innovation].”110 However, in 2017, Alexander Galetovic and Stephen Haber found that, contrary to those predictions, between 1994 and 2013, products incorporating SEPs exhibited higher rates of innovation than did products that did not rely on SEPs.111 They measured the rate of innovation by analyzing the relative rates of change in quality-adjusted prices and found that the rates of innovation for products that rely on SEPs significantly exceeded the economy-wide average.112 In addition, Galetovic and Haber found that “there was rapid entry of new firms [,] . . . so much so that industrial concentration, measured with the number of devices sold, actually fell in this industry over time.”113 Therefore, their empirical results contradict the predictions that patent holdup will result in higher quality-adjusted prices, fewer products, or less innovation.

As of November 2018, proponents of the patent-holdup conjecture have failed to reconcile their theory with the empirical evidence refuting it. Although Shapiro and other proponents purport to have responded to the empirical criticism of the patent-holdup conjecture, in fact they have ignored the vast majority of those substantive criticisms and have failed to explain why empirical evidence contradicts the predictions of the patent-holdup conjecture. For example, in response to John Golden’s thoughtful criticisms published in 2007,114 Lemley and Shapiro failed to provide any rigorous empirical analysis proving their claim that patent holders are overcompensated; instead, they simply asserted: “In our article, we offered several theoretical reasons to believe that judicial determinations of reasonable royalties might systematically overcompensate patent owners where multicomponent products are at issue.”115 Similarly, the attempts by Shapiro and other proponents to address the lack of affirmative empirical evidence supporting the patent holdup conjecture, as well as their attempts to defend that conjecture in the face of contradictory empirical evidence, have been superficial, ineffective, and unpersuasive. In October 2015, for example, Shapiro said in response to my criticisms of the patent-holdup conjecture that I was ignoring the large body of empirical research supporting the general theory of holdup—which is to say, authentically Williamsonian holdup.116 That statement is incorrect. By October 2015, I had already published many substantive criticisms of the patent-holdup conjecture that Shapiro simply ignored.117

#### U.S. innovation is high and globally dominant

Wolf ’21 [Martin; April 27; Chief Economics Commentator, M.A. in Economics from Oxford University; Financial Times, “China is wrong to think the US faces inevitable decline,” <https://www.ft.com/content/8336169e-d1a8-4be8-b143-308e5b52e355>]

The Chinese elite are convinced that the US is in irreversible decline. So reports Jude Blanchette of the Center for Strategic and International Studies, a respected Washington-based think-tank. What has been happening in the US in recent years, particularly in politics, supports this perspective. A stable liberal democracy would not elect Donald Trump — a man lacking all necessary qualities and abilities — to national leadership. Nevertheless, the notion of US decline is exaggerated. The US retains big assets, notably in economics.

For one and half centuries, the US has been the world’s most innovative economy. That has been the basis of its global power and influence. So how does its innovative power look today? The answer is: rather good, despite competition from China.

Stock markets are imperfect. But the value investors put on companies is at least a relatively impartial assessment of their prospects. At the end of last week, 7 of the 10 most valuable companies in the world and 14 of the top 20, were headquartered in the US.

If it were not for Saudi Arabian oil, the five most valuable companies in the world would be US technology giants: Apple, Microsoft, Amazon, Alphabet and Facebook. China has two valuable technology companies: Tencent (at seventh position) and Alibaba (at ninth). But those are China’s only companies in the top 20. The most valuable European company is LVMH at 17th. Yet LVMH is just a collection of established luxury brands. That ought to worry Europeans.

When we look only at technology companies, the US has 12 of the top 20; China (with Hong Kong but excluding Taiwan) has three; and there are two Dutch companies, one of which, ASML, is the largest manufacturer of machines that make integrated circuits. Taiwan has the Taiwan Semiconductor Manufacturing Company, the world’s biggest contract computer chipmaker, and South Korea has Samsung Electronics.

Life sciences are another crucial sector for future prosperity. Here there are seven European companies (with Switzerland and the UK included) in the top 20. But the US has seven of the top 10, and 11 of the top 20. There is also one Australian and one Japanese company, but no Chinese businesses.

In sum, US companies are globally dominant and nearly all the most valuable non-US firms are headquartered in allied countries.

### 2NC --- AT: ATR High

#### Antitrust is constrained in IP now.

Barnett ’20 [Jonathan; December 21; Law Professor at the University of Southern California; Antitrust Chronicle, “How and Why Almost Every Competition Regulator Was Wrong About Standard-Essential Patents,” Vol. 3, No. 2]

II. THE LEGAL UNRAVELING OF THE SEP-SKEPTICAL CONSENSUS

The reversal of the Federal Trade Commission v. Qualcomm decision has deservedly garnered extensive attention. Yet it is only one element in a sequence of regulatory pronouncements and judicial decisions since 2015, and accelerating starting in 2019, that have eroded a formerly blanket regulatory consensus in favor of deploying competition law to constrain substantially the enforcement and licensing capacities of SEP owners in wireless communications markets. To provide a point of reference for the rest of the discussion, the Table below sets forth selected regulatory and judicial actions that are representative of this policy shift.

