# 2AC---Round 6

### 2AC---AT: No Patent Holdup---Not Systemic

#### 1---there’s no impact to winning this argument.

Cotter et al. 19, \*Thomas F. Cotter, Briggs and Morgan Professor of Law, University of Minnesota Law School; Innovators Network Foundation Intellectual Property Fellow; \*Erik Hovenkamp, Assistant Professor, USC Gould School of Law; \*Norman Siebrasse, Professor of Law, University of New Brunswick Faculty of Law; (2019, “Demystifying Patent Holdup”, https://scholarlycommons.law.wlu.edu/cgi/viewcontent.cgi?article=4667&context=wlulr)

B. Patent Holdup Is Not a Problem, Because It Is Not Systemic

A second, related argument is that there is no empirical evidence of patent owners engaging in pervasive, systemic patent holdup in the very industries holdup theorists are most concerned with (e.g., telecommunications).139 Indeed, according to the critics, if holdup were pervasive one would expect innovation and growth in the affected industries to “stagnate, wither, or die,”140 whereas if one looks “across human history, it is not clear that the commercialization of complex technologies has ever been faster than it is today in those industries that reform proponents point to as most plagued by the patent holdup ‘problem.’”141

Although we agree that whether, or to what extent, patent holdup occurs in the real world is ultimately an empirical matter, the implication that patent holdup is a problem only if it is “pervasive” or “systemic” is a non sequitur.142 If our analysis above is correct—that the ability to engage in patent holdup depends on path dependence, that settings conducive to patent holdup are not uncommon, and that the three components of a holdup royalty can exist independently of one another—patent holdup does not have to be systemic to be capable of reducing social welfare. Seeing how the empirical critiques of patent holdup do “not claim[ ] that individual firms never attempt to engage in behavior that can be characterized as holdup,”143 the conclusion that holdup is not systemic may well be accurate, for all we know, while still being of any limited relevance for purposes of determining whether injunctive relief should issue on the facts of any one particular case.144 If the choice were between always granting an injunction without tailoring or conditions, and never granting any form of injunctive relief, perhaps the question of whether holdup was systemic, at least in a particular industry, would be central. But the traditional approach to injunctive relief looks to the facts of the particular case.145

#### Patent holdup is real and necessitates intervention, even if it can’t be systemically proven.

Contreras 19, \*Jorge Contreras, Professor, University of Utah S.J. Quinney College of Law; (2019, “MUCH ADO ABOUT HOLD-UP”, <https://www.illinoislawreview.org/wp-content/uploads/2019/08/Contreras.pdf>)

B. Protective Measures May Already Be Working to Reduce Hold-Up

Another important factor that should be considered regarding the purported lack of empirical evidence of systemic hold-up is the effect that existing policy measures have already had in reducing hold-up. As noted above, the threat of patent hold-up was a primary motivating factor for many SDOs to adopt policies requiring the disclosure and licensing of SEPs. These policies have been in place for decades. In the United States, the first such policy was adopted in 1959 by the American Standards Association (the predecessor to today’s American National Standards Institute (ANSI).102 Today, every one of the more than 200 ANSI-accredited developers of American National Standards must adhere to ANSI’s essential requirements, including the adoption of such a licensing policy for SEPs. Similar policies have existed in European and international standards organizations since at least the 1980s.103 These policies, which were developed by SDOs in large part to reduce the likelihood of hold-up within standard-setting systems, have had several decades to work, and it is likely that the lack of observed hold-up in some studies can be attributed to the successful operation of these policies.

Similarly, antitrust and competition enforcement agencies in the U.S. and Europe have been aware of the potential for hold-up connected with standardization for many years. Accordingly, they have brought enforcement actions when it has been alleged that hold-up behavior has resulted in a violation of the antitrust laws. High-profile enforcement actions against patent holders such as Rambus, 104 Google 105 and Qualcomm106 send powerful deterrent signals to the market and warn others not to engage in similar behavior lest they, too, become the subject of agency enforcement. Like SDO policies, it is likely that the general market awareness of agency interest in standard-setting and hold-up has, to a degree, limited the amount of hold-up that is actually attempted in the marketplace, thereby limiting the direct evidence of hold-up as a systemic problem.

But do the deterrent effects of SDO and agency efforts to reduce hold-up signify that hold-up is not a problem? Certainly not. To reach such a conclusion would be perverse: akin to claiming that burglary is not a problem in a neighborhood that experiences reduced burglary rates after it has implemented an active neighborhood watch program and enhanced policing.

C. Indicia of Healthy Markets do not Prove the Absence of Anticompetitive Conduct

As noted above, one of the principal arguments advanced by commentators seeking to refute the “hold-up theory” is that markets for telecommunications products, namely smart phones, are robust – evidenced by increasing product functionality, decreasing consumer prices and rapid innovation -- and that this degree of robustness indicates that hold-up cannot be a problem in these markets.107 If hold-up were a problem in these markets, they reason, we would see product stagnation, stable (but high) prices, and a lack of competition – features associated with classic examples of hold-up in markets for products such as natural resources and agricultural goods.108

But this argument relies on a false syllogism: hold-up results in market dysfunction; if a market functions well, then it cannot be subject to hold-up. The weaknesses in this argument are multifold. First, hold-up may exist in individual instances without sufficient weight to affect overall market characteristics, particularly in a large global market such as mobile telecommunications. Thus hold-up may exist, even in a market that outwardly appears to be functioning well. Second, there is no valid counterfactual to use to compare the health and robustness of the market for mobile telecommunications products.109 Other consumer electronics devices, such as televisions and DVD players, do not compare well with mobile telecommunications devices, which have taken on a unique character in the modern networked economy. Thus, observing the strength of the market fails to answer the critical questions “compared to what?” and how much stronger the market might be (through more product diversity, functionality, price reduction) without hold-up?

A simple historical illustration is useful in this context. During the decade leading up to the enactment of the Sherman Antitrust Act of 1890, several major U.S. commodity markets (e.g., steel, salt, petroleum, coal, sugar, lead, and others) came under intense scrutiny for a variety of allegedly anticompetitive industrial arrangements. One might have argued that these markets, had they been subject to the sorts of anticompetitive collusion that the Sherman Act sought to address, should have seen reductions of output and increases in price. Yet, between 1880 and 1890, U.S. output of salt, petroleum, steel, and coal all increased significantly, and prices of steel, sugar and lead all dropped significantly.110 Do these positive market indicia demonstrate that the subject markets were not subject to anticompetitive collusion, and that the Sherman Act was not necessary? Certainly, investigations of these industries revealed significant cartel behavior. I would suggest that few commentators today would argue that the coal, steel, sugar and other major industrial producers of the late nineteenth century were innocent of collusive and anticompetitive conduct, or that the Sherman Act was not a necessary and beneficial measure for the U.S. economy.111 Yet, had we relied solely on the positive characteristics exhibited by these markets as proof that anticompetitive conduct did not exist, then perhaps the Sherman Act never would have been enacted.

By the same token, the fact that global markets for standardized products such as computers and smart phones appear to be thriving does not itself refute the possibility of hold-up nor the existence of anticompetitive conduct in these markets. Nor does it allow regulators and policy makers to drop their guard or cease to monitor these important industries.

### 2AC---LD---Innovation Incentives

#### 2---ex ante valuation preserves profit due to mass licensing volume---that’s Melamed and Shapiro and…

Stern 18, \*Richard H. Stern, Professorial Lecturer in Law, The George Washington University Law School. A Washington, D.C. patent and antitrust attorney, Stern was Chief of the Patent Section of the US Justice Department’s Antitrust Division during the Nixon and Ford Administrations; (2018, “Who Should Own the Benefits of Standardization and the Value It Creates?”, https://scholarship.law.umn.edu/cgi/viewcontent.cgi?article=1439&context=mjlst)

D. INCENTIVIZE ME OR I’LL DEFECT

A highly theoretical argument is often made by SEP owner spokesmen—that lessened compensation to SEP owners will “disincentivize” them from creating technology and contributing it to standardization, stagnating further standardization. For example:

If the SEP holder cannot capture any of the value from standardization that its technology creates for the standard, it will have a dampened incentive to continue contributing its best technologies to SSOs. In the long run, the quality of technologies contributed to a future standard—and the expected value of that new standard—would decrease. The SEP holder’s decision to contribute its technologies to a standard depends on the compensation that an SEP holder expects to obtain from such a contribution, compared with the SEP holder’s alternative option to monetize its invention outside the standard. . . . If the SEP holder expects not to be compensated fully for its contributions, it will not commit its most valuable technologies to the standard.431

But the amount of dampening of incentive (assuming that we do not already have enough or more than enough incentive for smartphones) may well be outweighed in impact by the prospect of nonetheless gaining first-user and head-start advantage from incorporation of one’s technology into a standard, and the opportunity to increase one’s equipment sales (anointed with the imprimatur of the standard),432 even if one cannot also obtain monopoly profits as well, from SEP royalties. In a sense, those advantages are a form of “the compensation that an SEP holder expects to obtain” from such a SEP contribution, but the commentator fails to take those significant incentives into consideration.433 Moreover, the supposed “SEP holder’s alternative option to monetize its invention outside the standard” may be a figment of the SEP holder spokesman’s imagination.434 If an alternative technology becomes standard, the only opportunity to monetize the withheld invention may be to incorporate the technology into unsaleable non-standard products. Defection may be a poor business strategy.

#### 3---under-compensation is empirically denied.

Stern 18, \*Richard H. Stern, Professorial Lecturer in Law, The George Washington University Law School. A Washington, D.C. patent and antitrust attorney, Stern was Chief of the Patent Section of the US Justice Department’s Antitrust Division during the Nixon and Ford Administrations; (2018, “Who Should Own the Benefits of Standardization and the Value It Creates?”, https://scholarship.law.umn.edu/cgi/viewcontent.cgi?article=1439&context=mjlst)

Furthermore, a considerable amount of standardization activity has been coming from groups that prohibit the participating companies or individuals from collecting SEP royalties—so-called “RF-RAND” (royalty-free RAND)435 and “RAND-Zero” (RAND with zero royalties) groups or groups that rely on promises not to assert essential-patent claims436—as well as from SSOs that permit RAND licensing but whose members in practice collect royalties on few, if any, standards.437 The availability of these important, royalty-free technology sources is a factor in evaluating the threatened “disincentivization” and massive resistance against the policies reflected in the IEEE 2015 Patent Policy update.

