



# Regulatory Transparency Project

*Unlocking Innovation & Opportunity*

## Putting Innovation First: The “New Madison Approach” to Patent Licensing and Antitrust

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## Introduction

Patented technology is all around us. From the light switches on our walls to the screens on the smart devices in most of our pockets, many products we take for granted every day began with a patented innovation. Major COVID-19 vaccines that have saved countless lives rely on patented mRNA technology.<sup>1</sup> Patents often cover innovations that are incorporated into standards, which “establish technical specifications and procedures designed to maximize the reliability of the materials, products, methods, and/or services people use every day.”<sup>2</sup>

Very importantly, standards cover groups of technologies that allow our devices to interoperate. Bluetooth and WIFI are standards, as well as OBD II in your car and LTE on your smartphones. Due to standardization, the method of transmission and data handling is the same across all devices, so it does not matter who manufactures the device. Phones from Apple or Samsung will be able to access the same WIFI connection, and a check engine light on a Ford or a Ferrari can be read at the same local repair shop. Using standardized technology has wide-ranging benefits for consumers, innovators, and manufacturers alike, and a key to the realization of these benefits is the patent system. Many important high tech standards are developed by experts from many companies who come together under the auspices of standard setting organizations (SSOs).

Unfortunately, the legitimate rights of patent holders whose inventions apply to technologies specified in standards (often referred to as “standard essential patents” or SEPs) may be undermined by unwarranted antitrust challenges and by public policies that undermine the value of SEPs and patents in general. Specifically, the uncertainty and related costs that come from the threats of antitrust litigation and the denigration of SEP rights will deter innovative patent-holding enterprises from their core function – facilitating the creation of new and beneficial products and services for the world to use. These threats grew during the Obama administration as a result of policy pronouncements and litigation initiatives advanced by the federal antitrust enforcement agencies.

The New Madison Approach (NMA), unveiled by then-Assistant Attorney General for Antitrust Makan Delrahim in 2018, directly confronts these threats. It sets forth proposed legal principles to appropriately protect the legitimate property rights of patent holders and to shield their unilateral patent licensing decisions from unwarranted antitrust attack. Further, the 9th Circuit Court of Appeals decision in *FTC v. Qualcomm*<sup>3</sup> applies NMA reasoning in rejecting the Federal Trade Commission’s challenge to a major technology firm’s SEP licensing practices. By categorically dismissing calls to employ antitrust as a tool in SEP patent licensing disputes, and in outlining specific principles which the patent system and SSOs should uphold, the NMA and the *Qualcomm* holding point public policy in a direction that is conducive to robust American innovation and economic growth. Such a policy orientation is also in harmony with the American constitutional tradition of respect for intellectual property (IP) rights. There are some troubling initial signs, however, that the Biden administration may reject this perspective and reinstitute the Obama administration’s “patent skeptical” approach.

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<sup>1</sup> Drugs based on patented mRNA technology are also expected to be useful in treating a wide variety of other serious diseases as well. See Daniel Shores, *The mRNA Patent and Competitive Landscape: Pioneers, Litigation Outlook and Big Pharma’s Next Moves (Part III)*, IPWATCHDOG, April 30, 2021.

<sup>2</sup> “What Are Standards?”, IEEE Beyond Standards, <https://beyondstandards.ieee.org/what-are-standards-why-are-they-important/> (accessed July 2, 2021).

<sup>3</sup> *Federal Trade Commission v. Qualcomm, Inc.*, 969 F.3d 974 (9th Cir. 2020).

This essay begins by highlighting the importance accorded to intellectual property rights (including patents) in the U.S. Constitution and in early U.S. judicial decisions. Next, it discusses the economics of patents and standard setting, before turning to the particulars of the NMA and the Qualcomm case. The essay concludes with recommendations and cautions for the Biden administration as it develops its policy concerning the patent-antitrust interface. It is to be hoped that a closer consideration of the key role of robust patent rights in sparking innovation and economic growth may cause the new administration to reconsider any thoughts it might have about rejecting the NMA.

