DEPARTMENT OF JUSTICE

"Don't Stop Thinking About Tomorrow"*: Promoting Innovation by Ensuring Market-Based Application of Antitrust to Intellectual Property

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I. Introduction

Good morning. It's a real pleasure to join you today here in Paris, and it has been my honor to chair the discussions in WP3 earlier this week.

Before we begin, I ask that we pause for a moment so that we can mark the 75th anniversary of the Allied landing in Normandy today. We should reflect and remember the lives lost that day among the soldiers who helped liberate the continent, as well as the civilians—including many French nationals—who perished while assisting the Allied effort.

Thirty-five years ago today, President Ronald Reagan delivered one of his most famous speeches, on the shores of Normandy, in commemoration of the 40th Anniversary of D-Day. Some of his words are particularly appropriate for a gathering like this one. He explained:

> When the war was over, there were lives to be rebuilt and governments to be returned to the people. There were nations to be reborn. Above all, there was a new peace to be assured. These were huge and daunting tasks. But the Allies summoned strength from the faith, belief, loyalty, and love of those who fell here. They rebuilt a new Europe together.[1]

That process of rebuilding included the founding of the OECD, initially called the "Organisation for European Economic Cooperation," as part of the post-war Marshall Plan.[2] The strength of this institution grew over time as more countries around the world joined the organization. As we remember the fallen heroes of the past, we should be proud to take part in these proceedings today, and to honor those who gave their lives to make our efforts today possible. Our U.S. President, President Trump, is also here in France today, in Normandy, commemorating this day in history, along with my friend, the Chairman of the American Battle Monuments Commission, David Urban.

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* FLEETWOOD MAC, *Don't Stop* (Warner Bros., 1977).

[1] President Ronald Reagan, "On the 40th Anniversary of D-Day," HistoryPlace.com, http://www.historyplace.com/speeches/reagan-d-day.htm.

[2] OECD, History, https://www.oecd.org/about/history/.

I am personally grateful for the opportunity to speak today on one of my favorite topics: the application of competition law to intellectual property licensing. Having reviewed the contributions from the participants in today's roundtable, I was impressed by the uniform commitment among competition enforcers to tailoring our policies toward the common goals of fostering innovation and economic liberty.

There's no better location to convene for a discussion of competition and innovation policy than where we stand today, only a few kilometers from the Eiffel Tower: one of the most iconic shrines to innovation in the world.

Over the past century, the Tower has taken on a romantic image, but its original historical meaning still remains. France, and Paris in particular, played an important role in promoting technological innovation in the industrial era, building on Enlightenment ideals of using science and reason to improve the human condition.[3] That same spirit animated the United States during the early decades of our own Republic, as the U.S. patent system flourished.

During the first half of the 19th Century, France justifiably was proud of its innovative spirit. It celebrated its technological leadership by staging "national exhibitions" that brought together inventors, engineers, and artisans to promote their new ideas.[4] France's culture of innovation proved contagious around the globe. Other countries followed its lead by hosting their own exhibitions, which soon became international gatherings beginning with London's "World Expo" in 1851.[5]

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[3] Arthur Chandler, *Revolution: The Paris* Exposition Universelle, *1889*, WORLD'S FAIR MAGAZINE, http://www.arthurchandler.com/paris-1889-exposition (last visited May 30, 2019).
[4] Pauline De Tholozany, *Paris: Capital of the 19th Century: The Expositions Universelles in Nineteenth Century Paris*, BROWN UNIVERSITY LIBRARY CENTER FOR DIGITAL SCHOLARSHIP https://library.brown.edu/cds/paris/worldfairs.html#contents (last visited May 30, 2019).
[5] *Id.*

As some of you may know, Paris held one of the most famous world's fairs in October 1889, commemorating the 100th anniversary of the storming of the Bastille.[6] At that event, the Eiffel Tower was revealed on the world stage as the planet's tallest man-made structure—a title it held for the next 41 years.[7] When the committee in charge of putting on the 1889 fair was deciding on a construction project to commemorate the event, they opted for Eiffel's more modern design for a tower because they wanted to use metal, a new technology, rather than stone, an ancient building method, to give the tower a "distinctive character."[8]

The Tower serves as a symbol of human ingenuity, inventiveness, and ambition.