Finally, the disincentivization argument is pure ipse dixit, for no analysis of comparative rates of return on alternative investment opportunities is offered. Nor is any empirical support provided.438 The rhetoric of “Incentivize me or I’ll defect” is completely unsupported and therefore not credible.

## AT: T---PROHIBIT = PER SE

### 2AC---AT: T---Prohibit = Per Se---TL

#### We meet---the plan still increases prohibitions on anticompetitive conduct, the rule of reason is simply a test that decides whether certain conduct actually violates said prohibition.

Fishman 19, \*Todd Fishman, [Allen & Overy LLP](https://www.jdsupra.com/profile/Allen_Overy_docs/); (January 31st, 2019, “The Rule of Reason as a Bar to Criminal Antitrust Enforcement”, https://www.jdsupra.com/legalnews/the-rule-of-reason-as-a-bar-to-criminal-87406/)

Antitrust law’s rule of reason was born of technical necessity. By its terms, §1 of the Sherman Act prohibits “[e] very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade.” 15 U.S.C. §1. Despite the expansive language of the statutory prohibition, the Supreme Court has held that §1 prohibits only agreements that unreasonably restrain trade. *Board of Trade of Chicago v. United States*, 246 U.S. 231, 238 (1918); *Standard Oil Co. of N.J. v. United States*, 221 U.S. 1, 58-60 (1911). With the rule of reason, antitrust courts assumed a prudential role in administering the scope of antitrust violations, applying a factual inquiry weighing legitimate justifications for a restraint against any anticompetitive effects. Under the rule of reason, “the factfinder weighs all of the circumstances of a case in deciding whether a restrictive practice should be prohibited as imposing an unreasonable restraint on competition.” *Continental T.V. v. GTE Sylvania,* 433 U.S. 36, 49 (1977).

#### Counter-interpretation---rule of reason is a prohibition.

Light 19, Sarah E. Light Assistant Professor of Legal Studies and Business Ethics, The Wharton School, University of Pennsylvania., The Law of the Corporation as Environmental Law, 71 Stan. L. Rev. 137, 2019, Lexis/Nexis

While antitrust law can serve as an environmental mandate by prohibiting collusive behavior that keeps environmentally preferable goods from the market, there is also conflict between antitrust law's goals of promoting competition and environmental law's goals of promoting [\*177] conservation. 192 Because antitrust law's per se rule and rule of reason operate on a somewhat fluid continuum, 193 this Subpart discusses the two doctrines together. The per se rule operates as a prohibition, whereas the rule of reason operates as both a prohibition and a disincentive. As noted above, antitrust law generally prohibits certain types of market activity - price fixing, horizontal boycotts, and output limitations - as illegal per se, and harm to competition is presumed. 194 For example, if an industry association declines to award a seal of approval necessary for a product's sale without any good faith attempt to test the product's performance, but rather simply because that product is manufactured by a competitor, such an action would be illegal per se. 195 Under this Article's framework, a per se violation is thus a prohibition. The more fact-intensive inquiry under the rule of reason tests "whether the restraint imposed is such as merely regulates and perhaps thereby promotes competition or whether it is such as may suppress or even destroy competition." 196 While this extremely broad statement might suggest that any fact is relevant to the inquiry, the salient facts under the rule of reason are "those that tend to establish whether a restraint increases or decreases output, or decreases or increases prices." 197 If an anticompetitive effect is found, then the action is illegal and the rule of reason operates, like the per se rule, as a prohibition. 198 The rule of reason can also operate as a disincentive, even if no [\*178] court finds an anticompetitive effect, as uncertainty and litigation risk may discourage firms from undertaking legally permissible, environmentally positive industry collaborations. 199 Associations of firms have adopted numerous mechanisms of private environmental governance to address the management of common pool resources like fisheries, forests, and the global climate. 200 Examples include the Sustainable Apparel Coalition's Higg Index 201 and the American Chemistry Council's Responsible Care program. 202 But private industry standards raise special antitrust concerns. An agreement among competitors with respect to product or process specifications may exclude competitors who fail to meet such standards, raising the specter that such industry collaborations really constitute output limitations or efforts to limit competition. 203 While the U.S. Supreme Court has scrutinized private standard-setting associations carefully, 204 it has noted that if associations "promulgate … standards based on the merits of objective expert judgments and through procedures that prevent the standard-setting process from being biased by members with economic interests in stifling product competition … , those private standards can have significant procompetitive advantages." 205 In the absence of price fixing or a boycott, a rule of reason analysis generally applies to product standard setting by private associations. 206 The uncertain outcome [\*179] inherent in the application of antitrust law in this context could therefore serve as a potential disincentive to the adoption of private industry standards. 207 The challenge of course is that some form of explicit sanctions on noncompliant industry members may be necessary for private industry standards to be effective. In the context of private reputational mechanisms like the New York Diamond Dealers Club, 208 Barak Richman has pointed out that the Club's use of reputational sanctions and voluntary refusals to deal with actors who flout industry norms, while welfare enhancing, could nonetheless amount to violations of antitrust law. 209 This echoes the concern raised by Andrew King and Michael Lenox in their extensive empirical analysis of the Responsible Care program created by the Chemical Manufacturers Association (now the American Chemistry Council). 210 King and Lenox concluded that the absence of explicit sanctions on members who failed to meet the standards set by the program left the program vulnerable to "opportunism." 211 While they suggested that industry associations could look to third parties to enforce the rules, 212 an alternative way to facilitate the long-term environmental benefits of stronger sanctions would be to interpret antitrust law in conformity with the environmental priority principle presented below. 213 [\*180] In some instances, the conflict between the values of promoting competition and conserving environmental resources can be stark. 214 Jonathan Adler, for example, has identified this conflict in the context of fisheries - a tragedy of the commons situation in which some form of collective action is required to avoid overfishing. 215 He cites as an example Manaka v. Monterey Sardine Industries, Inc., in which a fisherman was excluded from a local fishing cooperative. 216 The fisherman sued the cooperative under the Sherman Act, and the court found an antitrust violation in his exclusion. 217 While the fishing cooperative's policies were no doubt exclusionary, Adler contends that they also promoted conservation by restricting catch. 218 The fishery collapsed by the 1950s, a collapse Adler hypothesizes might have been "inevitable" but that perhaps might not have occurred in the absence of the antitrust suit. 219 While a court performing a rule of reason analysis must consider whether a restraint on trade suppresses or destroys competition, Adler points out that courts may also "consider offsetting efficiencies from otherwise anticompetitive arrangements." 220 It is not clear, however, that the courts have consistently taken these factors into account. 221 Among other potential remedies, Adler argues that to resolve this tension between antitrust law, on the one hand, and private collective action to conserve environmental resources, on the other, courts should more actively consider the "ancillary conservation benefits of otherwise anticompetitive conduct." 222 Recognizing the long-term health of a fishery would be consistent with antitrust law's purpose of ensuring viable markets exist in the future, and consistent with the environmental priority principle introduced below. 223

#### Prohibit can mean ‘severely hinder’---doesn’t necessitate a ban.

Washington Court of Appeals 19 (KORSMO-judge. Opinion in State v. Kimball, No. 35441-5-III (Wash. Ct. App. Apr. 2, 2019). Google scholar caselaw. Date accessed 7/13/21).

His argument runs counter to the meaning of the word "prohibit." It means "1. To forbid by law. 2. To prevent, preclude, or severely hinder." BLACK'S LAW DICTIONARY 1405 (10th ed. 2014). As "severely hinder" suggests, a "prohibition" need not be an all or nothing proposition.

#### The ‘per se’ distinction is meaningless---rules always devolve into standards.

Crane 7 Daniel A. Crane is Assistant Professor, Benjamin N. Cardozo School of Law, Yeshiva University, Rules Versus Standards in Antitrust Adjudication, 64 Wash. & Lee L. Rev. 49 (2007), https://scholarlycommons.law.wlu.edu/wlulr/vol64/iss1/3