|  |  |  |
| --- | --- | --- |
| Date | Court or Regulator | Action or Statement |
| Sept. 2015 | European Court of Justice | Permits SEP owners to seek injunctions in case of "unwilling licensee." |
| Nov. 2017 | DOJ Antitrust | Rejects view that SEPs pose high risk of patent holdup, given lack of evidence. |
| Mar. 2019 | UK High Court | Issues injunction against SEP infringer on grounds of "holdout" behavior. |
| Dec. 2019 | DOJ Antitrust, National Institute of Standards and Technology, U.S. Patent & Trademark Office | Rejects "no-injunction" rule for SEPs. Expresses concern over patent holdout. |
| May 2020 | German Federal Court of Justice | Adopts "unwilling licensee" standard for SEP injunctions. |
| Aug. 2020 | Court of Appeals for the Ninth Circuit | Overturns district court ruling in FTC v. Qualcomm. |
| Aug. 2020 | UK Supreme Court | Adopts "unwilling licensee" standard for SEP injunctions. |
| Sept. 2020 | Northern District of Texas | Dismisses antitrust suit against automotive 5G patent pool. |

Table 1. The Global Policy Shift on SEP Licensing (2015-Present)6 These judicial and regulatory actions have rejected, or expressed skepticism toward, the dominant view that the enforcement and licensing activities of SEP owners pose a high risk of patent holdup that warrants antitrust intervention. In particular, these judges and regulators have generally adopted two views that significantly constrain the role of antitrust in SEP licensing disputes.

### 2NC --- L --- O/V

#### 1. Liability --- it destroys incentives to participate in the standard setting process and kills innovation

Ginsburg et al. 21 – Antonin Scalia Law School, George Mason University

Douglas H. Ginsburg, Joshua D. Wright, Camila Ringeling, “Growing Convergence: The Limited Role of Antitrust in Standard Essential Patent Disputes,” George Mason University Law & Economics Research Paper Series, 21-19, CPI Antitrust Chronicle, Vol. 1, No. 2, Summer 2021, https://www.law.gmu.edu/pubs/papers/2119

There is no benefit to be had from imposing antitrust liability upon a patentee merely for seeking to enforce its property right. Indeed, to hold that seeking an injunction may be anticompetitive negatively affects an important right that promotes dynamic competition by ensuring there are strong incentives to invest in innovative technologies.98 More important still, imposing antitrust liability for enforcing an SEP frustrates the constitutional purpose of conferring patent rights, turning a property rule into a liability rule and creating a de facto compulsory licensing scheme.99

Competition and consumers both benefit when inventors have complete incentives to exploit their patent rights. This requires an assurance to inventors that they need not subsidize their competitors’ business models.100

#### 2. The prospect of antitrust liability for SEP holders over-deters.

Ginsburg et al. 15 – Judge on the U.S. Court of Appeals for the District of Columbia, Professor of Law at George Mason University School of Law, and Chairman of the International Advisory Committee of the Global Antitrust Institute

Douglas H. Ginsburg, Koren W. Wong-Ervin, Joshua D. Wright, “The Troubling Use of Antitrust to Regulate FRAND Licensing,” CPI Antitrust Chronicle, October 2015, https://www.law.gmu.edu/assets/files/publications/working\_papers/LS1537.pdf

Moreover, an antitrust sanction is not only unnecessary to protect consumer welfare given that the law of contracts is sufficient to provide optimal deterrence,18 but is likely to be harmful.19 First, significant monetary sanctions are likely to over-deter procompetitive participation in SSOs; FRAND-encumbered SEP holders need the credible threat of an injunction if they are to recoup the value added by their patents and have no other adequate remedy against an infringing user. Indeed, excessive deterrence is particularly likely because, with liability turning upon whether the infringing user was truly a “willing licensee”20—a factual determination that may be far from clear in many cases—the outcome of an antitrust case will necessarily be uncertain. The prospect of penalizing a FRAND-encumbered SEP holder for seeking injunctive relief diminishes the value of its patents and hence reduces its incentive to innovate.

Second, the prospect of antitrust liability for a patentee seeking injunctive relief would enable an infringing user to negotiate in bad faith, knowing its exposure is capped at the FRAND royalty rate; in this way, an unscrupulous or a judgment-proof infringing user can force the SEP holder to take a below-FRAND rate. Indeed, when the worst penalty an SEP infringer faces is not an injunction but merely paying, after a neutral adjudication, the FRAND royalty that it should have agreed to pay when first asked, then reverse holdup and holdout give implementers a profitable way to defer payment—or if they are judgment proof, to avoid payment altogether— and puts SEP holders at a disadvantage that reduces the rewards from, and can only discourage innovation and participation in, standard setting.21

#### 3. Treble damages make the aff uniquely harmful.

Ginsburg 14 – Senior Circuit Judge, U.S. Court of Appeals for the D.C. Circuit, Professor of Law at George Mason University

Douglas H. Ginsburg, Taylor M. Owings, Joshua D. Wright, “Enjoining Injunctions: The Case Against Antitrust Liability for Standard Essential Patent Holders Who Seek Injunctions,” The Antitrust Source, George Mason University Law and Economics Research Paper Series, October 2014, https://papers.ssrn.com/sol3/papers.cfm?abstract\_id=2515949

