Federal Trade Commission

Does the FTC Have a New IP Agenda?

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Good evening. It is my pleasure to be here and I would like to thank the Antitrust and Trade Regulation Committee of the New York City Bar Association, and especially Fiona Schaeffer, for the invitation to speak with you today.

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* The views stated here are my own and do not necessarily reflect the views of the Commission or other Commissioners. I am grateful to my advisor, Joanna Tsai, my intern, Kristin Stortini, and honors paralegal, Kelsey Goodman, for their invaluable assistance in preparing this speech. My remarks are based largely upon work co-authored with Judge Douglas H. Ginsburg. *See* Joshua D. Wright & Douglas H. Ginsburg, *Whither Symmetry? Antitrust Analysis of Intellectual Property Rights at the FTC and DOJ*, 9 COMPETITION POL'Y INT'L 2, Autumn 2013. Nevertheless, the views I express here are my own.

I. Introduction

This evening I would like to share some thoughts with you regarding the approach of antitrust law to Intellectual Property Rights ("IPRs"). In particular, I am going to focus upon the FTC's recent enforcement actions applying the antitrust laws to IPRs and FTC policy initiatives involving IPRs. The titular question – "Does the FTC Have a New IP Agenda?" – is somewhat self-explanatory. I want to focus upon whether the FTC's recent activities at the intersection of antitrust and IPRs are simply the extension of conventional antitrust principles that have been applied to real property and other intangible assets for decades or, alternatively, do those activities suggest a new approach to the antitrust analysis of IPRs.

To save the audience from any unintended suspense I will tell you now that I will answer the question in the affirmative. The FTC's recent IPR-related antitrust enforcement efforts do suggest a departure from what I describe as the "symmetry principle" – that is, the principle that the application of antitrust law to IPRs is in parity with the approach applied to real property. During my remarks I will focus on establishing the existence of that deviation from symmetry and exploring its implications.

Parity between the modern antitrust approach to IPRs and real property is prominently enshrined as the first core principle of the DOJ/FTC 1995 Guidelines on licensing IPRs, which provide that the "[a]gencies apply the same general antitrust principles to conduct involving intellectual property that they apply to conduct involving any other form of tangible or intangible property."[1]

Of course, some precision as to what symmetry means and does not mean in this context is useful. It does not mean ignorance of economic facts unique to IPRs. Neither the symmetry principle nor the 1995 Guidelines require the agencies to ignore unique features of IPRs relevant to the antitrust analysis.[2] The primary contribution of the symmetry principle is that it affirmatively rejects the notion that a different analytical framework or special rules are required to enforce the antitrust laws in a manner consistent with promoting consumer welfare.

Agencies in the United States have some experience with and can glean lessons from prior deviations from the symmetry principle. As most of you know, once upon a time antitrust agencies succumbed to the temptation – nudged along by antitrust

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[1] U.S. DEP'T OF JUSTICE & FED. TRADE COMM'N, ANTITRUST GUIDELINES FOR THE LICENSING OF INTELLECTUAL PROPERTY § 2.1 (1995), *reprinted in* 4 Trade Reg. Rep. (CCH) ¶ 13,132, *available at* http://www.usdoj.gov/atr/public/guidelines/0558.pdf [hereinafter ANTITRUST-IP GUIDELINES].

[2] The IP Guidelines themselves reject the view that symmetry requires antitrust to ignore characteristics of intellectual property that might bear on antitrust analysis. Fed. Trade Comm'n, To Promote Innovation: The Proper Balance of Competition and Patent Law and Policy (2003), *available at* http://www.ftc.gov/sites/default/files/documents/reports/promote-innovation-proper-balance-competition-and-patent-law-and-policy/innovationrpt.pdf ("intellectual property has important characteristics, such as ease of misappropriation, that distinguish it from many other forms of property. These characteristics can be taken into account by standard antitrust analysis, however, and do not require the application of fundamentally different principles.").

commentators and academics – to treat IPRs differently and deem nearly all licensing arrangements involving IPRs as what modern practitioners might describe as "inherently suspect." Indeed, just a few decades ago, antitrust's well-known "inhospitality tradition" applied in full force to IPRs and culminated in *per se* prohibitions of various arrangements involving patents embodied in the now-infamous "Nine No-No's."[3]

That obsolete and economically incoherent approach has been rejected in favor of a largely symmetrical approach to antitrust enforcement involving IPRs and other forms of property. However, the temptation to grant IPRs special treatment does revisit from time to time. Some recent FTC enforcement actions and antitrust scholarship suggest the makings of an intentional and calculated departure from symmetry may be underway – and, as with the Nine No-No's – the departure is increasingly and uniformly hostile to IPRs.