Before proceeding much further, it is worth pausing to consider the possibility that a world of antitrust rules would be illusory because, in practice, rules always fade into standards. Take H.L.A. Hart's observation that "[n]atural languages like English are... irreducibly open-textured" when specifying "general classifying terms,' ' 0 0 or Wittgenstein's point that the problem with rules is that they do not tell you when they should be applied.' 0 ' Because language is irreducibly open-textured and indeterminate and because rules lack internal mechanisms to specify when they should be applied, even when the law is formally framed as a rule, it requires penumbral rules, canons of interpretation, and other secondary decisional criteria which end up swallowing the apparent simplicity of the rule. 10 2 Specifying the governing law as a simple, bright-line rule may merely conceal the fact that important balancing of social interests, weighing of probabilities, and choosing between competing ends and means lurk in the shadow of the rule. Declaring a legal rule thus appears misleading or even dishonest because it hides the social preferences that animate the decision-maker's conclusion. Under one interpretation, antitrust law provides the perfect illustration for Hart and Wittgenstein's point. In this view, there never have been such things as case-determinative antitrust rules-only standards clad in rule-bound rhetoric. The current march toward standards, then, is not so much a change in liability determinants as a dissipation of the mystery surrounding antitrust's concealed methodology. In a moment, I will dispute this possibility and argue that the specification of antitrust law as rule or standard has very important practical consequences. But first, it is worth acknowledging the extent to which Hart and Wittgenstein's observation rings true in antitrust. A case in point is antitrust law's long-standing per se prohibition against "price fixing." As any antitrust practitioner will recognize, price fixing appears in quotation marks because application of the per se rule depends not on the fact that competitors have literally fixed prices but that the challenged conduct falls within the antitrust category known as "price fixing." The judicial decision often thought to have established the per se rule against price-fixing did not involve price fixing either literally or figuratively but rather a gentleman's agreement by dominant oil producers to buy up distressed oil from small refineries and thereby stabilize the wholesale market. 1 03 The defendants never came close to agreeing on price. Nonetheless, the Supreme Court held that any "combination formed for the purpose and with the effect of raising, depressing, fixing, pegging, or stabilizing the price of a commodity in interstate or foreign commerce" amounts to "price fixing" in the relevant legal sense, whether or not the defendants have actually done the act that a lay person might suppose "price fixing" to be-fixing a price. 1 On the other hand, the Supreme Court has described an act of apparent price fixing by competitors-an agreement on prices for blanket licensing of musical repertoires-as something other than "price fixing" and hence subject to the rule of reason. 0 5 In BMI v. CBS, the Supreme Court rejected textual "literalism" and held that application of the per se rule against price fixing is not as "simplistic" as "determining whether two or more potential competitors have literally 'fixed' a 'price.'" 06 Rather, "[a] s generally used in the antitrust field, 'price fixing' is a shorthand way of describing certain categories of business behavior to which the per se rule has been held applicable."' 0 7 Application of the per se rule turns not on whether the conduct amounts literally to price fixing but on whether the "particular practice is one of those types or that it is 'plainly anticompetitive' and very likely without 'redeeming virtue."" 8 This flexibility in the per se rule invites endless pages of briefing on whether the conduct at issue should be properly characterized as "price fixing" because it unjustifiably tampers with the market mechanism for determining prices or as something else because it can be justified by efficiencies, a standard-favoring way of doing law.'0 9 Hence, Hart explains that rules inevitably dissolve into standards and Wittgentsein explains that rules do not tell us when to apply them.

## CP---Patent Law

### 2AC---AT: Patent Law CP---TL

#### A---consumer-action deficit. Patent infringers have attenuated incentives to cough up high royalties because SSO’s can profit in aggregate by passing costs onto consumers---that’s Melamed and Shapiro. That means widening the plaintiff pool beyond implementers is key---which the counterplan CANNOT do.

Cary et al. 11, \*Messrs. George Cary and Alex Sistla are members of the California and District of Columbia Bars. Mr. Mark Nelson is a member of the New York and District of Columbia Bars. Mr. Steven Kaiser is a member of the New Jersey and District of Columbia Bars; (2011, “THE CASE FOR ANTITRUST LAW TO POLICE THE PATENT HOLDUP PROBLEM INSTANDARD SETTING”, <https://www.clearygottlieb.com/~/media/organize-archive/cgsh/files/publication-pdfs/the-case-for-antitrust-law-to-police-the-patent-holdup-problem-in-the-standard-setting.pdf>)

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

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

#### SSO interests do not align with consumers. Patent law is an insufficient proxy for securing competition.

Speegle 12, \*Adam Speegle, J.D., (May 2012, “Antitrust Rulemaking as a Solution to Abuse on the Standard-Setting Process Setting Process”, https://repository.law.umich.edu/cgi/viewcontent.cgi?article=1128&context=mlr)

Even assuming that SSO members are willing and able to engage in litigation with a firm attempting patent holdup, consumer welfare takes a backseat to the members' financial considerations.3 8 Because the incentives of the SSO members do not align with those of consumers, enforcement actions by firms in the private sector cannot be relied on to adequately protect consumers. 39 This concept is illustrated by a practice known as injunction threats, in which a patent holder threatens to bring an injunction against a manufacturer for violating its patent unless the manufacturer pays a substantial royalty.4 ° While the patent holder's threat may have questionable legal footing, the manufacturer will often pay the royalty instead of engaging in extended litigation.4 This happens for several reasons. First, the manufacturer has a disincentive to engage a patent holder in litigation because the manufacturer will bear the cost of the litigation, the result of which could benefit competitors. 42 Companies will tend to pay the royalty and wait for another company to challenge the practice. 43 Second, the costs associated with challenging injunction threats may be substantial." On top of ordinary litigation costs, if the manufacturer has already begun making and distributing goods based on the patented technology, a potential preliminary injunction could have a devastating effect on its business.4 5 While engaging a patent holder in litigation may collaterally benefit consumers in that increased royalties are not passed through to the price of the ultimate product, this benefit does not tip the scales in favor of manufacturers pursuing such a path.' Thus, reliance on litigation by SSO members or other third parties will not provide a complete solution to patent holdup, as these parties serve as poor proxies for consumers.

#### B---targeting deficit---faulting the entire SSO is key to curtail monopolization---targeting individual SEP holders fails.

Melamed & Shapiro 18, \*A. Douglas Melamed is Professor of the Practice of Law at Stanford Law School; \*Carl Shapiro is the Transamerica Professor of Business Strategy at the Haas School of Business at the University of California at Berkeley; (May 2018, “How Antitrust Law Can Make FRAND Commitments More Effective”, https://www-cdn.law.stanford.edu/wp-content/uploads/2018/05/How-Antitrust-Law-Can-Make-FRAND-Commitments-More-Effective.pdf)

Antitrust enforcement aimed only at SEP holders is not sufficient to prevent or remedy ex post opportunism. First, as described in Part I, that kind of enforcement must be implemented separately for each patent holder, and for many standards, there are hundreds or even thousands of SEP holders. Second, some of the most common kinds of opportunism are arguably beyond the reach of antitrust claims against SEP holders. 61 Moreover, enforcement aimed at SEP holders is not directed at the basic problem: the failure of the SSOs to take adequate steps to prevent the ex post opportunism that the SSOs’ conduct enabled.

#### C---deterrence deficit---only antitrust law creates a legitimate cost to misconduct---that’s 1AC Melamed and Shaprio---whereas the loss of a private lawsuit wouldn’t change SEP holder’s calculus.

Tsilikas 17, \*Haris Tsilikas is an IP and Antitrust Consultant, a Doctoral Candidate and Visiting Research Fellow at the Max Planck Institute for Innovation and Competition, Munich; (2017, Antitrust Enforcement and Standard Essential Patents: Moving beyond the FRAND Commitment”, https://www.jstor.org/stable/pdf/j.ctv941t01.9.pdf?refreqid=excelsior%3A92dc720d1ebc7088811b40032a60f575)

Antitrust could play a meaningful role.165 The most important contribution of antitrust enforcement against abuses of SEPs is its deterrent effect.166 Although patent law reforms or contractual binding of subsequent SEPs-holders to FRAND licensing would provide to victims of hold-up useful defences in court, they do not sufficiently deter abusive assertion of SEPs in the first place. For instance, the contractual binding to FRAND could raise counterclaims of breach of contract or/and contractual performance; however, the opportunistic SEP-holder will, in case it loses on such grounds, be left no worse than with a licence on FRAND terms. In the end, a patent hold-up is indeed precluded, but contractual constraints can do little to prevent opportunistic assertion of SEPs in the first place. The victims still suffer the costs of uncertain and resource-draining litigation; most importantly, the reliability of the standards-setting process might still be at risk.

Antitrust enforcement on the other hand, in imposing tortfeasors positive monetary losses in the form of fines, alters the profit-cost calculus of opportunistic behaviour in the first place; opportunistic assertion of SEPs will come at a cost. Of course, a too-heavy-handed approach could have a chilling effect on legitimate patent assertions against implementers that are reluctant to pay FRAND royalties, thus leading to false positives. Antitrust enforcement should carefully examine the specificities of each case, such as the particular PAE conduct, the relationship between PAEs and practicing entities, the structure of downstream markets.167 More importantly, an economically informed antitrust analysis focusing on the actual and potential anticompetitive effects of opportunistic SEPs assertion should prohibit behaviour that is truly harmful to consumers. Safeguarding the inclusive and efficient character of the standards-setting process is a competition law problem. Informed antitrust analysis could provide adequate responses to opportunistic PAE behaviour and privateering.

### 2AC---Monoculture Deficit

#### Relying exclusively on a single 5G standard creator concentrates vulnerability---creates widespread cyber risk.

Chertoff 19, \*Michael Chertoff served as secretary of homeland security, 2005-09 and is the author of “Exploding Data: Reclaiming Our Cyber Security in the Digital Age.” He is executive chairman of the Chertoff Group, whose clients include technology companies involved in the original complaint and that have filed amicus briefs in the case; (November 24th, 2019, “Qualcomm’s Monopoly Imperils National Security: The U.S. shouldn’t rely on one company for vital technologies like wireless silicon microchips”, https://www.wsj.com/articles/qualcomms-monopoly-imperils-national-security-11574634436)

But then, on appeal, the Energy and Defense departments entered the fray on Qualcomm’s side. They argued to the appellate court that Qualcomm, as the last remaining American mobile-chip manufacturer, needed to be protected from competition so that it could remain economically viable and retain the ability to provide the military with vital chip components. To put it colloquially, the government thinks Qualcomm is too important to fail.

That viewpoint is not only unwise, it’s inconsistent with history and inimical to national security. Being dependent on a single source for critical components puts the U.S. in peril. Having only one provider gives rise to a technological version of “monoculture risk.” That’s when farmers plant only one variety of a crop—such as the Gros Michel banana—which diminishes genetic diversity and increases vulnerability to disease. Banana wilt devastated Gros Michel yields in the 1950s, and similar diseases could wipe out other monoculture crops today.

A monoculture technology system likewise poses substantial risks. If there is some critical flaw in the single system on which the U.S. is dependent, its failure would be catastrophic. These technical vulnerabilities are especially risky in security-sensitive industries such as telecommunications. American reliance on a single chip provider creates an inviting target for adversaries, who would need to find and exploit only one vulnerability to execute a destructive cyberattack.

The U.S. has long struggled to maintain at least two providers of most critical military systems. The government subsidizes two builders of submarines. It purchases military aircraft from more than one source. It also relies on open standards in technology to foster many suppliers, allowing companies to compete in the open market while offering products that have similar capabilities and are interoperable. No strategic analyst could ever imagine voluntarily relying on only one supplier of arms or materiel.