An Antitrust Sanction for Seeking an Injunction Would Be Harmful

An antitrust remedy is not only unnecessary to protect consumer welfare when the law of contracts and injunctions is sufficient, it would be harmful. First, a familiar point: antitrust liability comes with treble damages and so is most appropriate when anticompetitive conduct is difficult to detect or otherwise unlikely to be litigated. Because initiating litigation by filing for an injunction entails neither of these problems, treble damages will overdeter SEP holders that need an injunction to recoup the value added by their patents and have no other adequate remedy against an infringing user.24 Indeed, excessive deterrence is particularly likely because the outcome of an antitrust case would be uncertain. Liability would attach based in significant part upon whether the SEP holder refused a FRAND offer, but what constitutes a FRAND price is far from clear. A SEP holder with a meritorious position reasonably may fear a contrary finding and abandon its right to an injunction in order to avoid the risk of being held liable for treble damages.

For instance, a SEP holder may require injunctive relief against a SEP user that is or appears or claims to be judgment proof or consistently and in bad faith rejected FRAND terms to gain leverage in negotiations by putting the SEP holder to the need for costly litigation. Bo Vesterdorf, the former president of the General Court of the European Union, makes the point with unmistakable clarity:

If such SEP owners, when they believe that the only way to get [a SEP user] to accept to take a license is to seek an injunction against the unauthorized and thus illegal use of the SEP, run the risk of being found to abuse a dominant position with the ensuing risk of potentially large fines, it puts them in a position of unwarranted legal uncertainty.25

This uncertainty is not only bad for private parties, it is contrary to the public interest in dynamic competition. Overdeterring SEP holders from seeking an injunction effectively diminishes the value of their patents and hence their incentive to innovate.26 [FOOTNOTE 26 STARTS] 6 See id. (a prohibition on seeking an injunction “may discourage [SEP holders] from contributing their technology to standards and from accepting to commit to license on FRAND terms, or even discourage them from investing in R&D as much as they would otherwise have done”); Bernhard Ganglmair, Luke M. Froeb & Gregory J. Werden, Patent Hold-Up and Antitrust: How a Well-Intentioned Rule Could Retard Innovation, 60 J. INDUS. ECON. 249 (2012). [FOOTNOTEE 26 ENDS] It enables a SEP user to negotiate in bad faith, knowing its exposure is capped at the FRAND licensing rate, and requires a SEP holder to take a below-FRAND price from an unscrupulous or judgment-proof SEP user.27

### 2NC --- L --- Immnunity

#### There’s a precedent of patents being immune to antitrust --- that’s key to innovation.

Schuster and Day, 21 [W. Michael and Gregory Day; 2021; Professors at the University of Georgia’s Terry College of Business; Wisconsin Law Review, “Colluding Against a Patent,” Forthcoming Volume]

Courts have struggled to determine when, if ever, patent strategies may constitute an antitrust offense. In hopes of harmonizing patent and antitrust laws, the general rule is that a patent grants a zone of antitrust immunity, though questions persist about the scenarios in which a rightsholder has exceeded their patent's scope. 35Consider the competing functions of patent and antitrust laws.

1. Patent Law, Exclusion, and Innovation

The patent system is meant to promote innovation by granting twenty years of exclusive rights. 36Experts have long thought that society would lack incentives to create if third parties could copy and sell an inventor's device without incurring the costs of creation. 37To avoid this outcome, a patent confers exclusive rights, allowing the patent holder to charge monopoly prices (to the degree that consumers are willing to pay high [\*546] prices). 38If a party employs another's patented technology without acquiring a license, the patent owner may recover damages and seek injunctive relief, estopping the infringer from using the device altogether. 39Because patent law lacks a general defense of innocent or accidental infringement, firms must exercise significant caution in creating, employing, and selling technology. 40

Since a patent embodies "the right to exclude," it may come as little surprise that the system impedes degrees of competition. 41This has generated allegations that some patentees have sought to erect barriers to competition rather than to protect original technology. 42If patent owners undermine enough competition and innovation, critics contend that the abuse of patent rights should, at some point, constitute an antitrust offense. 43But antitrust's application to such innovation has so far posed a host of practical and theoretical problems.

2. Antitrust Law in the Shadow of Patents

Antitrust has struggled where it collides with patent law. To resolve this tension, courts have sought to draw clear lines about when patent owners can legally exclude competition or, in the alternative, when antitrust law may condemn exclusionary acts. The key to defining antitrust's scope stems from the historical difficulties of identifying anticompetitive conduct regardless of patent rights.