All of these are qualities that each of us hope to protect in our roles as competition enforcers, academics, and practitioners.

II. Advancing Innovation Through the Sound Application of Competition Law to Intellectual Property Disputes

The next great technological breakthrough of tomorrow may be only a dream today. At the Antitrust Division of the U.S. Department of Justice, we aim to protect the process of innovation by ensuring that adequate incentives exist to turn those dreams into reality.

Over the past 20 months, the Antitrust Division has aimed to modernize the U.S. government policy approach to competition and innovation policy. In a series of academic speeches, we outlined the "New Madison" approach to antitrust and intellectual property law, which is premised on the notion taken from the Framers of our Constitution that antitrust and patent law share the same goal of promoting dynamic competition.[9] We discussed and debated

[6] *Id.*
[7] Cristopher Klein, *10 Things You May Not Know About the Eiffel Tower*, HISTORY.COM, https://www.history.com/news/10-things-you-may-not-know-about-the-eiffel-tower (Mar. 31, 2014).
[8] Chandler, *supra* note 3.
[9] Makan Delrahim, Assistant Attorney General – Antitrust Division, "The 'New Madison' Approach to Antitrust and Intellectual Property Law" (Mar. 16, 2018), *available at* https://www.justice.gov/opa/speech/file/1044316/download.

these issues at home and abroad. Our goal has been to advance civil debate into the questions regarding what role, if any, competition law should play in policing IP licensing disputes.

To be sure, our policy positions have fostered a lively discussion among scholars, practitioners, and other agencies.[10] It also has spurred some internal reflection about how, in the past, U.S. policymakers and enforcers may have fostered a one-sided discussion regarding the risks of so-called patent hold-up and hold-out.[11]

Even as the dialogue regarding these issues has advanced, I worry that some enforcers and courts still may harbor suspicions about how the unilateral exercise of patent rights might pose risks to competition. These fears surface most frequently in the context of standard setting activity and the licensing of patents for technologies that have been incorporated into standards.

The U.S. enforcement agencies recognize, of course, that the collaborative standard-setting process can produce substantial benefits.[12] Standard setting enables the spectrum of industry participants cooperatively to create solutions to technical problems. Standards can make products less costly for firms to produce and more valuable to consumers. They can foster public health and safety; increase innovation, efficiency, interoperability, and consumer choice; and serve as a fundamental building block for international trade.[13]

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[10] *E.g.*, Letter to Assistant Attorney General Makan Delrahim (Feb. 18, 2018), https://cpip.gmu.edu/wp-content/uploads/sites/31/2018/02/Letter-to-DOJ-Supporting-Evidence-Based-Approach-to-Antitrust-Enforcement-of-IP.pdf.

[11] Makan Delrahim, Assistant Attorney General – Antitrust Division, "Protecting Free-Market Patent Bargaining, Competition, and the Right To Exclude," at 6 (Oct. 10, 2018), *available at* https://www.justice.gov/opa/speech/file/1100016/download.

[12] U.S. DEPARTMENT OF JUSTICE & FEDERAL TRADE COMMISSION, ANTITRUST ENFORCEMENT AND INTELLECTUAL PROPERTY RIGHTS: PROMOTING INNOVATION AND COMPETITION 33 (2007).

[13] *See generally* Allied Tube & Conduit Corp. v. Indian Head, Inc., 486 U.S. 492, 501 (1988) (explaining that when "private associations promulgate safety 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").

Nevertheless, collaborative standard setting is not free of risks. Firms that choose to work through a collaborative standard-setting group to develop and adopt standards may be, and often are, competitors. Thus, agreement among competitors about which standard to adopt replaces competition and consumer choice. Consumers could lose some benefit if competitors proceed via agreement rather than by relying on market forces to choose a key industry technology. Competition and consumers may suffer if alternative standards, approaches, or solutions are prevented arbitrarily from competing in the marketplace.

U.S. courts fortunately have been sensitive to antitrust issues that may arise in the context of collaboratively set standards. In a handful of cases, the U.S. Supreme Court has recognized that there can be antitrust liability for collusive activity that manipulates the standard-setting process to gain an advantage over rivals.[14]

To that end, the Antitrust Division recognizes that concerted action among implementers or innovators at the same level of the supply chain could constitute an antitrust violation. Implementers could use their collective power in standard setting bodies to create a monopsony effect, driving down licensing rates. Conversely, patent-holders could exert power through joint monopolistic conduct that drives up licensing rates. We will not and should not hesitate to take action in these circumstances.