In the Pentagon’s view, maintaining the company’s economic health is also essential because it is a critical player in the competition with China to develop 5G technology. To be sure, it’s important to support the viability of U.S. firms that can compete with China on 5G, but this hardly justifies the risks of a monoculture in the defense-industrial base.

Further, the argument mistakenly links two national-security issues in an artificial way. Qualcomm doesn’t need protection in the wireless chipset market to strengthen its competitive edge in the 5G race. To the contrary, it has every incentive to develop leading 5G technologies even in the absence of protection in the chip market.

In the technology race against China, the U.S. should prefer to let competition drive innovation rather than support exclusive national champions. Apart from the economic inefficiency, a single-source national champion creates an unacceptable risk to American security—artificially concentrating vulnerability in a single point. The government’s argument in support of Qualcomm isn’t prudent, and if courts accept it, the result would be a self-inflicted wound to U.S. national interests. We need competition and multiple providers, not a potentially vulnerable technological monoculture.

## CP---ATL PIC

### 2AC---Perm Do Both

#### Permutation do both---concurrent enforcement by both antitrust and regulatory agencies solves the tradeoff link.

Varney et al. 20, \*Christine A Varney, Julie A North and Margaret Segall D’Amico are partners, and Molly M Jamison is an associate, at Cravath, Swaine & Moore LLP; (October 22nd, 2020, “Antitrust Remedies in Highly Regulated Industries”, https://globalcompetitionreview.com/guide/the-guide-merger-remedies/third-edition/article/antitrust-remedies-in-highly-regulated-industries#footnote-059)

Balancing remedies with regulation

As discussed above, there is a wide range of approaches for merger review between antitrust authorities and specialised regulatory agencies. Given the range of different approaches, it is difficult to make generalisations across either agencies or industries. What is clear is that there are certain strengths and weaknesses to a dual merger review and remedy approach. On the one hand, the dual review system has been criticised for its purported inefficiency and added costs of concurrent reviews by two agencies.[[84]](https://globalcompetitionreview.com/guide/the-guide-merger-remedies/third-edition/article/antitrust-remedies-in-highly-regulated-industries#footnote-007) On the other hand, others have touted the importance of consistent antitrust review[[85]](https://globalcompetitionreview.com/guide/the-guide-merger-remedies/third-edition/article/antitrust-remedies-in-highly-regulated-industries#footnote-006) and the avoidance of agency capture that a dual review system can accomplish. So how should antitrust authorities approach mergers in highly regulated industries? Should Congress do away with dual review and grant exclusive merger review jurisdiction to the DOJ or FTC? Or should the regulatory agencies be responsible for merger review and remedies in their areas of expertise? A review of past practices suggests that there is not a single right answer to these questions. However, in the current landscape there are considerations that could mediate some concerns about inefficiency and cost.

First, coordination between the relevant antitrust authority and regulatory agency can facilitate consistent outcomes and ensure that the appropriate remedies are ordered. The most common critique of having both antitrust and regulatory review of mergers is inefficiency. Having two federal agencies both expend time and resources reviewing mergers and imposing remedies is expensive for both taxpayers and the merging entities, and extends the time required to review transactions. Conflicting decisions – where one agency may approve a transaction while the other challenges it – also add to the risk of inefficiency. Better coordination and cooperation can mediate these concerns to an extent.[[86]](https://globalcompetitionreview.com/guide/the-guide-merger-remedies/third-edition/article/antitrust-remedies-in-highly-regulated-industries#footnote-005) As the American Antitrust Institute identified, increased cooperation should be a ‘high priority’, particularly in industries transitioning from regulated to a more competitive free market.[[87]](https://globalcompetitionreview.com/guide/the-guide-merger-remedies/third-edition/article/antitrust-remedies-in-highly-regulated-industries#footnote-004)

Second, antitrust authorities should continue to use regulatory agencies’ strengths to the fullest extent possible to construct appropriate remedies. Regulatory agencies have expert knowledge of the industry and often have access to far more information on the market than the DOJ or FTC would be able to gather on their own. The DOJ and FTC have to rely on receiving information from parties, competitors and customers in the market. Such information is often limited in scope and time period. By contrast, regulatory agencies, such as the FCC and Federal Reserve, have access to information on the market spanning decades and are better able to access necessary information that can save antitrust authorities time and cost. Moreover, regulatory agencies already have the ability to monitor and oversee industry actors. Reliance on the regulatory agencies’ ability to monitor could resolve the frequent concerns about imposing conduct remedies and the use of long-term consent decrees.[[88]](https://globalcompetitionreview.com/guide/the-guide-merger-remedies/third-edition/article/antitrust-remedies-in-highly-regulated-industries#footnote-003) The ability to impose effective conduct remedies may reduce the DOJ and FTC’s reliance on the one-time fix of a structural remedy and open the possibility of more tailored remedies.[[89]](https://globalcompetitionreview.com/guide/the-guide-merger-remedies/third-edition/article/antitrust-remedies-in-highly-regulated-industries#footnote-002)

### 2AC---Perm Do CP

#### 1---regulations expands the scope of core antitrust laws by increasing prohibitions.

Bradford and Chilton 18 (Anu Bradford, Henry L. Moses Professor of Law and International Organization, Columbia Law School. Adam S. Chilton, Assistant Professor of Law and Walter Mander Research Scholar @ the University of Chicago. “Competition Law Around the World from 1889 to 2010: The Competition Law Index” , Columbia Law School Scholarship Archive Faculty Scholarship, <https://scholarship.law.columbia.edu/cgi/viewcontent.cgi?article=3519&context=faculty_scholarship> , 2018, date accessed 9/5/21)

The Scope Index is the closest to the CLI in that it also measures the law in the books, treating prohibitions as elements that increase the scope (or stringency) of the law and defenses as elements that reduce the scope (or stringency) of the law. Basic categories in the Scope Index and our CLI are also the same, even if somewhat differently labeled. For example, we refer to “anticompetitive agreements” where the Scope Index refers to “restrictive trade practices.”

## CP---Multilateral

### 2AC---Say No

#### 2---zero risk of international agreement

Stephan 5, Professor and Hunton & Williams Research Professor, University of Virginia School of Law. (Paul, “Global Governance, Antitrust, and the Limits of International Cooperation,” <https://scholarship.law.cornell.edu/cgi/viewcontent.cgi?article=1635&context=cilj>)

The broad definition of competition policy not only makes sense logically, but underscores the difficulties of achieving an international consensus about its content. Even if states could agree that efficiency optimization of the sum of consumer and producer welfare-is the only legitimate objective of competition policy, agreement as to whether a particular regime advances or detracts from efficiency would remain elusive. Specifying the optimal mix of competition and cooperation in a particular economic sector is inevitably controversial. 23 Technological innovation and other kinds of change, as well as shifting consumer preferences, limit the lessons one can learn from a sector's history. Once legitimate differences over the optimal level of competition arise, it becomes difficult, if not impossible, to determine whether a regulator is pursuing efficiency-driven competition policy. The proliferation of alternative objectives for competition policy multiplies the difficulty of finding common ground. Given the difficulty of fixing optimal levels of competition, we should expect much competition law to take the form of elastic standards rather than of precise and constraining rules. With increased discretion comes inconsistency. For example, one cannot insist on maximizing consumer welfare and still promote national champions or protect inefficient small producers. In turn, tolerance of inconsistency opens the door to discrimination. Regulatory choices driven by animus towards foreign producers can be reconciled with other, permissible rationales. The more open-ended and multi-factored the policy and the greater the discretion of regulators to decide where and how to apply competition policy, the easier it becomes to disguise trade protection as competition policy. 24 Strategic deployment of competition law would be most feasible where governments have exclusive enforcement authority. 25

#### A broad, unambiguous, transparently enforceable ruling is key---the counterplan confuses the plan’s decision, ruining investor certainty and inviting loopholes----links to biz con

Reed 19, \*Morgan Reed, President of the App Association, represents more than 5,000 app makers and connected device companies in the mobile economy; (March 13th, 2019, “An FTC Settlement with Qualcomm Could Hold the Entire IoT Economy Hostage”, https://actonline.org/2019/03/13/an-ftc-settlement-with-qualcomm-could-hold-the-entire-iot-economy-hostage/)

Any Outcome that Allows Qualcomm to Export its Illegal Behavior to New Markets Would Be Devastating

Qualcomm’s executives are desperate to save their jobs as shareholders fume over the $121 billion offer they rejected, and time is running out to turn the ship around. Qualcomm’s history, and its current desperate situation, mean that FTC cannot take any promises Qualcomm makes at face value, and must ensure any remedies they reach are iron clad and not limited to a few companies or even the broader smartphone industry. Any company willing to argue that the refusal to license patents to competitors is perfectly legal under its FRAND commitments clearly has no qualms about breaking its contracts and legal commitments. With shareholders demanding results immediately, Qualcomm’s executives will be looking for any loophole or gray area they can exploit as long as possible.

Perhaps most importantly, the FTC must ensure any outcome of this case protects competition beyond the smartphone industry.  Any court decision or settlement in this case should be comprehe

nsive (i.e., fully address each charge the FTC has made in its enforcement action), enforceable, and as transparent as possible in order to provide small business innovators with maximum clarity.

As we move toward a 5G connected world, Qualcomm’s practices represent a clear and present danger to the entire economy. We must protect these standards which form the foundation for competition in the connected economy, and that means holding Qualcomm to their FRAND commitments across the board in a way that leaves no room for the gamesmanship it is famous for in this context. Anything less will only serve to encourage Qualcomm to export its anticompetitive behavior to every corner of the economy.