Uncertainty has long prevailed over the types of practices that antitrust law bans. This is due to the broad text of the Sherman Antitrust Act (Sherman Act) which facially forbids vast swaths of acceptable activity. 44Section 1 bans every trade restraint, as in "every contract, [\*547] combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce," 45while Section 2 makes it illegal to "monopolize, or attempt to monopolize ... any part of the trade or commerce." 46The courts, in turn, have struggled to identify when the elimination of firms was due to anticompetitive practices or valid competition. 47

To resolve confusion, courts in the 1970s leaned on scholarship (notably, the "Chicago School" 48) to reinterpret and narrow antitrust law into its modern form: the "consumer welfare prescription." 49The movement's leaders asserted that antitrust's sole purpose is to foster competition for the benefit of consumers. 50Because consumers are primarily concerned about prices, quality, and innovation, modern antitrust may only condemn exclusionary practices that raised prices, diminished quality, eroded innovation, or rendered similar effects in a defined market. 51To violate antitrust law, the reduction of competition [\*548] must derive from an exclusionary act rather than the innovation of superior goods or other legitimate means. 52

Since the patent system grants the legal right to exclude competition, 53the consensus is that patent owners enjoy antitrust immunity so long as they act within their patent's scope. 54Examples of where a rightsholder exceeds its patent and thereby offends antitrust law include the tying of a non-patented item with a patented good (which extends one's patent to the non-patented item) 55and sham infringement litigation. 56However, when a rightsholder refuses to license a patent or charges fortunes to do so, courts have largely characterized these acts as squarely within one's exclusive rights. 57The principle is that a patent owner - or anyone else - owes no duty to help their rival. 58

Also informing this rule, antitrust enforcement might threaten innovation. A theory is that firms would tepidly invest in research and development (R&D) if they feared exercising their right to exclude. 59Along the same lines, it is thought that courts are ill-equipped to identify whether an act of innovation was meant to produce a superior good or, instead, suppress competition. 60Thus, for practical and policy reasons, the exploitation of patent rights has not typically been considered an exclusionary act. Undeterred, plaintiffs have sought to impose antitrust liability on patent holders under an array of theories, as explained next.

### 2NC --- L --- Consensus

#### Don’t trust us --- The overwhelming consensus among experts is that antitrust nukes innovation in patents

Barnett ’19 [Jonathan; Spring; Law Professor at the University of Southern California; Michigan Technology Law Review, “Article: Antitrust Overreach: Undoing Cooperative Standardization in The Digital Economy,” Vol. 25]

Following the conventional view, scholars and regulators have widely predicted that the combination of abundant intellectual property ("IP") rights, multiple IP holders, and multi-component systems that characterizes wireless device markets is liable to yield a "tragedy of the anti-commons" 13 in which high IP density inflates prices, reduces access and impedes innovation. 14Those types of statements can be found in scholarly publications, in-fluential reports issued by the DOJ, the FTC and the Patent & Trademark Office ("PTO") from 2003 through 2013 15, and statements made by competition agencies in the European Union and Asian jurisdictions. 16Some scholars are already making similar claims before the Internet of Things has even been deployed, arguing that intensive patent usage in that market "is likely to cause significant social welfare loss in the years ahead." 17

This near-consensus among much of the scholarly and policymaking communities faces one minor difficulty: it does not describe any actual real-world market. As the wireless communications industry has moved from 2G to 3G to 4G standards, patent issuance and the dispersion of patent ownership has increased. 18The consensus view would expect to observe some combination of increased prices, reduced output, blocked entry, and delayed innovation. Yet markets have disobeyed that theory. Quality-adjusted prices on mobile telephone devices and computing equipment have fallen, smartphone devices have rapidly achieved high rates of adoption in consumer markets, entry rates in device production have remained robust, and computing and communications functionalities have continuously improved. 19

The now-standard view has a clear normative implication: namely, weaken IP rights and intervene in privately negotiated licensing arrangements to "protect" the public interest against opportunistic enforcement and royalty rate-setting by patent owners. Illustrated most vividly by the sweeping order issued in the FTC v. Qualcomm litigation 20, courts and regulators in the U.S. and other commercially significant jurisdictions (again, with the recent exception of the DOJ Antitrust Division 21) have adopted policies that threaten the security of SEPs and the associated licensing infrastructure that stands behind the smartphone and related ICT markets. Specifically, courts and regulators have largely withdrawn the possibility of injunctive relief for SEP owners while regulators have advocated approaches for determining "reasonable royalties" in SEP infringement litigation and SEP licenses that would effectively reallocate market surplus away from innovators and toward device producers. This regulatory and judicial "reset" of the property rules in ICT markets distorts market negotiations between innovator-firms that supply the smartphone market with R&D inputs and producer-firms that embed those inputs into devices for the end-user. If there is no credible threat of injunctive relief, a downstream firm that can fund an extended litigation process (an assumption easily satisfied by the largest branded handset manufacturers) will elect what some industry observers now call "efficient" infringement 22: that is, use the upstream firm's technology and then negotiate the royalty rate in the courthouse, rather than the marketplace.

The sequence of policy actions pursued by competition regulators in the U.S. and other jurisdictions has overlooked the patent-dependent organizational mechanisms that have supported both robust R&D investment and standardization initiatives in wireless communications markets. For several decades, those markets have achieved those two objectives through a bottom-up process of private ordering rooted in three legal anchors: (i) reasonably secure IP rights, (ii) quasi-contractual commitments informed by reputational norms, and (iii) surgically applied antitrust safeguards against collusion. A secure foundation of IP rights and contract enforcement is necessary to induce an innovator-firm to invest in R&D and contribute the resulting output toward a collective standard-setting initiative. A rational manager will only allocate resources to these high-cost, high-risk activities on the expectation that the firm can expect ultimately to earn returns through licensing relationships with producer-firms that have the capital and expertise to embody R&D in products for the end-user market. From a competition policy perspective, this vertically disaggregated structure, over which no individual firm can exercise control, compares favorably with more historically prevalent mechanisms for achieving standardization through the coercive power of a government monopoly regulator or the market power wielded by a single dominant firm.