Let me begin by elaborating upon the notion of symmetry between IPRs and real property for the purposes of antitrust law and discussing some of the advantages of such an approach.

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[3] *See* Bruce B. Wilson, Deputy Assistant Att'y Gen., Antitrust Division, Remarks before the Michigan State Bar Antitrust Law Section (September 21, 1972), *reprinted in* 5 CCH Trade Reg. Rep. (CCH) ¶ 50,146.

II. The Symmetry Principle and Its Benefits

One can conceive of the symmetry principle as establishing that an antitrust claim based upon the use of one's IPR is no more suspect than a claim arising from the use of any other form of property. It equally implies antitrust claim cannot be defended upon the ground that the use of an IPR is inherently less suspect than the use of some other form of property. As I've mentioned, the antitrust agencies' joint 1995 Guidelines clearly and prominently endorse the former proposition.[4] The best – and most colorful – expression of the latter principle appears in the D.C. Circuit's decision in *United States v. Microsoft*, wherein it observed Microsoft's claim to an "unfettered right to use its intellectual property as it wishes" was "no more correct than the proposition that use of one's personal property, such as a baseball bat, cannot give rise to tort liability."[5]

A corollary of the symmetry principle is that antitrust claims involving IPRs are not entitled to special presumptions or relaxed burdens of production or proof on the grounds that IPRs are involved rather than real property. Clearly, symmetry is perfectly consistent with the use of truncated analysis such as a *per se* prohibition where

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[4] ANTITRUST-IP GUIDELINES, *supra* note 1, § 2.1, at 3 (discussing that the special characteristics of IP "can be taken into account by standard antitrust analysis . . . and do not require the application of fundamentally different principles").

[5] United States v. Microsoft Corp., 253 F.3d 34, 63 (2001) (per curiam).

it would be appropriate for both IPRs and real property. For example, naked price-fixing is obviously and correctly *per se* unlawful whether the underlying assets involve intellectual or other types of property rights.[6] Such a presumption, however, is based upon the likelihood of anticompetitive effect arising from the conduct. That the conduct involves the transfer, acquisition, or licensing of a particular kind of property is irrelevant to the presumption.[7]

Adherence to the symmetry principle has served antitrust remarkably well. One obvious benefit is the aforementioned rejection of the Nine No-No's. Few if any would quarrel with the proposition that shedding the Nine No-No's raised the rate of return antitrust offers consumers. A second contribution is that adoption of the symmetry principle helped the antitrust agencies and courts take their first steps toward rejecting a misperceived contradiction between antitrust law and IPRs: Antitrust constrains monopoly power whereas IPRs confer monopoly power. This false tension was

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[6] *See* ANTITRUST-IP GUIDELINES, *supra* note 1, § 3.4, at 16 (explaining the agencies will challenge horizontal agreements involving intellectual property rights as per se violations of the antitrust laws when the "type of restraint is one that has been accorded per se treatment" in other settings). *See also id*. at ex. 7 (describing an agency challenge under the per se rule of "a sham intended to cloak [the] true nature" of a particular licensing agreement).

[7] The symmetry principle also applies both to *Walker Process* claims, which require proof not only of the defendant's fraud upon the patent office but also of all the elements of a Section 2 monopolization claim, *see* Walker Process Equip., Inc, v. Food Mach. & Chem. Corp., 382 U.S. 172, 179 (1965), and to actions for sham litigation, see Prof'l Real Estate Investors, Inc. v. Columbia Pictures Indus., Inc., 508 U.S. 49, 61 (1993). There is no meaningful difference between the antitrust standard applied to these claims and that faced by a plaintiff alleging monopolization or attempted monopolization by the defendant having fraudulently procured a real property right or other government-granted privilege.

repudiated and reconciled with good reason by the Supreme Court in *Illinois Tool Works*;[8] that IPRs necessarily confer monopoly power is inconsistent with sound economic theory and demonstrably false.

A third benefit is that a symmetrical approach to IPRs and real property rights also facilitates recognition of the broader proposition that complex questions involving IPRs and antitrust are properly understood through the lens of the economics of property rights. Former Chairman Tim Muris recognized in 2001 that "it is now well understood that an effective legal regime defining and protecting property rights is essential to a well-functioning competitive economy."[9] IPRs, like other property rights, play a critical role in a property rights regime focused on voluntary commercial exchange and competition. Linking the antitrust analysis of IPRs to the already well-developed toolkit available to analyze the economics of business arrangements involving real property rights encourages methodological consistency and analytical rigor in identifying the appropriate limits on the exercise of IPRs.

A fourth benefit is of ever-increasing importance to the growing global antitrust community, which now contains well over one hundred antitrust regimes. The

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[8] *See* Ill. Tool Works Inc. v. Indep. Ink, Inc., 547 U.S. 28 (2006), *rev'g* 396 F.3d 1342 (Fed. Cir. 2005).