#### No internal link.

Allison Murray 19, JD from the Loyola Law School, Los Angeles Law School, BS in Business Administration from the University of Redlands, Judicial Law Clerk at the U.S. Bankruptcy Courts, Former Corporate Paralegal at Boeing, Degree in Economics and Management from the University of Oxford, “Given Today's New Wave of Protectionism, Is Antitrust Law the Last Hope for Preserving a Free Global Economy or Another Nail in Free Trade's Coffin?”, Loyola of Los Angeles International and Comparative Law Review, Volume 42, Number 1, 42 Loy. L.A. Int'l & Comp. L. Rev. 117, Winter 2019, p. 117-119

Trump is not the only high-profile leader flirting with staunch protectionism. Western leaders in the E.U. appear to be growing more comfortable than their predecessors with considering similar policies. However, Western lawmakers themselves do not seem as persuaded by the statements of their leadership. The general sentiment among international policymakers is that there has been too much political wherewithal spent on loosening international trade barriers to take actions [\*119] that could counteract that progress. 6Presidential actions taken because of dissatisfaction with current global trade relations aside, a complete overhaul of trade agreements may be too daunting and difficult a task, especially absent ample political support in legislative bodies.

#### Trade doesn’t solve war---commerce just re-routes.

Joanne Gowa & Raymond Hicks 17. \*\*William P. Boswell Professor of World Politics of Peace and War, Princeton. \*\*Statistical Programmer, Niehaus Center for Globalization and Governance; PhD in political science, Emory. “Commerce and Conflict: New Data about the Great War.” *British Journal of Political Science* 47(3): 653-74. Emory Libraries.

The findings we report show that the Great War led to a **rerouting**, rather than a wholesale breakdown, of trade. This did not come as a surprise to states: the historical record shows that states anticipated wartime shifts in their trade channels. Most belligerents nonetheless incurred efficiency losses as a consequence of the shifts, but the losses pale in light of the aggregate costs the war imposed on them. These findings suggest that neglecting wartime trade channels can **overstate** the deterrent power of ex ante trade. It is reasonable to question the extent to which wartime trade can, in general, substitute for its ex ante counterpart. This depends, as we noted above, on the composition of trade. The dominance of homogenous products in trade at the time of World War I made substitution a feasible option. For the same reason, other wars that occurred during the first half of the twentieth century seem likely to have precipitated the same trade dynamics as did the Great War. Preliminary empirical analyses are consistent with this argument. 95 After World War II, however, intra-industry trade – that is, trade in differentiated products between countries with similar factor endowments – came to account for a much larger share of commerce. Krugman notes, for example, that intra-industry rose from about 22 per cent of trade between the industrialized countries in 1962 to about 50 per cent in 2006. 96 This trade tends to involve ‘highly specialized imported varieties for which domestic imports are hard to find’, 97 raising the estimated gains from trade that accrue to countries shifting from autarky to free trade. Trade in these products can magnify wartime trade costs to the extent that trade across enemy lines engages imports that cannot easily be obtained from other trading partners. Production networks also spread more widely across countries over time. This implies that conflicts in the more recent past might indeed have wreaked havoc on trade, raising the deterrent power of ex ante trade. But the composition of conflicts also shifted over time. After 1945, no war would ever again split the major trading states. As we noted above, the advent of the Cold War transformed them into each other’s sturdiest allies. Because the advanced industrialized countries account for a large share of **intra-industry trade**, post-World War II conflicts **did not endanger** the exchange of differentiated products. The same is true of foreign direct investment: for most of the twentieth century, it was largely the major developed country trading partners that were both its home and host countries. 98 The **changing composition of warring dyads** after World War II may help explain the findings in the empirical literature on this period that conflict and ex ante trade are inversely related. The effects of conflicts on wartime commerce in this period have yet to be examined, however. Conclusion That the First World War unleashed tremendous destruction is indisputable. It marked the inception of what has been described as the long European civil war. It resulted in sixteen million deaths and twenty million wounded and destroyed large amounts of physical capital. 99 In its wake, the great powers never established anything remotely similar to the Concert of Europe that succeeded the Napoleonic Wars. Their best efforts produced a League of Nations that was unable to resolve the conflicts of interest that stymied co-operation among them. They could agree neither on the enforcement of the Versailles Treaty nor on a collective response to the Great Depression, which set the stage for the outbreak of the Second World War. The Great War also reputedly destroyed the large trade flows that existed during the first golden age of globalization. For this reason, it has become central to debates about the liberal peace. Its outbreak seemed to destroy any hope that leaders had internalized the idea that war had become a ‘great illusion’, more likely to impose costs than benefits because of the concomitant destruction of the trade that had become integral to the growth of national power. 100 Because its belligerents had been each other’s major trading partners ex ante, the Great War seemed to destroy hopes that economic linkages would secure peace. Yet, the evidence we present here suggests that one of the largest wars in history did not induce a breakdown of trade. Instead, large shifts occurred in interstate commerce, privileging trade between allies, penalizing commerce between adversaries and increasing trade with neutrals. The composition of early twentieth-century trade helped to mitigate the welfare losses these shifts imposed, as it enabled states to switch trading partners and transit routes more easily than might seem possible later in the twentieth century. Because ex ante commerce between belligerents is not necessarily a good indicator of their ex post trade, estimates of the deterrent power of trade need to take both into account.

## AT: CP---STATE ANTITRUST

### 2AC---Preemption

#### The Ninth Circuit imposed court-order limitations on antitrust law to preserve its balance with patent law.

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

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

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

Rejection of District Court’s Expansive Interpretation of Antitrust Laws

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

#### State efforts to impose greater antitrust liability than established by federal courts will be preempted to protect that balance.

Samp 14, \*Richard A. Samp is the chief counsel for Washington Legal Foundation (WLF), a non-profit, public interest law firm in Washington, D.C. WLF filed an amicus brief in support of Love Terminal Partners. (2014, “The Role of State Antitrust Law in the Aftermath of Actavis”, https://scholarship.law.umn.edu/cgi/viewcontent.cgi?article=1062&context=mjlst)

V. ACTAVIS’S PREEMPTIVE EFFECT

Application of state antitrust law to reverse payment settlements is not merely a hypothetical possibility. There are a fair number of pending lawsuits that challenge reverse payment settlements on state-law grounds. The California Supreme Court has agreed to review one such suit.74 In seeking affirmance of the appeals court’s dismissal of the suit, the defendants argue inter alia that the suit is preempted by federal law.75

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

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

Other issues left open by Actavis are likely to be answered in the years ahead. For example, the Supreme Court did not specify whether noncash benefits received by a generic manufacturer in connection with a patent settlement can ever serve as the basis for federal antitrust liability. If the Supreme Court eventually answers that question by stating: “No, federal antitrust law will not examine settlement benefits other than cash that flow to the infringing party,” then it is likely that state antitrust law would be required to conform to that rule. The potential grounds for such a ruling (a desire both to promote settlement of patent disputes and to uphold reliance interests in existing patents) are based largely on values embedded in federal patent law.

There is little reason to believe, however, that the Court would prevent application of state antitrust law to patent settlement agreements where state law is fully consistent with federal antitrust law. Even in areas subject to extensive federal regulation, the Supreme Court has upheld the authority of states to engage in parallel regulation that is not inconsistent with the federal regulation.79 Unless the Court were to determine, as in Connell,80 that states could not be trusted to properly accommodate the objectives of the federal statute at issue (here, federal patent law), there is no reason to conclude that Congress would not have wanted states to be permitted to police the same sorts of anticompetitive conduct that is policed by federal antitrust law. Moreover, states are likely free to impose greater penalties on the proscribed conduct than is available under federal law. As the Court explained in California v. ARC America Corp., state antitrust law is not required to adhere to the same set of sanctions imposed by federal antitrust law.81

It seems reasonably clear, however, that Actavis prohibits states from adopting the procedural devices rejected by the U.S. Supreme Court—either a per se condemnation of reverse payment settlements or a presumption of illegality accompanied by “quick look” review. The Supreme Court rejected those approaches because it determined that in many cases there might well be pro-competitive economic justifications for reverse payment settlements and that presuming their illegality could result in the suppression of economically useful conduct.82 State antitrust laws that adopted the FTC’s proposed presumption of illegality would be subject to similar criticism, and thus would likely be impliedly preempted as inconsistent with the careful balance between antitrust and patent law established by Actavis.

CONCLUSION

Because Actavis left so many questions unanswered regarding the application of federal antitrust law to patent settlement agreements, the extent to which federal law preempts the application of state antitrust law to such agreements remains similarly unsettled. One can be reasonably confident that if private plaintiffs become dissatisfied with the results of pending litigation under federal antitrust law, they will turn with increasing frequency to state antitrust law as an alternative remedy. Even if state law ends up doing no more than “parallel” federal antitrust law, defendants are likely to incur substantial litigation costs fending off such state claims in the years to come.

## DA---FTC

### Thumper---FTC Prior Approval

#### Prior approval thumps.

Edwards 10-26-2021, (Jane, “FTC to Require Acquisitive Firms to Obtain Prior Approval Before Closing Any Future Deal,” https://www.govconwire.com/2021/10/ftc-issues-prior-approval-policy-statement-to-prevent-anticompetitive-mergers)

The Federal Trade Commission has issued a new policy statement that seeks to restore into standard practice the use of prior approval authority to restrict future acquisitions for companies pursuing anticompetitive merger transactions. Under the Prior Approval Policy Statement, companies seeking to make acquisitions should secure prior approval from FTC before closing any future deal in an affected market where violation is alleged to occur for a minimum period of 10 years, the commission said Monday. FTC will look at the nature of the deal, degree of pre-merger market power, evidence of anticompetitive market dynamics, history of acquisitiveness of merging parties, the level of market concentration and other factors as it works to determine the coverage of a prior approval provision.