The approximately three-decade history of wireless communications networks has shown how standardization can be achieved without government direction, thereby harnessing the superior information-gathering and processing capacities of the private market, but without entrenching a single dominant incumbent, thereby avoiding the pricing, output, and other distortions inherent to a monopolized market. When this occurs, there is no quasi-utility entity setting the standard, and government intervention counterproductively substitutes an ad hoc rate-setting process, as implemented through legal proceedings, for the collective judgment of market actors, as expressed through the price discovery mechanism. As scholars working in the public choice tradition have emphasized and documented, resource allocation through the political process presumptively underperforms resource allocation through the market due to inherent informational disadvantages, bureaucratic delay and the susceptibility of political entities to capture by well-organized rent-seeking constituencies. 23In the wireless communications markets, a consistent pattern of political-economic behavior supplies substantial ground for the latter concern, at both the "firm level" and the "country level." Since the inception of these markets, firms and countries that specialize in the production, assembly and distribution segments of the ICT supply chain have advocated for, and achieved substantial success in securing, outcomes in antitrust and patent law that attenuate patent owners' ability to bring enforcement actions against, and negotiate licensing fees with, intermediate users. From a privately interested perspective, the logic is self-evident. Weakening patents shifts the "IP balance of trade" in favor of firms and countries that principally occupy downstream portions of the ICT supply chain while potentially undercompensating firms that specialize in upstream R&D. From a publicly interested perspective, however, regulatory and judicial interventions that erode the property rights and contracting infrastructure behind wireless technology markets endangers the cooperative standardization mechanisms that have supported innovation and commercialization in these markets.

### 2NC --- AT --- FRAND Collapse

#### Their ONE card for FRAND collapse coming is this Hovenkamp card --- 1. He concludes the aff is bad 2. He is only referring to IF an SEP broke FRAND

Hovenkamp 20, \*Herbert J. Hovenkamp is James G. Dinan University Professor at the University of Pennsylvania Law School and the Wharton School of the University of Pennsylvania; (2020, “FRAND and Antitrust”, <https://scholarship.law.upenn.edu/cgi/viewcontent.cgi?article=3095&context=faculty_scholarship>)

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 set-ting,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 de-pend 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 Clay-ton Act.10 The end goal is to identify practices that harm com-petition, 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.

#### That’s silly --- Qualcomm’s No license No chip strategy is pro-competitive AND doesn’t violate FRAND

**Lee, 20** (Leonard Lee, Leonard Lee is the founder and managing director of neXt Curve, an advisory firm focused on industry and technology research., 10-30-2020, accessed on 1-8-2022, Fierce Electronics, "Industry Voices -- Lee: Qualcomm's antitrust win is a win for innovation", https://www.fierceelectronics.com/electronics/industry-voices-lee-qualcomm-s-antitrust-win-a-win-for-innovation)//Babcii

Qualcomm’s licensing and overall business model is not well or broadly understood. **Qualcomm’s licenses its patents to competing chip manufacturers for free in order to meet the requirements for FRAND** (fair, reasonable, and nondiscriminatory) in its commitments to ATIA, TIA and other organization involved in establishing the standards for mobile wireless technologies including 5G. In return, chip manufacturers agree to sell their chips to OEMs that have a licensing agreement with Qualcomm and pay a licensing royalty. This arrangement has been dubbed the infamous “**no license, no chips**” policy which allows Qualcomm to monetize their IP without being limited by patent exhaustion. Ironically, Qualcomm would be exposed to antitrust risk if it licensed its patents directly to chip makers. The findings and conclusions of the appellate court’s opinion issued on August 11 established that the FTC had failed to prove how “Qualcomm’s alleged breach of its contractual commitment itself impaired the opportunities of rivals.” It also determined that the district court had failed to sufficiently qualify that Qualcomm’s licensing royalty constituted an “anticompetitive surcharge” on rival chip suppliers. In essence, the appellate court found that Qualcomm’s licensing business model was “chip-supplier neutral” and that any alleged breach of FRAND commitments to standard-setting organizations **was a matter of contract** or tort law. The court’s decision effectively confirms the legal viability of Qualcomm’s business model which is comprised of their IP licensing business and their semiconductor business. The appellate court’s decision to vacate the district court’s ruling against Qualcomm clearly supports the convention that being a monopoly is not intrinsically a violation of the Sherman Act. It also clarifies the precept that **hypercompetitive behavior does not constitute anticompetitive behavior**.