At the same time, courts and enforcers have struggled over how to treat unilateral conduct by holders of standard-essential patents that agree by contract to license on "fair, reasonable, and non-discriminatory" terms.

FRAND commitments were first conceptualized as a means of encouraging cooperation between innovators and implementers through information disclosure, and they are often effective

[14] *See id.* at 500; Am. Soc'y of Mech. Eng'rs, Inc. v. Hydrolevel Corp., 456 U.S. 556, 571 (1982); Radiant Burners, Inc. v. Peoples Gas Light & Coke Co., 364 U.S. 656 (1961).

in this regard.[15] At the urging of industry participants, however, many standard setting organizations have embraced FRAND requirements as a gate-keeper for any technology under consideration for incorporation into a standard. Indeed, today, sophisticated commercial parties often view FRAND commitments as a cost-control mechanism. Or, in a potentially more troubling trend, implementers view FRAND as a source of leverage to demand subcompetitive royalty rates from the owners of patents for new technologies, under threat of litigation.[16]

These developments are not surprising, given the inherent vagueness of contractual terms like "fair," "reasonable," and "non-discriminatory."[17] Case in point: earlier this month, two federal district judges issued seemingly irreconcilable rulings, within days of each other, regarding what FRAND requires. One court held that a FRAND commitment precludes a patent owner from seeking royalties based on a percentage of the device's end-user price,[18] while the other court held that a patent holder's device-level licensing demands *do* comport with FRAND commitments.[19]

Small wonder, then, that patent holders and licensees fundamentally disagree over what licensing rates are "FRAND." As a result, bargaining outcomes may skew in favor of the party that sees greater upside from delaying agreement on licensing terms or from litigating over the

[15] Richard A. Epstein & Kayvan B. Noroozi, *Why Incentives for "Patent Holdout" Threaten to Dismantle FRAND, and Why It Matters*, 32 BERKELEY TECH. L.J. 1381, 1381-82, 1392-93 (2017); Jorge L. Contreras, *A Brief History of FRAND: Analyzing Current Debates in Standard Setting and Antitrust Through A Historical Lens*, 80 ANTITRUST L.J. 39, 42 (2015).

[16] *See* Delrahim, *supra* note 11, at 7-8 (explaining how FRAND commitments may impact bargaining leverage in licensing negotiations).

[17] *See* Joshua D. Wright, *SSOs, FRAND, and Antitrust: Lessons from the Economics of Incomplete Contracts*, 21 GEO. MASON L. REV. 791, 796 (2014) (explaining that "the intentionally vague F/RAND commitment common in many SSOs' IPR policies" is intentionally "made by sophisticated parties informed by a number of tradeoffs," including the fact that "there is considerable uncertainty concerning the ultimate value of the technology, if adopted, especially in dynamic and ever-changing markets").

[18] Findings of Fact and Conclusions of Law, FTC v. Qualcomm Inc., No. 17-CV-00220-LHK, at 172 (Dkt. No. 1490) (N.D. Cal. May 21, 2019).

[19] Memorandum of Findings of Fact and Conclusions of Law, HTC Corp. et al. v. Telefonaktiebolaget LM Ericsson et al., No. 6:18-cv-00243, at 14 (Dkt. No. 538) (E.D. Tex. May 23, 2019).

license rate. I would hope that the law ultimately skews in favor of innovation and dynamic competition that benefits consumers.

III. The Limits of Competition Law as a Tool to Police FRAND Commitments

Innovation and dynamic competition inevitably suffer when licensing negotiations break down due to uncertainty about the meaning of "FRAND." Injecting antitrust or competition law remedies into these disputes makes matters worse. This problem is particularly acute in the United States, where treble damages under the antitrust laws hinge on a court's or jury's determination of what constitutes "FRAND." Should there be a dispute as to the meaning of these contractual terms, relief under contract law is the proper remedy.