[9] Timothy J. Muris, Former Chairman, Fed. Trade Comm'n, Competition and Intellectual Property Policy: The Way Ahead, Prepared Remarks of before American Bar Association, Antitrust Section Fall Forum (Nov. 15, 2001), *available at* http://www.ftc.gov/public-statements/2001/11/competition-and-intellectual-property-policy-way-ahead.

emerging antitrust community includes countries with less of a tradition of institutions that value well-defined and robustly enforced property rights. Other countries in the growing antitrust community have no such tradition to speak of at all. If antitrust is to contribute to the global economy by facilitating innovation, competition and economic growth, then it should recognize that convergence on the ideal of using economic analysis to guide competition policy is a far more achievable goal in the short and medium term than convergence across legal institutions and cultures exhibiting enormous variation. Legal institutions respect borders far more than the law of demand.

What does this have to do with the symmetry principle? Quite a bit, I would argue. There is in some quarters a growing concern about some antitrust regimes around the world using the antitrust laws to further nationalistic goals at the expense of IPR holders, among others. This has evoked an important discussion about the appropriate role for antitrust in limiting IPR rights, especially in young and emerging antitrust regimes, and most notably in China. There is no doubt that certain business arrangements involving IPRs harm competition. However, as China and other emerging jurisdictions craft their own approach to applying antitrust principles to IPRs it is critically important that the message coming from the actions and words of the global antitrust community, including the FTC and DOJ, is that promoting competition and consumer welfare as understood through the lens of rigorous economic analysis is the best and most intellectually coherent approach. The symmetry principle articulates precisely such a commitment – a commitment to reject special rules or shortcuts in the analysis of IPRs that render contractual arrangements involving those rights "inherently suspect." Deviation from the symmetry principle, on the other hand, invites and may encourage ad hoc and non-economic considerations to be imported into the antitrust analysis of IPRs.

a. The FTC and the Symmetry Principle

The FTC's traditional commitment to the symmetry principle is discernible from prior enforcement actions and policy initiatives involving IPRs. For example, the FTC's approach to horizontal restraints involving IPRs has traditionally followed the symmetry principle. In *Summit Technology, Inc. & VISX*, for example, the parties had agreed to pool their patents for their rival laser eye surgery technologies, require licensees to pay $250 to the pool each time a procedure was performed using either firm's technology, and then split the proceeds according to a specified formula.[10] The FTC alleged that the fee established a de facto price floor for substitute technologies and amounted to a collusive agreement to charge the minimum for each procedure.[11]

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[10] Complaint at ¶ 12, In re Summit Tech., Inc. and VISX, Inc., 127 F.T.C. 208 (1998) (No. 9286), *available at* http://www.ftc.gov/sites/default/files/documents/cases/1998/03/ftc.gov-summit.cmp_.htm.

[11] *Id.*

Applying standard antitrust principles, the FTC acknowledged that horizontal relationships involving IPRs can potentially generate efficiencies but warned that, as with such agreements in the real property context, agreements facilitating naked price-fixing or market division would constitute per se violations of the antitrust laws.[12]

Similarly, the FTC's enforcement agenda in the area of reverse payment settlements also has embraced symmetry. Indeed, critical to the FTC's theory of harm in reverse payment cases is the proposition that the underlying agreement between competitors involves settlement of litigation involving IPRs is *not* relevant to the likelihood of competitive harm. The Supreme Court's analysis in *FTC v. Actavis* is perfectly consistent with the symmetry principle, holding that the rule of reason applies to horizontal arrangements capable of generating efficiencies – including patent settlements in the Hatch-Waxman context.[13]

The symmetry principle has also held generally across the panoply of IPR licensing arrangements. In the vertical context, the DOJ/FTC Antitrust-IP Guidelines

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[12] Analysis of Proposed Consent Order to Aid Public Comment, In re Summit Tech., Inc. and VISX, Inc., 127 F.T.C. 208 (1998), *available at* http://www.ftc.gov/sites/default/files/documents/cases/1998/08/ftc.gov-d09286ana.htm.