#### Their actions didn’t violate their FRAND commitments AND their actions were widespread before the decision

**DOJ, 19** (DOJ, DOJ Antitrust Division, 2019, accessed on 1-8-2022, Cdn.ca9.uscourts, "BRIEF OF THE UNITED STATES OF AMERICAAS AMICUS CURIAE IN SUPPORT OF APPELLANT ANDVACATUR", https://cdn.ca9.uscourts.gov/datastore/opinions/2020/08/11/19-16122.pdf)//Babcii

Further, the court misapplied patent law. Apportionment is a rule courts use in calculating patent-infringement damages under 35 U.S.C. § 284, and it does not constrain a patentee’s right to ask for a different royalty base (or higher royalties). See Bandag, Inc. v. Gerrard Tire Co., 704 F.2d 1578, 1583 (Fed. Cir. 1983) ("a reasonable royalty . . . is merely the floor below which damages shall not fall”).3 **Nor does a FRAND commitment necessarily bar the use of a handset as a royalty base.** Mem. at 14, HTC Corp. v. Telefonaktiebolaget LM Ericsson, 6:18-CV-00243 (E.D. Tex. May 23, 2019) (ECF 538) (holding that licensing of 4G SEPs directly to OEMs, based on the price of the entire device, was consistent with FRAND commitments). These errors are especially significant when Qualcomm’s licensing strategy is **not uncommon** in the industry, as the court acknowledged. 1ER131. Finally, that the court based antitrust liability on conduct arguably allowed by patent law creates unnecessary tension between antitrust and patent law, which “share the common purpose of promoting innovation and enhancing consumer welfare.” U.S. Dep’t of Justice & Fed. Trade Comm’n, Antitrust Guidelines for the Licensing of Intellectual Property § 1 (Jan. 12, 2017) [hereinafter, IP Guidelines]

# 1NR --- Swing 2 Quarts

## 1NR --- Collusion CP

### 1NR --- S --- Gen

#### Economic theory and studies prove that collusion solves better than the affs condemnation of the patentee --- It also keeps the innovative nature of patent rights in balance

Schuster and Day 21 (W. Michael Schuster and Gregory Day – University of Georgia Terry College of Business Assistant Professors, Aug 13, 2021, “Colluding Against a Patent”, https://ssrn.com/abstract=3799477, accessed 8/30/21,)//Babcii

**Economic theory supports the contention that allowing a cartel to collude against a monopolist is superior to condemning** the cartel. Consider a two-party bargaining system with the patentee on one side and a cartel of licensees on the other, opposing it. **If the rightsholder wants to license its patent, it must deal with the cartel,** and if the cartel wants to secure a license, it must deal with the patentee.220 Restated in economic terms, a bilateral monopoly exists with a monopolist selling licenses on one side and a cartel of buyers (a monopsony) on the other.221 This landscape allows, as we show, the cartel to balance the rightsholder’s negotiating power without turning the tables, giving the licensees the power to exploit monopsony pricing.222 **This should, at the macro level, allow patent markets to enhance efficiency**. All **the innovative incentives conferred by a patent should also remain intact**, as we explain later in Part IV.

In the typical monopoly or monopsony, the dominant actor can extract supracompetitive benefits due to its market power.223 Absent a bilateral monopoly, a monopolist controls the supply function such that it will operate at the point on a demand curve that maximizes profits.224 Likewise, **a monopsonist usually controls the demand curve** and can select a preferred location on the supply curve at which to buy.225 These **benefits break down in a bilateral monopoly** because **there are no markets to establish supply and demand curves** on which the monopolist and monopsonist can operate.226 The **deal must occur at some point** below the monopoly price and above monopsony pricing, meaning that neither party can render the inefficiencies of market power.227

This two-party system does, however, create the risk of a stalemate where an agreement cannot be reached.228 Yet, unlike a traditional bilateral monopoly involving physical goods, the patent regime enjoys several ways of encouraging a deal. In FRAND situations, the patentee is contractually obligated to license on fair and reasonable terms at the risk of facing liability for breach of contract.229 A would-belicensee could also **coerce negotiations by threatening to attempt to invalidate the patent** via inter partes review.230 Potential negative outcomes associated with these actions **would thus break a stalemate.**

Nevertheless, a bilateral monopoly offers the second-best scenario for consumers: better than when a monopolist controls the market but worse than the best-case scenario—vigorous competition.231 **Since the two parties may negotiate between themselves, this should maximize the surplus split between the parties**.232 Moreover, the expected supply curve from a patentee—especially in regulated situations like essential patents— **is expected to account for hyper-marginal returns to recoup research costs and fund future endeavors**.233 Accordingly, formation of a monopsony **among potential licensees should not harm aggregate welfare** while creating a method to discipline patentees who engage in holdup behaviors. Similar evidence exists in Sherman Act’s legislative history which is essential to modern enforcement.