#### Creates uncertainty and saps up resources.

Loughlin and Oliver 10-28-2021, (Chuck Loughlin, Leigh Oliver, “FTC establishes broad policy to require prior approval provisions in all merger divestiture orders,” https://www.jdsupra.com/legalnews/ftc-establishes-broad-policy-to-require-6917794)

Analysis

The FTC’s Prior Approval Statement explains that the FTC is hoping that the more liberal use of prior approval provisions will discourage companies from moving ahead with “facially anticompetitive” deals, preserve Commission resources, and flag anticompetitive deals that fall below the Hart-Scott-Rodino (HSR) thresholds and do not trigger federal reporting requirements. Certainly, demanding prior approval provisions—which may extend beyond the relevant markets affected by the merger—will create uncertainty and increase the burden on merging parties. The effect could be that parties take more cases to litigation rather than agree to consent decrees with prior approval provisions that go beyond the scope of the challenged transaction. Moreover, the Commission’s suggestion that it may seek prior approval provisions even when parties abandon a merger would necessarily require the FTC to continue a litigation even after the parties abandoned the deal, using up important Commission resources on expensive litigation that is no longer needed to block the transaction at issue that allegedly has an imminent threat of harming competition. This provision, and others that stretch beyond the transaction at issue, could push more parties to litigate mergers that they would otherwise abandon. After all, if the FTC is going to litigate the issues in the case in order to secure a prior approval provision, then parties may be less willing to abandon the deal in the first place. The Commission appears to hope that these requirements result in less deal activity to begin with, but that is not at all certain.

#### Statement creates confusion and timing uncertainty.

Schwarts et. al 10-28-2021, Akin Gump Strauss Hauer & Feld LLP. (Haidee Schwartz , Corey W. Roush , Ed Pagano and Taylor Daly, “FTC Makes Major Changes To Expand Prior Approval In Merger Consents, Creating Greater Risk For Merging Parties Subject To FTC Merger Review,” https://www.mondaq.com/unitedstates/antitrust-eu-competition-/1125562/ftc-makes-major-changes-to-expand-prior-approval-in-merger-consents-creating-greater-risk-for-merging-parties-subject-to-ftc-merger-review)

On Monday, October 25, the Federal Trade Commission (FTC or "Commission") issued a policy statement announcing that the Commission will require all parties that enter into a merger consent agreement to agree that the parties will for at least ten years seek and obtain prior approval from the FTC before closing any future transaction affecting each relevant market for which a violation was alleged. Unlike reviews under the Hart-Scott-Rodino Antitrust Improvements Act of 1976 ("HSR Act") that provide a statutory timeline for U.S. antitrust agency review of proposed transactions and thus some timing certainty for merging parties, the prior approval provisions anticipated by the FTC will have no statutory or other timeline for transactions to receive prior approval. Thus, any company with a transaction subject to prior approval will face much greater timing uncertainty. The FTC policy statement also states that the FTC may require companies entering into merger consent orders to agree to a prior approval provision that covers product and geographic markets beyond those impacted by the merger. When making such determinations of additional relief in the future, the Commission's policy statement indicates that the agency will consider several factors, including (1) the nature of the transaction; (2) the level of market concentration; (3) the degree to which the transaction increases concentration; (4) the degree to which one of the parties had market power pre-acquisition; (5) the parties' history of acquisitiveness; and (6) evidence of anticompetitive market dynamics. Further, in the policy statement, the FTC announced it will require buyers of divested assets subject to a merger consent order to agree to seek prior approval of any future sale of those assets for a minimum of ten years. This will discourage some divestiture buyers and likely will decrease the value of divested assets. Finally, the Commission policy statement stated that in cases in which the Commission issues a complaint and the parties subsequently abandon the transaction, the agency will make a case-specific determination as to whether it will pursue a prior approval order. This would require a court order or party agreement. The Antitrust Division of the Department of Justice (DOJ) did not join the FTC's announcement on its prior approval policy, creating an additional area of divergence between the DOJ's and FTC's merger review policies and practices—a divergence that could have a significant impact on transactions.

#### Impacts all markets.

Litvack and Vooris 10-26-2021, (Douglas E Litvack is co-chair of the firm’s Antitrust and Competition Law Practice. He represents both plaintiffs and defendants in complex antitrust litigation and appeals, Lee K Van Vooris is co-chair of the firm’s Antitrust and Competition Law Practice and a member of the Corporate and Private Equity Practices, “Client Alert: FTC Reverses Quarter-Century of Enforcement Policy,” https://www.jdsupra.com/legalnews/client-alert-ftc-reverses-quarter-8487547)

In a move widely expected after the Federal Trade Commission’s Democratic majority rescinded a 1995 policy in July, the FTC issued a policy statement yesterday requiring prior approval provisions for settlements in future transactions affecting any relevant market for which they alleged a violation. The 1995 policy was not to require prior approval provisions as part of a consent decree, settlement, or enforcement order absent extraordinary circumstances (typically where one of the parties to the decree had a history of doing anticompetitive transactions below the HSR threshold). Now, the FTC will require a prior approval provision for all merging parties that resolve antitrust issues subject to a Commission Order. The FTC also appears likely to pursue a prior approval order even when the parties abandon a transaction after substantially complying with a Second Request. Under a prior approval provision, the party must obtain the FTC’s permission before consummating any transaction subject to the provision. As the statement suggests, the FTC could simply reject the transaction without having to provide a court with sufficient evidence to show the transaction violates the law. Styled as a measure to “preserve Commission resources,” the overall effect of the policy on transactions may not be that clear. However, this new policy will certainly add additional risk to any transaction that could be resolved with a divestiture because the parties will need to give the FTC veto power over future deals in that relevant market – and perhaps even beyond that market, as the FTC bragged about in a consent decree also released yesterday. The new Commission policy states that in certain cases where “stronger relief is needed,” the prior approval order may include geographic and product markets beyond those in the instant transaction. Because of the veto power and the threat of an expansive prior approval provision, parties may be more likely to litigate a transaction’s legality rather than settle with the FTC and accept a provision that will hamstring their ability to do future deals. It therefore appears that this policy may inadvertently incentivize more costly merger litigation for both the FTC and defendants, opening the question of whether the policy change might actually cost more in Commission resources than the former policy, which did not penalize companies in this way for settling antitrust disputes with the FTC.

### 2AC---UQ

#### FTC is excessively devoting resources to enforcing patent holdup now.

Morris 9/17/21, \*Angela Morris, Deputy editor at IAM Media; (September 17th, 2021, “The FTC creates a potential new US headache for SEP owners”, https://www.iam-media.com/frandseps/the-ftc-creates-potential-new-us-headache-sep-owners)

SEP owners that may already be wary of potential Biden Administration regulatory changes now have a new threat to keep them up at night.

Over the summer the Federal Trade Commission [announced an expanded view](https://www.jdsupra.com/legalnews/the-ftc-expands-section-5-enforcement-7020931/) of its standalone enforcement authority to curb anti-competitive misconduct; and [now the agency has made it clear](https://www.ftc.gov/news-events/press-releases/2021/09/ftc-streamlines-investigations-in-eight-enforcement-areas) that priority targets include “abuse of intellectual property” and “monopolistic practices”.

The agency’s description of the “anticompetitive and deceptive conduct” it seeks to curtail in the technology sector most likely will encompass alleged misconduct by standards essential patent (SEP) owners and their commitments to licensing on FRAND terms, according to IP and antitrust attorney Tim Syrett.

“The FTC has previously conducted two investigations where it found that SEP holders seeking injunctions against licensees was anti-competitive and presented a threat to innovation,” Syrett, who is a partner in Wilmer Hale in Washington DC, explains via email. “That may be an area where the FTC wants to continue to devote resources and is certainly an area where there can be harm to competition because of the hold-up power of SEPs.”

He adds that investment-backed patent assertion entities and patent aggregation organisations may also have reason to fear ITC investigations.

“Investment-backed patent assertion entities can obscure information about who actually owns or has an interest in patents that can harm both licensing and litigation,” says Syrett. “Further, we have seen a concerning rise of patent assertions where the incentives of investors to obtain outsized returns from patents trump any reasonable valuation of the patents’ worth, which can harm competition in the licensing of patents.”

IP owners in the pharmaceutical, technology and gasoline refining industries should also take note of the development, since the commission indicated that it would investigate potential abuses of IP rights that create anti-competitive and deceptive conduct in those spaces.

Big Tech companies and other large businesses would be advised to pay attention as well, given that another stated FTC aim is to target alleged abuses of their market power that stop entrepreneurs from competing.

The two resolutions were among a group of eight that a divided commission passed this month on a 3-2 vote, as the agency seeks to handle increased workload from high merger filings. Both resolutions, effective for 10 years, direct the agency to use its compulsory processes to obtain documents and testimony through either demands or subpoenas to investigate allegations that would be a violation of Section 5 of the FTC Act.

### 2AC---Link Turn

#### Two link turns:

#### 1---private action---the plan buttresses private enforcement to remedy SSO patent holdup---that zeroes the link.

Speegle 12, \*Adam Speegle, J.D., (May 2012, “Antitrust Rulemaking as a Solution to Abuse on the Standard-Setting Process Setting Process”, <https://repository.law.umich.edu/cgi/viewcontent.cgi?article=1128&context=mlr>)

* Plan is not FTC activism
* Requiring SSO’s to administer rules lets the private sector self-manage
* No new staff/resources required
* No FTC monitoring required
* If the FTC does have to do anything, number of cases will be limited due to deterrence, which solves an excessive workload

This too is not fatal to the approach. The proposed rule uses a light touch in that it only buttresses rules established by SSOs. Because the rule would support actions by the private sector to manage their own activities rather than introducing additional agency oversight, Congress would be unlikely to react the way it did when the FTC's activism in the consumer protection arena evoked fears of excessive government intervention.