[13] 133 S. Ct. 2223 (2013). *See also*, FTC v. Actavis and the Future of Reverse Payment Cases, Remarks of Joshua D. Wright, Commissioner, Federal Trade Commission, at the Concurrences Journal Annual Dinner, New York, NY, Sept. 26, 2013, *available at* http://www.ftc.gov/sites/default/files/documents/public_statements/ftc-v.actavis-future-reverse-payment-cases/130926actavis.pdf.

state that although exclusive dealing agreements involving IPR are often pro-competitive, they "may anticompetitively foreclose access to, or increase competitors' costs of obtaining, important inputs, or facilitate coordination to raise price or reduce output."[14] This is precisely the anticompetitive concern with exclusive dealing and tying contracts involving other forms of property and the relevant factors for assessing the likelihood of competitive harm are identical for all types of property.[15]

The FTC has also adhered to the symmetry principle in monopolization cases involving allegations that deception in the standard setting process led to the acquisition or maintenance of market power. For example, in *Unocal*, the FTC found a patent holder liable for affirmative misrepresentations.[16] In *Rambus*,[17] the D.C. Circuit ultimately overturned the Commission's analysis because it concluded the FTC had not established that the alleged deception resulted in the exclusion of a rival from the standard. However, the D.C. Circuit's analysis does not reject the analytical underpinnings of the FTC's enforcement efforts targeting deception in the standard setting process: that deceptive conduct that excludes rival technology holders and

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[14] ANTITRUST-IP GUIDELINES, *supra* note 1, § 4.1.2, at 19.

[15] *See, e.g.*, United States v. Microsoft Corp., 253 F.3d 34, 69-70 (2001).

[16] In re Union Oil Co. ("Unocal"), 138 F.T.C. 1 (2004), *available at* http://www.ftc.gov/os/adjpro/d9305/040706commissionopinion.pdf.

[17] Opinion of the Commission, In re Rambus Inc., FTC No. 9302 (F.T.C. Aug. 2, 2006), *rev'd*, Docket Nos. 07-1086, 07-1124 (D.C. Cir. 2007), *available at* http://www.ftc.gov/sites/default/files/documents/cases/2006/08/060802commissionopinion.pdf.

results in harm to the competitive process can constitute exclusionary conduct under Section 2 of the Sherman Act; this is true whether or not IPRs are involved.

The symmetry principle also applies to horizontal merger analysis involving IPRs. The presence of IPRs does not alter the key question identified by the Agencies in the 2010 Horizontal Merger Guidelines, whether the merger creates market power that would not otherwise exist. This question requires analysis of the pre- and post-merger incentives and abilities of the merging firms; IPRs may be relevant to the analysis but only to the extent any other property would be. Indeed, the only reference to IPRs in the Horizontal Merger Guidelines emphasizes that their combination may affect the merged firm's ability to appropriate the gains from, and thereby its incentive to engage in, innovative activities.[18]

b. The Academic Assault on the Symmetry Principle

Some recent antitrust scholarship expressly rejects or challenges the symmetry principle in favor of IP-specific antitrust analysis. There are several related strands of academic work generating this trend.

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[18] *See* U.S. DEP'T OF JUSTICE & FED. TRADE COMM'N, HORIZONTAL MERGER GUIDELINES §10, at 31 (2010), *available at* http://www.ftc.gov/os/2010/08/100819hmg.pdf ("The Agencies also consider the ability of the merged firm to appropriate a greater fraction of the benefits resulting from its innovations. Licensing and intellectual property conditions may be important to this enquiry, as they affect the ability of a firm to appropriate the benefits of its innovation.").

The most prominent strand involves the observation that patent rights are inherently more probabilistic in nature than real property rights and generate greater incentives for opportunistic or anticompetitive behavior.[19] The threat of patent hold-up is by now a generally well-understood phenomenon. For example, in the standard setting context, once an IPR is incorporated into a standard and switching to an alternative standard would require significant additional investment, the IPR holder can exploit its position to extract higher royalties.[20] Beyond the argument that antitrust should be used to police contractual opportunism, the insights in this literature have also been used to make the case for limiting patent acquisitions. For example, Professors Fiona Scott-Morton and Carl Shapiro recently observed in discussing patent acquisitions that, "[s]ome of the economic effects of patent acquisitions – such as enhancing market power by consolidating ownership of substitute technologies – are familiar but appear with new twists."[21] Interestingly, Scott Morton and Shapiro explicitly reject the symmetry principle, noting that while "it has been popular to assert

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[19] The term "probabilistic" reflects the generally accepted proposition that the validity of patent is, on average, less certain than the validity of the title to a piece of real or personal property. *See, e.g.*, Mark A. Lemley & Carl Shapiro, *Probabilistic Patents*, 19 J. ECON. PERSP. 75 (2005).

[20] *See, e.g.*, Joseph Farrell et al., *Standard Setting, Patents, and Hold-Up*, 74 ANTITRUST L.J. 603, 611-15 (2007).