#### It allows bargaining in concert

Schuster and Day 21 (W. Michael Schuster and Gregory Day – University of Georgia Terry College of Business Assistant Professors, Aug 13, 2021, “Colluding Against a Patent”, https://ssrn.com/abstract=3799477, accessed 8/30/21,)//Babcii

A. Colluding Against the Garden Variety Monopolist Our approach could as easily work against the garden variety monopolist as with rightsholders. Commentators and lawmakers have grown increasingly anxious about the market power accrued by Big Tech, the telecommunications giants, and other monopolists.266 Concerns involve how companies, like Amazon, wield market power over the firms selling on their platforms. 267 The problem is that small firms operating through Amazon **lack the ability to bargain in concert with** Amazon and similar **monopolists**, **given the illegality of collusion**. While not the overarching focus of this Article, our proposal could likewise apply to monopolists acting without patent rights. It would, in fact, help to resolve complaints about the growth of “natural” or legal **monopolists** such as Facebook and Google, which allegedly diminish consumer welfare without offending the antitrust laws.268 In fact, underlying the e-book case between Apple and Amazon were allegations that Amazon had priced e-books below the market rate in an act of predatory pricing; as such, commentators asserted that the publishers were right to collude against Amazon’s **abuse of market power**.269 We are sympathetic to this argument, as it would be **optimal for rivals to solve this problem via private ordering—rather than litigation**— **and to effectively estop monopolists from using the antitrust law to preserve their market power**. To this end, **instead of increasing antitrust enforcement, a more efficient remedy would entail permitting smaller firms to bargain in concert against such monopolists**.

#### That successfully deters anti-competitive behavior without harming patent owners

Schuster and Day 21 (W. Michael Schuster and Gregory Day – University of Georgia Terry College of Business Assistant Professors, Aug 13, 2021, “Colluding Against a Patent”, https://ssrn.com/abstract=3799477, accessed 8/30/21,)//Babcii

CONCLUSION As described herein, **the patent system has the capacity to encourage innovation by affording a specific set of exclusionary rights**. However, certain firms undertake strategies that create power extending beyond the scope of their patent rights, which can damage competition. In response, some **market participants attempt to remedy this harm by collectively bargaining to even the playing field**. These behaviors have been alleged to violate the antitrust laws. We argue that application of antitrust laws in this instance is a policy error. **Collective negotiations have the capacity to undercut abusive behaviors** that may be undertaken by mass patent aggregators or those who ignore their FRAND obligations. And as shown through our analysis, anticompetitive behaviors such as aggregation of huge numbers of patents can undercut the incentive to spend money on research, incentivize the filing of relatively lower value patents, and increase market concentration. With this in mind, we argue that antitrust should not be used to stifle **collective negotiation** where the opposing party enjoys monopoly power. Moreover, we address the implications of our proposal, showing that while it **discourages anticompetitive behaviors**, it should **not harm patent owners** who behave in good faith.

### 1NR --- S --- SSO/FRAND

#### Information sharing encourage FRAND terms AND makes litigation easier if the patentee doesn’t accede

Schuster and Day 21 (W. Michael Schuster and Gregory Day – University of Georgia Terry College of Business Assistant Professors, Aug 13, 2021, “Colluding Against a Patent”, https://ssrn.com/abstract=3799477, accessed 8/30/21,)//Babcii

The **impact** will be, however, **significant where the patentee engages in a holdup behavior** by offering a license at obviously non-FRAND terms (i.e., a rate higher than fair). In this instance, the patentee has no interest in litigation, as a court will simply force it to license its patents at a fair and reasonable price, plus it will still have to pay litigation costs. The patentee’s goal in a holdup instance is to encourage some licensees to agree to the **elevated** non-FRAND **rate**. A rational, individual licensee will do so where the aggregate additional licensing cost (the difference between a FRAND rate and the holdup rate offered) is less than the cost of litigation. In some instances, this may be a reasonable choice by the single licensee, **as the cost of litigation can be substantial.**

This **situation changes**, however, **where licensees work in concert**. In that instance, they will jointly agree not to accept the **holdup** rate, which discourages the patentee from demanding this elevated sum, with the goal of inducing it to offer FRAND terms. Should this **change not occur, the decision for licensees to litigate becomes more palatable in the cartel situation**. Given the **shared** litigation **interests** within the group (e.g., proving that the offered license rate is unreasonable and unfair or that the patent is invalid), **substantial efficiencies are created by sharing the costs of these undertakings**.284 This, in turn, encourages litigation by the licensees to the exclusion of accepting a holdup cost license from the patentee. That is the **exact opposite of what the patentee hopes for**, thus encouraging the patentee to offer licenses at **a FRAND rate**.

More, to the extent that the licensee cartel shares information about licensing **offers from the patentee** (explicitly or implicitly, by leaving the cartel), **this benefits the cartel**. The parties recognize that the patentee must license on non-discriminatory terms, such that it must afford all licensees the same offer as it gave to one.285 If another party left the cartel, it is likely they received better terms than the holdup rate, **which encourages the cartel to demand these improved terms** for itself.286

#### Basic economic calculation proves --- Moving closer to a FRAND deal is in the patentee’s self interest

* ΔP \* units > PL\_Cost --- (Change in price multiplied by units is greater than private litigation costs)
* %\_FRAND \* ΔP \* units > PL\_Cost --- (Percent chance jury will uphold offer multiplied by change in price multiplied by units is greater than private litigation costs)

Schuster and Day 21 (W. Michael Schuster and Gregory Day – University of Georgia Terry College of Business Assistant Professors, Aug 13, 2021, “Colluding Against a Patent”, https://ssrn.com/abstract=3799477, accessed 8/30/21,)//Babcii