In the view of the United States, violating a FRAND commitment, by itself, should not give rise to an antitrust claim. An antitrust cause of action premised on a failure to abide by FRAND commitments would be inconsistent with Section 2 of the Sherman Act. That is because there is no duty under U.S. antitrust law for a holder of an intellectual property right to license on FRAND terms, even after having committed to do so.[20] As I noted, contract law is available and adequate to remedy such conduct. Any additional deterrence that the Sherman Act could offer risks curbing procompetitive conduct and reducing innovation, especially where our Congress has not authorized such a remedy.[21]

The misuse of the antitrust laws in these situations tilts the negotiating field away from the free-market competitive outcome and threatens to undermine innovation. This concern is at its

[20] Pac. Bell Tel. Co. v. linkLine Commc'ns, Inc., 555 U.S. 438, 450 (2009) ("[I]f a firm has no antitrust duty to deal with its competitors at wholesale, it certainly has no duty to deal under terms and conditions that the rivals find commercially advantageous."); *see* Makan Delrahim, Assistant Attorney General – Antitrust Division, "Antitrust Law and Patent Licensing in the New Wild West," at 7-11 (Sept. 18, 2018), *available at* https://www.justice.gov/opa/speech/file/1095011/download.

[21] Verizon Commc'ns Inc. v. Law Offices of Curtis V. Trinko, 540 U.S. 398, 414 (2004); Delrahim, *supra* note 20, at 11-14.

peak in dynamic industries, where consumers, who ultimately benefit from competition and innovation, would bear the risk of a misapplication of competition law to these disputes.

A number of commentators and U.S. courts generally agree with these principles, although there have been some recent, non-final court rulings to the contrary.[22] In the United States, some sophisticated litigants and their counsel often take these allegations one step further. In particular, a number of licensees have accused patent holders of "deceiving" standard-setting bodies by entering into such commitments despite having no intention of abiding by them.[23] It is hard to dismiss that these are contractual constraints. Should allegations relating to intent in bilateral contracting now give rise to an antitrust violation?

It is the position of the Executive Branch of the United States that an allegedly "deceptive" promise in a contract with an SSO to license at FRAND rates likewise does not give rise to an antitrust claim because it does not harm the competitive process.[24] I have briefly articulated this point before,[25] but it bears repeating with further elaboration in this international forum.

Under U.S. appellate case law, a deceptive representation can harm the competitive process of selecting technologies for inclusion in a standard only if two conditions are satisfied. First, the patent holder must communicate material information that is false, rather than open to interpretation. Second, the misstatement must actually cause the standard setters to lock in a

[22] *E.g.*, Findings of Fact and Conclusions of Law, FTC v. Qualcomm Inc., No. 17-CV-00220-LHK (Dkt. No. 1490) (N.D. Cal. May 21, 2019).
[23] *E.g.*, Broadcom Corp. v. Qualcomm Inc., 501 F.3d 297 (3d Cir. 2007); u-blox AG v. Interdigital, Inc., No. 3:19-cv-001-CAB-(BLM), 2019 WL 1574322 (S.D. Cal. Apr. 11, 2019); Complaint, Lenovo (United States) Inc. v. IPCom GMBH & Co., No. 5:19-cv-01389 (N.D. Cal. Mar. 14, 2019).
[24] United States v. Microsoft Corp., 253 F.3d 34, 58 (D.C. Cir. 2001) (en banc) (per curiam) (behavior "must harm the competitive *process* and thereby consumers" to violate Section 2 of the Sherman Act).
[25] Delrahim, *supra* note 20.

standard that excludes rival technologies.[26] Our Supreme Court has not yet commented on this exact issue.

Suppose a patent holder discloses its IP and complies with a standard-setting organization's IP policy that requires it to make a generic FRAND commitment. Importantly, in that instance, there can be no material "deception" about the patent holder's licensing intentions.

That is because the SSO's decision to standardize a FRAND-assured patent is accurately informed by the SSO's IP policy. These policies typically require patent holders and licensee implementers to negotiate a rate bilaterally after a standard is set subject to the contractual FRAND commitments. Companies engaging in such negotiations recognize that a court or neutral decision-maker, if negotiations fail, may be called upon later to decide what the contract terms of a "fair, reasonable, and non-discriminatory" licensing rate mean. There is no harm to the competitive process when the expected benefit of the competitively driven bargain is fully enforceable after the technology selection phase is over. This is an important point and a critical point for antitrust enforcement.