[21] Fiona M. Scott Morton & Carl Shapiro, *Strategic Patent Acquisitions* (Working Paper July 2, 2013), 79 ANTITRUST L.J. AT 1 (forthcoming 2014), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2288911.

that intellectual property is not fundamentally different from other assets,"[22] such a rule of thumb "does not address fundamental differences between most forms of real property, such as real estate, and questionable patents with vague boundaries,"[23] and that "[t]ransferring probabilistic 'exclusion rights' is fundamentally different from transferring more conventional assets such as production facilities, trade secrets, brand names, or skilled personnel."[24]

A second strand examines whether the optimal level of antitrust enforcement should depend upon the strength of the patent rights associated with each particular industry. For example, Professor Mark Lemley advocates for a policy where the antitrust laws should be strong when IPRs are strong.[25] In this view, antitrust acts as an ad hoc counterweight to IP; the need for antitrust enforcement "depends on the industry in question and the nature of the invention."[26]

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[22] *Id.*

[23] *Id.*

[24] *Id.*

[25] Mark A. Lemley, *New Balance Between IP and Antitrust*, 13 SW. J.L. & TRADE AM. 237 (2007). The argument is grounded in the tradeoff between the benefits, on the one hand, of innovation and dynamic competition and, on the other hand, the deadweight loss associated with monopoly. One difficulty with calibrating antitrust policy on an industry-by-industry basis based upon a presumed positive or "inverted U-shape" relationship between static product market competition and innovation is that neither economic theory nor the empirical record supports such a presumption. *See* Douglas H. Ginsburg & Joshua D. Wright, *Dynamic Analysis and the Limits of Antitrust Institutions*, 78 ANTITRUST L.J. 1, 4-5 (2012).

[26] Lemley, *supra* note 25, at 256.

The net impression left by these separate strands has been to encourage a form of IP exceptionalism for antitrust. The exceptionalism calls for a deviation from symmetry that uniformly favors greater intervention and limits placed upon the exercise and use of IPRs. The impact of these academic attacks on symmetry has been relatively widespread acceptance of the proposition that injunctive relief should generally not be available for patent holders because it is, from a competition and consumer welfare perspective, inherently suspect. While my own view is that neither available economic theory nor empirical evidence warrants such a presumption, there is no doubt that this view has gained many supporters and that it has influenced the enforcement priorities of the antitrust agencies, including the FTC.

III. Does the FTC Have a New IP Agenda?

Recent FTC enforcement actions, testimony, and speeches appear to suggest the beginning of what could be a wholesale departure from the symmetry principle. This development is troublesome, in my view, because it invites a drift toward ad hoc antitrust analysis of IPRs and promotes hostility toward the exercise of property rights and their exchange. It also sends a dangerous signal of approval to emerging antitrust regimes that special rules for IP are desirable from a competition perspective and that business arrangements involving IPRs may be safely presumed to be anticompetitive without rigorous economic analysis and proof of competitive harm.

a. Pursuit of Preliminary Injunctions by SEP Holders

The FTC has repeatedly expressed its opposition to the availability of injunctive relief for aggrieved SEP holders. For example, the FTC recently submitted an *amicus* brief to the Federal Circuit in support of a district court's denial of injunctive relief to a RAND-encumbered holder of an SEP.[27] Similarly, in June 2012, the FTC encouraged the International Trade Commission to apply the "public interest standard" of Section 337 of the Tariff Act of 1930 in a manner that would preclude granting an injunction to an SEP holder on the ground that consumers would be harmed thereby.[28] The Commission has apparently adopted the view that granting injunctive relief to an SEP holder in this setting is presumptively anticompetitive and thus against the public interest. The Commission has even encouraged Congress to adopt or endorse this

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[27] Brief for Fed. Trade Comm'n as Amicus Curiae Supporting Neither Party at 16, Apple Inc. v. Motorola, Inc., Nos. 2012-1548 & 2012-1549 (Fed. Cir. Dec. 5, 2012) (stating that "[w]hen a patentee makes a FRAND commitment to an SSO, the irreparable harm analysis, balance of harms, and the public interest will, as here, generally militate against an injunction"). Commissioner Ohlhausen did not vote in favor of its submission.

[28] *See* Third Party United States Fed. Trade Comm'n's Statement on the Public Interest, In re Certain Wireless Communication Devices, Portable Music & Data Processing Devices, Computers and Components Thereof, Inv. No. 337-TA-745 (June 6, 2012), www.ftc.gov/os/2012/06/1206ftcwirelesscom.pdf; Third Party United States Fed. Trade Comm'n's Statement on the Public Interest, In re Certain Gaming and Entertainment Consoles, Related Software, and Components Thereof, Inv. No. 337-TA-752 (June 6, 2012), http://www.ftc.gov/os/2012/06/1206ftcgamingconsole.pdf. I was not a member of the Commission when the statement was filed.

approach, abdicating the Commission's role as economic analyst of a complex issue in favor of an overly simplistic legislative change.[29]