One final concern with the approach is that it will demand more of the FTC in a regulatory capacity than the FTC is capable of handling. For example, under any rule where the FTC would be called upon to enforce RAND terms, the FTC might fall into the role of license-rate regulator, determining which licensing fees are reasonable and which are unreasonable. But the FTC is a relatively small institution with limited resources.1 62 Some are concerned that under such a scenario the Commission would have to bring on new staff with expertise in the technology sector to monitor the reasonableness of licensing terms arising from SSO commitments.163

This concern is unlikely to be serious under the proposed formulation. As to the problem of determining "reasonableness," the FTC has already developed expertise in this area and, in fact, recently authored a report putting forth workable solutions to the problem of calculating "reasonableness" in the context of RAND commitments. 64 Further, the FTC would not need to establish itself as a monitoring body and would not incur the related costs of increases in staff and resources. Rather, enforcement of the proposed rule would operate similarly to the FTC's enforcement of its consumer protection rules. Under that regime, companies and individuals report fraudulent activity that violates one of the FTC's rules, which the Commission then investigates and, at its discretion, prosecutes. 16 Because the burden would be on the private sector to report in such a regime, the FTC would not need to monitor SSO activity. And as with consumer protection enforcement, a small number of decisive enforcement actions against abusive firms should act as a deterrent sufficient to decrease the FTC's litigation workload. 166 Thus, despite some legitimate concerns with the approach of enforcement by rule, those concerns are not fatal to the strategy. Moreover, the next Section demonstrates that there are also general benefits to enforcement by rule that weigh in favor of the approach.

### 2AC---Impact---AT Food

#### US not key to global ag and others fill in— Here’s a chart

Knoema 2018 (data library, https://knoema.com/cduhihd/world-exports-and-imports-of-agricultural-products)

Table

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## AT: DA---5G Leadership

### IL---Innovation

#### The Qualcomm decision has cooling effect on 5G innovation.

Breed et al. 20, \*Logan M. Breed, antitrust partner in the Washington office of Hogan Lovells; \*Edith Ramirez, former Chairwoman of the Federal Trade Commission; \*Suparna S. Reddy, Associate at Hogan Lovells based in Washington; \*Labeat Rrahmani, an Associate at Hogan Lovells; (August 19th, 2020, “Ninth Circuit rules in favor of Qualcomm, distancing antitrust law from FRAND disputes”, https://www.engage.hoganlovells.com/knowledgeservices/news/ninth-circuit-rules-in-favor-of-qualcomm-distancing-antitrust-law-from-frand-disputes)

The practical effects of the Ninth Circuit’s decision are already emerging: other holders of significant wireless SEP portfolios such as [Nokia](https://www.nokia.com/about-us/news/releases/2020/03/24/nokia-announces-over-3000-5g-patent-declarations/) and [Ericsson](https://www.ericsson.com/en/blog/2019/10/5g-patent-leadership) have already begun to use more aggressive patent strategies related to 5G devices. The decision could also have repercussions beyond the technology sector. Companies litigating against the FTC, including in the pharmaceutical sector, have quickly [availed](https://globalcompetitionreview.com/gcr-usa/federal-trade-commission/vyera-claims-qualcomm-reversal-supports-defence-against-ftc) themselves of the ruling to defend themselves. The ruling may also have a cooling effect on innovation if companies are less inclined to participate in standard-setting processes due to limited repercussions for companies that maneuver around their FRAND obligations. If the panel decision stands, it could have far reaching consequences.

### 2AC---Holdup Bad---Melamed

#### Monopoly pricing undermines innovation by reducing product output, taxing follow-on inventions, and distorting the standards-development process.

Melamed & Shapiro 18, \*A. Douglas Melamed is Professor of the Practice of Law at Stanford Law School; \*Carl Shapiro is the Transamerica Professor of Business Strategy at the Haas School of Business at the University of California at Berkeley; (May 2018, “How Antitrust Law Can Make FRAND Commitments More Effective”, https://www-cdn.law.stanford.edu/wp-content/uploads/2018/05/How-Antitrust-Law-Can-Make-FRAND-Commitments-More-Effective.pdf)

II. The Need For Effective FRAND Commitments

Restrictions on ex post opportunism are needed to prevent a wealth transfer from implementers and their customers to SEP holders as a result of monopoly pricing.17 But much more is at stake.

A. Underlying Economic Principles

Basic economic principles instruct that ex post monopoly pricing by SEP holders harms consumers by raising the cost of products that comply with the standard. Ex post monopoly pricing also creates welfare-reducing deadweight loss in three respects. First, it increases the cost of, and thus reduces the output of, standard-implementing products. Second, and perhaps more important, supracompetitive pricing by SEP holders increases the cost of follow-on inventions that build on or improve the technologies claimed by the SEPs. This cost acts as a tax on follow-on innovation, reducing such innovations and impairing the very process of invention that the patent laws are intended to promote. Third, the prospect of ex post monopoly pricing by SEP holders exaggerates incentives for firms to obtain patents that might become SEPs and, perhaps more important, to jockey for inclusion of their patented technologies in industry standards. The latter incentive in turn could cause delays and induce expensive rent-seeking conduct in the standard-setting process and distort the standards-development process away from optimal technical solutions in ways that further the interests of rent seekers.

### AT: Taiwan

#### No invasion – China shifting to a strategy of soft power

Reuters and Kyodo ‘19

(Thomson Reuters News, is the world’s largest international multimedia news provider; AND, Kyodo News Plus is an online publication delivering the latest news from Japan together with those stories from around the globe, “Ahead of Taiwan's January election, China tries to offer up a softer touch,” <https://www.japantimes.co.jp/news/2019/12/01/asia-pacific/politics-diplomacy-asia-pacific/china-taiwan-election-softer-touch/>, Snider)

China is stepping up efforts to be nice to Taiwan ahead of key elections on Jan. 11, offering better treatment to Taiwanese in China and urging the democratic island to “come home,” but many there only see Beijing wielding a threatening stick. China denies interfering in elections in Taiwan, which it claims as sacred territory, but it traditionally tries various means to influence their result, hoping politicians with a more positive view of Chinese ties get into office. These can range from military intimidation — China fired missiles into the Taiwan Strait before the 1996 election — to what Taiwan’s government calls Beijing’s manipulation of China-friendly Taiwanese media. China also wants to ensure that Taiwan’s huge business community in the country is happy, hoping businesspeople will go home to vote for China-friendly politicians. In November, China unveiled 26 measures to further open its economy to Taiwanese investors and said Taiwanese abroad could turn to Chinese embassies for consular help. Dovetailing with those steps has been an unusual Chinese effort at soft power to speak directly to people in Taiwan, a gentler approach after some hostile moves this year, such as a threat of force by President Xi Jinping in January. Commenting on the 26 measures, Hai Xia, one of the highest-profile news presenters on Chinese state television, appealed for Taiwan to return “home.” “Taiwan’s fate is connected with the motherland. Wan Wan, come home,” she said on the air, using a diminutive for Taiwan. Not only has China been using Mandarin, the official tongue on both sides of the strait, but it has also deployed Hokkien and Hakka, two languages spoken on the island whose formal use is not encouraged in China. On Wednesday, it introduced Zhu Fenglian, a new spokeswoman for its policymaking Taiwan Affairs Office, who voiced warm greetings in both languages at her first news conference. “I am a Hakka from Guangdong. I’d like first here to say hello to folks in Taiwan,” she said in Hokkien, generally known in Taiwan as Taiwanese.

# 1AR

## Case

### - AT: Hold Up

#### Patent investments and potential royalty pricing are better statistics to determine if hold up is happening- it is

Shapiro & Lemley 20, \*Carl Shapiro is the Transamerica Professor of Business Strategy Emeritus at the Haas School of Business, University of California at Berkeley; \*Lemley is the William H. Neukom Professor at Stanford Law School and a partner at Durie Tangri LLP; (2020, “THE ROLE OF ANTITRUST IN PREVENTING PATENT HOLDUP”, https://faculty.haas.berkeley.edu/shapiro/patentholdup.pdf)

E. Actual Holdups Are Very Difficult to Measure

As just noted, the extensive empirical support for the general theory of holdup consists primarily of studies showing that firms structure their relationships to avoid or minimize the adverse effects of holdup. Critically, the evidence does not involve quantifying the magnitude of actual ex post holdups.36 Indeed, the empirical literature on holdup has relatively few documented examples of large-scale actual holdups.37 This will be important below when we turn to evaluating the empirical evidence regarding patent holdup in particular.

Anticipating the arguments being made by those who deny that the patent holdup problem is real and significant, it is instructive to ask why the empirical literature on the general holdup problem has not proceeded by measuring the frequency or magnitude of actual holdups.

In part this is for a very good conceptual reason: the theory predicts that market participants will structure their affairs to avoid or mitigate actual holdups. As stressed above, the social costs caused by the holdup problem can be large even if large-scale holdups are very infrequent. The validity of the general theory of holdup, and the importance of the holdup problem, do not hinge on the frequency or magnitude of actual holdups.

But practical considerations also play a big role in explaining why the very large empirical literature on the holdup problem includes few documented instances of actual holdups. Even in situations where such holdups take place, they are exceedingly difficult for researchers to reliably detect and quantify. To see why, denote the holdup (ex post monopoly) price by 𝑃𝐻 and the ex ante competitive price by 𝑃 ∗ . The (perunit) magnitude of the actual ex post holdup is equal to (𝑃𝐻 − 𝑃 ∗ ). Measuring either component of this difference can pose quite a challenge for researchers. Actual transaction prices in complex business-to-business transactions are rarely observable by researchers. Plus, even when a measure of price is available, it typically is confounded by other terms and conditions, making 𝑃𝐻 very hard to observe. Coming up with a good measure of the competitive benchmark price 𝑃 ∗ is even harder, since it reflects a counterfactual and since the transactions at issue are by nature idiosyncratic. Practical considerations also explain why the empirical literature on the holdup problem includes few documented instances in which the prospect of holdup has discouraged investment. The resulting reduction in investment typically will not normally be observable to researchers, much less attributable to holdup.

For all of these reasons, scholars studying the holdup problem widely agree that the general theory of holdup is very well supported empirically without expecting, much less demanding, a body of empirical work measuring actual holdups. This same sensible approach should be applied to patent holdup.

When we turn to look at patent holdup below, we will examine the two types of evidence used in the more general empirical literature on holdup. First, we look for evidence identifying situations in which the patent holdup problem is significant. **The telltale marker that the patent holdup problem is significant in a given setting is the presence of substantial investments specific to a given patent or patent portfolio. Second, we look for evidence that the mechanisms used to manage the patent holdup problem are costly or imperfect**. There is clear evidence that the mechanisms used by SSOs to manage SEP holdup are costly and imperfect.