As with any contractual promise, the right to the expected benefit does not include a right to avoid disagreement or litigation over it. If resolving a FRAND dispute requires the involvement of a neutral decision maker, that, by itself, does not imply that the SSO or its participants were deceived in accepting the commitment in the first place.

It is true that some U.S. courts have allowed antitrust claims to proceed to litigation based on allegations that a patent holder made an "intentionally false promise to license essential proprietary technology on FRAND terms" and that the SSO had "reli[ed] on that promise when

[26] *Cf.* Rambus Inc. v. FTC, 522 F.3d 456, 464 (D.C. Cir. 2008) ("Cases that recognize deception as exclusionary hinge . . . on whether the conduct impaired rivals in a manner tending to bring about or protect a defendant's monopoly power.").

including the technology in a standard."[27] Respectfully, those cases miss the point. As the D.C. Circuit Court of Appeals has explained, antitrust liability may attach only if the patent holder's conduct was the but-for cause of the exclusion—that is, if the conduct "lured the SSO away" from other technology.[28]

Typically, all patent holders who offer technology to a standard are required to assent to the SSO's IP policy. It is impossible to tell ahead of time how each will handle rate negotiations and whether those negotiations will require dispute resolution. Importantly, that means no single FRAND-assured patent holder can obtain an advantage over any other during the initial competitive process to select a technical standard. Each is bound by the same terms, which are enforceable in the same way.

Thus, even if a patent holder fully intends to maximize its licensing rate, the standard-setting decision to adopt the technology is fully informed, and the resulting bargain is reached competitively.[29] That means there is no harm to the competitive process, a necessary element, thus an allegation of "deceptive" conduct cannot serve as the basis for antitrust liability.

To be clear, such conduct may give rise to a contract claim. Indeed, courts in the United States have proven capable of handling such claims in light of the facts presented in each case. I refer to the *Microsoft v. Motorola* case in 2012.[30] The application of the antitrust laws, by

[27] *E.g.*, Broadcom Corp. v. Qualcomm Inc., 501 F.3d 297, 314 (3d Cir. 2007); u-blox AG v. Interdigital, Inc., No. 3:19-cv-001-CAB-(BLM), 2019 WL 1574322 (S.D. Cal. Apr. 11, 2019) (following *Broadcom*).
[28] *Rambus*, 522 F.3d at 466.
[29] Scholars have noted that members of SSOs, and the implementers especially, are sophisticated negotiators who can work within the policy process at the SSO to bargain for competitively derived benefits that should be policed by contract, not antitrust law. *See* Alden Abbott, *Standard Setting, Patents, and Competition Law Enforcement—The Need for U.S. Policy Reform*, CPI Antitrust Chron. Mar. 2015, *available at* https://www.competitionpolicyinternational.com/file/view/7345 ("[S]ophisticated SSO members generally are able to protect themselves from potential future abuses by: (i) influencing SSO rules (such as FRAND licensing commitments); (ii) implicitly threatening to retaliate against abusers that would hold them up (by acting to disadvantage the transgressors in future rounds of negotiations); or (iii) using private law remedies (sounding in contract, patent law, or the tort of deception) to counter excessive licensing demands. Such countermeasures should suffice to deal with most problems.").
[30] Microsoft Corp. v. Motorola, Inc., 864 F. Supp. 2d 1023, 1030-33 (W.D. Wash. 2012).

comparison, and important to our discussion, threatens to skew licensing negotiations away from free market outcomes. In turn, misuse of antitrust in this way could, ironically, undermine the forms of innovation that the patent system and competition laws were designed to protect.

The title of this speech is "Don't Stop Thinking About Tomorrow," named after the famous Fleetwood Mac song, to remind us that it is important not to forget about dynamic competition and innovation. If we approach alleged breaches of FRAND commitments as potential antitrust violations, we have stopped thinking about tomorrow's innovation. I humbly note that the goal of competition law is best advanced if we promote dynamic competition.

IV. Conclusion

To conclude, we recognize that not every enforcement authority shares all of the United States' views about the proper role of competition law in policing the exercise of IP rights. That much is clear from the contributions submitted in advance of this event. In the spirit of Paris's great fairs and expositions that captured the world's imagination over a century ago, we urge those here today to find common ground on how competition policy can enhance innovation. That way, we all can play a role in encouraging the next technological revolution.

Thank you for the opportunity to join you today. I look forward to hearing from our esteemed panelists.