The FTC's opposition to injunctions for SEP holders extends beyond mere advocacy to other agencies and institutions. Two recent FTC enforcement actions that predate my term alleged that a FRAND encumbered SEP holder violated Section 5 of the FTC Act merely by seeking an injunction. In *Bosch*, the FTC alleged an SEP holder's pursuit of an injunction was precisely such an unfair method of competition.[30] In *Motorola*, the FTC alleged the company "breached its FRAND obligations by seeking to enjoin and exclude implementers of its SEPs;" that after its acquisition of Motorola, "Google used these threats of exclusion orders and injunctions to enhance its bargaining leverage against willing licensees;" and that "Motorola filed, and Google prosecuted, patent infringement claims before the United States International Trade Commission."[31] Ignoring for a moment that no federal court has endorsed such a theory of competitive harm in a Sherman Act case, and that these cases can only exist because of the unbounded nature of the FTC's expansive Section 5 authority, it is worth exploring the

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[29] Fed. Trade Comm'n, Prepared Statement of the Fed. Trade Comm'n before S. Comm. on the Judiciary, Concerning Oversight on the Competition of Exclusion Orders to Enforce Standard-Essential Patents at 2 (July 11, 2012), *available at* http://www.ftc.gov/os/testimony/120711standardpatents.pdf.

[30] Complaint at ¶ 20, In re Robert Bosch GmbH, Docket No. C-4377, File No. 121-0081, 2012 WL 5944820 (F.T.C. Nov. 21, 2012).

[31] Complaint at ¶¶ 25-26, In re Motorola Mobility LLC, Docket No. C-4410, File No. 121-0120, 2013 WL 3944149 (F.T.C. July 23, 2013).

central analytical assumption underlying these consents. These complaints and consent orders, taken together, logically and necessarily depend upon the assumption that seeking injunctive relief, without more, is itself anticompetitive. There is certainly no economic evidence available to support that policy view. It is difficult to imagine a more open and notorious rejection of the symmetry principle or the basic economic proposition that the exercise and enforcement of presumptively valid property rights promotes economic exchange.

b. Breach of an SSO Commitment Alone Violates Section 5 of the FTC Act

The FTC's newfound hostility to IPRs has also extended to what might be described as garden-variety breaches of contract. For now, the only example of this conversion of breach of contract involving IPRs – there was no allegation of deceptive conduct – to an antitrust violation is *N-Data*, where the Commission alleged that departure from a contractual commitment to IEEE violated Section 5 of the FTC Act.[32] Over dissenting statements from Chairman Majoras and Commissioner Kovacic,[33] which highlighted the lack of evidence of competitive harm, the FTC ruled that

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[32] Statement of the Federal Trade Commission, In re Negotiated Data Solutions LLC, FTC File No. 051-0094 (Jan. 23, 2008), *available at* http://www.ftc.gov/sites/default/files/documents/cases/2008/01/080122statement.pdf.

[33] *See, e.g.*, Dissenting Statement of Commissioner William E. Kovacic, In re Negotiated Data Solutions, LLC, FTC File No. 051-0094 (Jan. 23, 2008), *available at* http://www.ftc.gov/os/caselist/0510094/080122kovacic.pdf.

departure from a contractual commitment to an SSO, standing alone, was enough to violate Section 5.[34] The economic logic of the Commission settlements in *Motorola* and *Bosch*, and the testimonies described above, however, suggest that Commission still views *N-Data* as an appropriate Section 5 case.

IV. Is There a Basis for Asymmetry – i.e. for Antitrust Law To Treat IPRs differently Than Real Property?

The analytical case for each of the departures from standard antitrust analysis I have described rests squarely upon the presumption, rather than the demonstration, that injunctions granted to SEP holders, or that breach of SSO commitment alone, are inherently anticompetitive. The rhetoric employed by advocates of this position contemplates the injunction as signature example of "exclusionary conduct" as defined by Section 2 of the Sherman Act. That is, the injunction excludes rivals – as it certainly does, by definition – without offsetting competitive virtues. But the long understood role that property rights and their exercise play in facilitating economic exchange and growth appear to be taken for granted.