Given the primary importance of whether the patent owner offered a FRAND license, we assess the situation under our rule for both when a FRAND offer was made and when one was not. **When a FRAND offer has been made**, the only question for the patentee is whether to **accede to lower demands** from a cadre of colluding licensees **or sue for infringement**. If an essential patent owner concedes to the demands of the colluding licensees, it loses the difference between its FRAND offer and the collusion **price** (ΔP) **times** the aggregate number of **units** of the technology created by the licensees (units).281 **If it chooses to go to court, it loses** the **cost of** bringing an infringement **lawsuit** (PL\_Cost).282 Thus, we expect litigation where the patentee made a FRAND offer, and the licensees responded with a collusion price counteroffer if:

(1) ΔP \* units > PL\_Cost

However, the **patentee must consider whether a jury will determine it did make a FRAND offer**. We call this likelihood “%\_FRAND.” **If the jury determines that the patentee failed** to make a FRAND-compliant offer, **it may adopt the licensees’ collusion rate** (or some other reasonable rate) as the measure of damages and future license rate. The benefit of going to court for the patentee must be adjusted to include the threshold that a jury must find its offer to be fair and reasonable if it is to collect the additional license income associated with not acceding to the collusion rates.

(2) %\_FRAND \* ΔP \* units > PL\_Cost

Based on this relationship,283 our proposal will have largely offsetting consequences where the patentee has lived up to its obligation to make a reasonable license offer. A patentee has an incentive to **increase** the **likelihood** that a **jury might find their offer fair and reasonable (and thus, increase the value of the left side of Equation 2),** but this decreases ΔP as the difference between the collusion price and demanded license price converge. Further, as these prices converge, more licensees are likely to defect and accept a license. This in turn decreases the aggregate number of units being litigated and decreases the cost of litigation for the patentee (PL\_Cost). Except in very specific examples, our proposal should have negligible impact.

#### No risk of overdeterrence --- FRAND offers cause defections from the cartel AND are easily litigated in favor of the patentee --- That encourages FRAND dealing

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(1) ΔP \* units > PL\_Cost

However, the patentee must consider whether a jury will determine it did make a FRAND offer. We call this likelihood “%\_FRAND.” If the jury determines that the patentee failed to make a FRAND-compliant offer, it may adopt the licensees’ collusion rate (or some other reasonable rate) as the measure of damages and future license rate. The benefit of going to court for the patentee must be adjusted to include the threshold that a jury must find its offer to be fair and reasonable if it is to collect the additional license income associated with not acceding to the collusion rates.

(2) %\_FRAND \* ΔP \* units > PL\_Cost

**Based on this relationship**,283 our proposal will have largely offsetting consequences where the patentee has lived up to its **obligation** to make a **reasonable license offer**. A patentee has an incentive to increase the likelihood that a jury might find their offer fair and reasonable (and thus, increase the value of the left side of Equation 2), but this decreases ΔP as the difference between the collusion price and demanded license price converge. Further, **as these prices converge, more licensees are likely to defect and accept a license**. This in turn decreases the aggregate number of units being litigated and decreases the cost of litigation for the patentee (PL\_Cost). Except in very specific examples, our **proposal should have negligible impact**.

### 1NR --- S --- Advantage two

#### Collusion sufficiently solves patent trolling and sham litigation --- Coordinated efforts reduce legal costs for the cartel

Schuster and Day 21 (W. Michael Schuster and Gregory Day – University of Georgia Terry College of Business Assistant Professors, Aug 13, 2021, “Colluding Against a Patent”, https://ssrn.com/abstract=3799477, accessed 8/30/21,)//Babcii

3. PATENT AGGREGATORS Similar benefits arise to a cartel of licensees in the face of a mass **patent aggregator** (patent troll or otherwise) that is either actively seeking to license its entire large portfolio or maintaining a large portfolio to discourage competition. 287 The aggregator’s patents and licensing efforts are backed by a threat of litigation, and often repeat litigation, if the initial suit does not achieve the intended goal. Their holdings are large enough that they can repeatedly sue a recalcitrant potential licensee for patent infringement, thus maximizing pressure to license via litigation cost and the potential for liability.288 For this business model to prove beneficial, aggregators must secure force licensing deals on market participants, **without undertaking excessive litigation costs** of its own (though litigation will sometimes be necessary). Price fixing by potential licensees may not undermine this approach, but it does harm it. Where a cadre agrees only to license the aggregator’s patents at a set price, this may injure the patentee’s ability to reap substantial profits. The aggregator must choose to accept lower license rates and undercut a part of its income, **or** it can threaten to sue the price-fixing potential licensees. The former undermines income, while **the latter increases costs** (likely through legal fees). And to the extent that aggregation was intended to create barriers to market entry, this goal is injured where these financial barriers (i.e., licensing costs) are diminished. Moreover, **should the aggregator choose to file suit**, the **coordinating parties may decrease their individual costs by engaging in joint defense activities**. Experts can be **shared**, negotiation tactics coordinated, and the costs associated with duplicative defense activities **avoided**. The exact scope of savings will vary from case to case, as a function of patents asserted, the timing of litigation, and other strategic behaviors by the aggregator. However, the price fixing individuals will be able to decrease income to the aggregator through diminished income or increased legal fees. This, in turn, disinclines the aggregator **business practice**

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