#### C:

## DOJ

### 1AR- Thumper

#### Impacts all markets.

Litvack and Vooris 10-26-2021, (Douglas E Litvack is co-chair of the firm’s Antitrust and Competition Law Practice. He represents both plaintiffs and defendants in complex antitrust litigation and appeals, Lee K Van Vooris is co-chair of the firm’s Antitrust and Competition Law Practice and a member of the Corporate and Private Equity Practices, “Client Alert: FTC Reverses Quarter-Century of Enforcement Policy,” https://www.jdsupra.com/legalnews/client-alert-ftc-reverses-quarter-8487547)

In a move widely expected after the Federal Trade Commission’s Democratic majority rescinded a 1995 policy in July, the FTC issued a policy statement yesterday requiring prior approval provisions for settlements in future transactions affecting any relevant market for which they alleged a violation. The 1995 policy was not to require prior approval provisions as part of a consent decree, settlement, or enforcement order absent extraordinary circumstances (typically where one of the parties to the decree had a history of doing anticompetitive transactions below the HSR threshold). Now, the FTC will require a prior approval provision for all merging parties that resolve antitrust issues subject to a Commission Order. The FTC also appears likely to pursue a prior approval order even when the parties abandon a transaction after substantially complying with a Second Request. Under a prior approval provision, the party must obtain the FTC’s permission before consummating any transaction subject to the provision. As the statement suggests, the FTC could simply reject the transaction without having to provide a court with sufficient evidence to show the transaction violates the law. Styled as a measure to “preserve Commission resources,” the overall effect of the policy on transactions may not be that clear. However, this new policy will certainly add additional risk to any transaction that could be resolved with a divestiture because the parties will need to give the FTC veto power over future deals in that relevant market – and perhaps even beyond that market, as the FTC bragged about in a consent decree also released yesterday. The new Commission policy states that in certain cases where “stronger relief is needed,” the prior approval order may include geographic and product markets beyond those in the instant transaction. Because of the veto power and the threat of an expansive prior approval provision, parties may be more likely to litigate a transaction’s legality rather than settle with the FTC and accept a provision that will hamstring their ability to do future deals. It therefore appears that this policy may inadvertently incentivize more costly merger litigation for both the FTC and defendants, opening the question of whether the policy change might actually cost more in Commission resources than the former policy, which did not penalize companies in this way for settling antitrust disputes with the FTC.

## DA

### 1AR---Link Turn---Overclaiming

#### Ex ante valuations streamline innovation by weeding out the nonessentials and rewarding truly essential patents.

Arsego 15, \*David Arsego, J.D., Brooklyn Law School, May 2016, Certificate in Intellectual Property Law, B.S. in Mechanical Engineering, Villanova University, May 2010, works at Fay Kaplun & Marcin; (“The Problem with FRAND: How the Licensing Commitments of Standard-Setting Organizations Result in the Misvaluing of Patents”, <https://brooklynworks.brooklaw.edu/cgi/viewcontent.cgi?article=1416&context=bjil>)

A common theme in current FRAND litigation is inflated claims for damages and desired royalty rates. Judge Holderman in In re Innovatio IP Ventures reduced IP Ventures’ award to a few percentage points of its original claim. He justified this action by stressing the importance of the patent to the standard at issue and ruled that patents of lesser importance are not entitled to as high of rates as patents of greater importance. This proposed valuation framework intends to assess that very same importance, ex ante and prior to any negotiations or litigation. The intent is for contracting parties to have an initial understanding of the patent value prior to negotiations. In the same way that Judge Holderman’s judgement turned on the classification of the at-issue patents as “of moderate to moderate-high importance to the standard”, an opinion from ETSI that assesses this same importance would give negotiation parties a relatively clear picture of the importance of their patents.

D. The Effects of Such Valuation

The intended effect of this mandatory patent valuation is not to solve every patent-licensing disagreement that parties will have. It is merely a proposed tool that will help companies come to an agreement more efficiently. Both parties will be aware if one party has a portfolio full of patents with little importance and will not waste time debating the value. Similarly, if two parties are in litigation regarding whether or not a royalty rate is FRAND, the judge will not have to perform an independent analysis of the patent’s importance herself, but can instead rely on ETSI’s determination. The effect of this reliance, and the initial determination of essentiality, will be far reaching. Duplicitous patent holders that may claim essentiality for meritless patents will now be barred from asserting SEP rights.246 Important innovators with valuable patents will be more justly rewarded for their innovation, not only by having an “important” label on their SEPs, but by no longer competing for royalties with patents that are deemed to be nonessential.

### 1AR- AT: Impact

#### No Impact- Propoganda trapping

Cole ‘19

(J. Michael, senior non-resident fellow at the Global Taiwan Institute, “The Principal Targets of CCP’s ‘Sharp Power’ Operations Against Taiwan,” The Global Taiwan Brief, Volume 4, Issue 22, Snider)

Beijing’s insistence on perpetuating United Front Work efforts against Taiwan regardless of their outcome—poor results or even, on some occasions, counterproductive—can be attributed to a combination of factors, among them an inability to comprehend the dynamics of a democratic society, resistance to change, as well as opportunism on the part of the institutions in China that benefit financially from the campaign against Taiwan (the same can be said of the People’s Liberation Army, or PLA, which no doubt has used the unresolved conflict over Taiwan as a key argument for obtaining larger budgets and the development/acquisition of modern combat capabilities). One other possibility for Beijing’s continued reliance on “sharp power,” which has not received as much attention but could certainly account for its perpetuation—notwithstanding the poor and counterproductive results—is the fact that the principal target of such operations, or a secondary target just as important as the primary one, is not in fact Taiwan, but rather the Chinese public, the CCP, and its affiliated institutions. In other words, to truly comprehend the rationale behind CCP political warfare, it is essential that analysts look at such efforts for their value as an instrument of propaganda aimed at a domestic audience. Although every Chinese leader and CCP general secretary since Mao Zedong (毛澤東) has made it a “core principle” to annex Taiwan, no leader has made this achievement such a cornerstone of his ideology as has Xi Jinping (習近平). In fact, Xi has staked his credibility (and survival as a political figure) on his ability to “rejuvenate the Chinese nation” and to secure China’s “rightful position” within the community of nations. Unifying Taiwan, an objective that, in his view, his predecessors have failed to give sufficient importance, lies at the center of his ambitions, even if recent developments, such as the crisis in Hong Kong and the trade war with the United States, have gotten in his way. Xi’s ambitions have furthermore been accompanied by a renewed emphasis on ideology, which while helpful in mobilizing the masses also creates higher expectations of the CCP’s ability to deliver on its promises. One consequence of this dynamic is that Xi and his CCP henchmen have painted themselves into a corner when it comes to China’s plans for Taiwan: hubris and unbridled nationalism. These characteristics of Xi’s worldview and key pillars of his legitimacy have created false expectations on the issue of unification, blinding the CCP leadership, and much of the Chinese population, to the fact that Beijing’s plans have been failing miserably. No combination of sticks and carrots by Beijing, from incentive programs to military coercion, has succeeded in arresting, let alone overturning, the trends in Taiwanese society which militate against a takeover by their authoritarian neighbor. Having oversold his ability to resolve a “core issue” that his predecessors had neglected, Xi now finds himself in an uncomfortable position. Sweeteners and punitive action, the full array of Chinese “sharp power,” aren’t working. The problem with dictators—especially dictators who are feared rather than loved by those around them, as is arguably the case with Xi—is that they cannot admit that they are wrong, or that their entire policy platform has been a mistake. Given the high pitch of CCP ideology concerning Taiwan and the repeated references to the historical inevitability of unification, no CCP leader could ever turn around to face his counterparts and state that they were wrong, that efforts to annex Taiwan have been fruitless. The only alternative to admitting defeat, therefore, is to engage in deception, to use propaganda to maintain the illusion that things are moving in the right direction. This explains why incidents in which famous Taiwanese politicians or members of the entertainment industry publicly state their allegiance to the People’s Republic of China (PRC) and their ethnicity as Chinese receive so much attention in Chinese media and social media, when in fact the impact on Taiwanese society is negligible and quite possibly counterproductive. That is perhaps why the CCP continues to insist that only a small number of Taiwanese from the reviled Democratic Progressive Party (DPP), along with malicious foreign forces, stand in the way of eventual “peaceful” unification. And this also explains why the Taiwan Affairs Office (TAO) and other CCP organs have repeatedly inflated statistics concerning the number of Taiwanese who have chosen to take advantage of the 31 and 26 incentive programs offered by China—the aim here being to demonstrate to the Chinese public that the Taiwanese cannot wait to reap the benefits of work in China, which of course in the CCP playbook is tantamount to support for “rejoining the Motherland.” With information in China under strict control and heavily censored, the general Chinese public is led to believe that the situation in the Taiwan Strait indeed is moving in the “right” direction and that the Taiwanese are fully embracing China. The alternative, of course, is unacceptable to the CCP, and the Chinese cannot become cognizant of this inconvenient fact. Another—and not unrelated—element that helps explain why political warfare is such an important instrument of propaganda for domestic consumption is the possibility that Xi remains convinced that the ultimate option to resolve the “Taiwan issue”—the use of force by the PLA—is too premature or would have catastrophic consequences for his grand ambitions. Propaganda, this time aimed at the PLA and other agencies in the national security establishment, therefore becomes necessary to quiet those voices calling for a more drastic course of action against Taiwan. Only progress, or in this case the illusion that things are progressing, can help counter forces that, if they prevailed against the current narrative, would in the process demonstrate that Xi’s entire Taiwan policy since 2012 has been a failure. The main point: While Chinese political warfare aims to corrode democratic institutions in Taiwan and create opportunities which can be exploited to help realize Beijing’s ambitions on unification, much of its raison d’être is also attributable to the need for the Chinese Communist Party to convince the Chinese public that things are moving in the right direction—despite all the evidence to the contrary.