Recognition of this point would appropriately allocate the burden of proof upon those advocating further antitrust-based restrictions upon the exercise of IPRs. Instead,

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[34] *See, e.g.*, Bruce H. Kobayashi & Joshua D. Wright, The Limits of Antitrust and Patent Holdup: A Reply to Cary et al., 78 ANTITRUST L.J. 701, 720-22 (2012).

the case for rejecting symmetry has rested largely but not exclusively upon an inexplicable presumption of net anticompetitive harm which is at odds with the conventional antitrust treatment of the exercise of real property rights, and is also, at a minimum, in significant tension with the symmetry principle enshrined in the 1995 Antitrust-IP Guidelines.[35]

To be sure, there is some serious and important scholarly work exploring the possibility of patent hold-up – a strategy usually perfected by the patentee seeking of an injunction in order to extract supra-competitive royalties.[36] However, this literature demonstrates the *possibility* that an injunction against infringement of a patent *can* be profitable and potentially anticompetitive. The same literature has long recognized, in both the IPR and real property context, the threat of reverse holdup. There is – to be clear – no empirical evidence that enforcement of a presumptively valid IPR is inherently or even likely anticompetitive. The reflexive position that an SEP holder violates the antitrust laws simply by seeking an injunction to vindicate its right clearly

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[35] I am also aware of recent instances in which antitrust agencies continue to endorse the symmetry principle, at least rhetorically. *See, e.g.*, Renata Hesse, Deputy Assistant Att'y Gen., U.S. Dep't of Justice, IP, Antitrust, and Looking Back on the Last Four Years (Feb. 8, 2013) ("[T]he Antitrust Division applies the same general antitrust principles to mergers and conduct matters involving intellectual property that it applies to any other type of property. That stance will continue.").

[36] *See, e.g.*, Joseph Farrell et al., *Standard Setting, Patents, and Hold-Up*, 74 ANTITRUST L.J. 603, 611-15 (2007). The economic forces at work in such cases of *ex post* opportunism are not, however, patent-specific. Indeed, they were first identified and explored with respect to other types of property. *See, e.g.*, Benjamin Klein, Robert Crawford & Armen A. Alchian, *Vertical Integration, Appropriable Rents, and the Competitive Contracting Process*, 21 J.L. & ECON. 297 (1978).

departs from the symmetry principle as antitrust law does not generally prohibit the holder of any other property right from seeking an injunction to vindicate that right.[37]

The extension of antitrust enforcement into contractual disputes governing IPRs is also problematic. In many SSOs, the availability of injunctive relief against an infringer is very likely part of the background understanding between the SSO and its members; in fact, the right to an injunction likely accounted in part for the patent owners' decisions to join the SSO and contribute technologies under a FRAND commitment. Agency attempts to "reform" SSO contracts by making them more precise or complete with respect to terms governing injunctive relief ignore the costs of further specification and provide no answer to the question of why sophisticated parties

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[37] To be clear, I have no quarrel with the holding in eBay Inc. v. MercExchange, L.L.C. 547 U.S. 388, 391 (2006), that whether a permanent injunction should issue in favor of a patent holder is to be determined "consistent with traditional principles of equity," which require that the plaintiff "demonstrate: (1) that it has suffered an irreparable injury; (2) that remedies available at law, such as monetary damages, are inadequate to compensate for that injury; (3) that, considering the balance of hardships between the plaintiff and defendant, a remedy in equity is warranted; and (4) that the public interest would not be disserved by a permanent injunction." Indeed, the principle of symmetry requires no less. Similarly, the courts properly consider whether a patentee, like any other applicant for a preliminary injunction, has shown that it will probably succeed on the merits of its case. *See* Amazon.com, Inc. v. Barnesandnoble.com, 239 F.3d 1343, 1951 (Fed. Cir. 2001). Rather, my objection is to the idea that a patentee violates the antitrust laws merely by seeking an injunction.

– the SSOs and their members – do not internalize the costs and benefits of further restricting injunctive relief.[38]

Beyond agency activity advising SSOs on how to write their contracts, this issue also extends into potential enforcement activity. The most common defense of asymmetry and the related presumption against injunctions is that an SEP holder seeking an injunction itself amounts to a breach of contract in the FRAND setting,[39] which is in turn the crux of the antitrust violation.[40] At least two immediate problems arise with this defense of asymmetry. First, mere breach of contract without more generally does not violate the antitrust laws when it comes to IPRs or real property

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[38] SSOs, FRAND, and Antitrust: Lessons from the Economics of Incomplete Contracts, Remarks of Joshua D. Wright, Commissioner, Federal Trade Commission, at the Center for the Protection of Intellectual Property Inaugural Academic Conference, Arlington, VA, Sept. 12, 2013, *available at* http://www.ftc.gov/sites/default/files/documents/public_statements/ssos-frand-and-antitrust-lessons-economics-incomplete-contracts/130912cpip.pdf .

[39] Apple, Inc. v. Motorola, Inc., 869 F. Supp. 2d 901, 914 (N.D. Ill. 2012) ("By committing to license its patents on FRAND terms, [the patent holder] committed to license the [patent-in-suit] to anyone willing to pay a FRAND royalty and thus implicitly acknowledged that a royalty is adequate compensation for a license to use that patent.").

[40] This theory has been asserted primarily as a violation of Section 5 of the FTC Act. *See, e.g.*, , *In re* Motorola Mobility LLC, Docket No. C-4410, File No. 121-0120, 2013 WL 3944149 (F.T.C., July 23, 2013); *In re* Negotiated Data Solutions, LLC, FTC File No. 051-0094 (Jan. 23, 2008), *available at* http://www.ftc.gov/os/caselist/0510094/080122statement.pdf. *Cf.* Hesse, *supra* note 35, at 21 (indicating the DOJ's interest in examining whether Section 2 of the Sherman Act should apply in cases of patent hold-up that do not involve deception).

rights.[41] Even in cases involving allegations of patent hold-up, every federal court to rule on the issue has required some additional conduct, such as deception in the standard-setting process, to support an antitrust violation.[42] The second problem with the "injunction-seeking as breach-of-contract" theory is that it depends upon the assumption that a FRAND commitment comprises an implicit agreement not to seek an injunction. This assumption appears to be widely accepted, but it is not compelled by economic logic or maxims of contract interpretation. An examination of actual industry practice suggests the opposite: No SSO appears expressly to currently disallow injunctions,[43] and some SSOs appear expressly to have considered and rejected such a rule.

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[41] The Supreme Court's analysis in *Kodak* is the closest the court has come to accepting a role for antitrust in regulating *ex post* contractual opportunism – though the underlying conduct at issue there was an aftermarket tie, not an allegation that breach of contract itself violated the antitrust laws. To the extent *Kodak* opened the door to using the antitrust laws to police contractual disputes, lower courts appear to have closed it. *See,* Kobayashi & Wright, *supra* note 34.

[42] *See* Rambus Inc. v. FTC, 522 F.3d 456, 466–67 (D.C. Cir. 2008), *cert. denied*, 129 S. Ct. 1318 (2009); Broadcom Corp. v. Qualcomm Inc., 501 F.3d 297, 311 (3d Cir. 2007). In each case, the court held a showing of deception that led to the acquisition of market power was required to state a claim under the Sherman Act.

[43] It is not clear that any SSO disallows injunctions. In fact, industry players have argued that, as an example, "European Telecommunications Standards Institute (ETSI) policies do not contain any provision precluding members from seeking injunctive relief when an infringer and potential licensee has rejected a FRAND licensing offer from the patent holder." *See* James Ratliff & Daniel L. Rubinfeld, *The Use and Threat of Injunctions in the RAND Context*, 9 J. COMPETITION L. & ECON. 1, 7 (2013). In addition, most of the SSOs and their stakeholders that have considered these proposals over the years have determined that there are only a limited number of situations where patent hold-up takes place in the context of standards-setting. The industry has determined that those situations generally are best addressed through bilateral negotiation (and, in rare cases, litigation) as opposed to modifying the SSO's IPR policy and arguably unnecessarily burdening the standardization process for the many ICT

V. Conclusion

Recent FTC enforcement actions and testimonies assert that injunctive relief is inappropriate in some IPR settings, or that IPR-related mergers require special review, or that IPR-enmeshed contracts give rise to antitrust liability for ordinary breaches of contract, all reduce to the same unsupported proposition: IPRs are inherently different from other property rights and, for antitrust purposes, inherently suspect.

I disagree. Departures from symmetry are not just lacking analytical support, they are also potentially quite harmful. Untethering antitrust enforcement from the symmetry principle creates uncertainty because it is in tension with the Commission's 1995 Guidelines. It also creates a risk of regressing toward an antitrust enforcement regime that is overly hostile to the exercise and exchange of IPRs. That risk is most acute when departures from symmetry substitute for rigorous analysis. Thus, it is fundamentally important that any such departure be both calculated and justified by the economic evidence on consumer welfare grounds. Otherwise, deviations create a significant risk that the FTC and other antitrust agencies signal to emerging antitrust

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standards that are being widely implemented in the marketplace with no apparent IPR-related challenges. Letter from Microsoft to the Fed. Trade Comm'n, Comment for Patent Standards Workshop, Project No. P11-1204, 3-5 (June 14, 2011), *available at* http://www.ftc.gov/policy/public-comments/comment-00009-28.

regimes that it is desirable or acceptable to adopt special limits and restrictions upon the exercise and exchange of IPRs.

It is my hope that the FTC will reaffirm the symmetry principle in the 1995 Guidelines, and reaffirm that the symmetry provides a consistent and predictable theoretical framework for antitrust challenges involving intellectual property, just as antitrust functions for all other kinds of property. On the other hand, if there are valid reasons and evidence for departing from the symmetry principle, the FTC should be clear about the reasons for treating IPRs differently. At the very least, the FTC ought to be cognizant and cautious of the departure that appears to be underway, and evaluate vigilantly whether it is the best policy going forward for the sake of competition, innovation, and consumer welfare.