## I. Intellectual Property Rights and the Constitution

The NMA is named for “Father of the Constitution,” James Madison,<sup>4</sup> in recognition of his key role in laying the foundation for the legal protection of patents (and intellectual property rights in general) in the United States. The Patent and Copyright Clause in Article I of the Constitution gives Congress the power to grant innovators the “exclusive [r]ight” to their innovations.<sup>5</sup> While the Constitution leaves the scope of such right to Congress, it is clear that the Framers of the Constitution had in mind some level of protection for innovative endeavors.

Significantly, in a famous essay for the National Gazette, Madison notes that property is “everything which a man may attach a value and have a right.”<sup>6</sup> He goes on to state that if the United States wants to be an example for the world, there need to be protections for both physical property and for property in “its larger and juster meaning” of opinions and speech.<sup>7</sup> In short, Madison thereby recognizes that property rights extend to the fruits of one’s intellect.

Madison refers directly and favorably to intellectual property in Federalist Number 43. In this essay, he writes that patents and copyrights “belong to” the authors and inventors, and they are seen as “claims of individuals.”<sup>8</sup> Analogizing patents to property, Madison understood the fundamental ownership aspect of IP and the great benefit that is bestowed upon an individual when property rights are strongly enforced.

Both the Constitutional language and Madison’s own understanding of intellectual property were highly influenced by John Locke’s view of natural rights as expressed in his Second Treatise on Government.<sup>9</sup> Locke viewed property rights as broadly protecting rights that individuals hold in their own selves and their own labor.<sup>10</sup> Government, according to Locke, exists to protect the rights of its citizens. This protection goes beyond simple life and liberty bounds and includes ownership of

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<sup>4</sup> “James Madison is known as the Father of the Constitution because of his pivotal role in the document's drafting as well as its ratification. Madison also drafted the first 10 amendments -- the Bill of Rights.” The Loc.gov Wise Guide, “Who’s the Father of the Constitution,?”, <https://www.loc.gov/wiseguide/may05/constitution.html> (accessed July 6, 2021).

<sup>5</sup> U.S. CONST. art. I, §8, cl. 8 (“The Congress shall have Power... To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their Respective Writings and Discoveries...”).

<sup>6</sup> James Madison, *On Property*, NATIONAL GAZETTE, Mar. 29 1792.

<sup>7</sup> *Id.*

<sup>8</sup> THE FEDERALIST NO. 43 (James Madison), available at [http://press-pubs.uchicago.edu/founders/documents/a1\\_8\\_8s7.html](http://press-pubs.uchicago.edu/founders/documents/a1_8_8s7.html).

<sup>9</sup> U.S. CONGRESS OFFICE OF TECHNOLOGICAL ASSESSMENT, INTELLECTUAL PROPERTY RIGHTS IN AN AGE OF ELECTRONICS AND INFORMATION 258 (Apr. 1986).

<sup>10</sup> JOHN LOCKE, THE SECOND TREATISE OF GOVERNMENT (1690) in LEE STIMPSON AND BETSY GLADE, DEMOCRATIC CITIZENSHIP: DOCUMENTS IN THE HISTORY OF DEMOCRACY AND CITIZENSHIP IN AMERICA 22 (1999).

property and fruits of one’s labor, be it physical or intellectual. Just as legal property protections are bestowed on an individual who builds a house or harvests a field of crops, so too is one entitled to all the fruits of his or her intellectual labor.

The respect for intellectual property rights expressed by the Founders influenced subsequent judicial decisions and commentaries, which confirmed that IP rights are property worthy of protection. In sum, as IP scholar Professor Adam Mossoff explains:

“The Founding Era sources, as well as the overwhelming weight of 19th-century court decisions, official statements, and commentaries, confirm that intellectual property rights are property—both as a matter of basic legal doctrine and as a matter of constitutional principle. . . . Despite . . . [a] lack of reference to these long-standing precedents, it is notable that the Supreme Court has still consistently and repeatedly protected intellectual property rights under the Constitution.”<sup>11</sup>

## II. The Law and Economics of Patents, Antitrust, and Standard Setting

In order to understand how the threat of antitrust litigation has the potential to hinder innovation, it is important to understand both patents and standards. Innovating is both incredibly risky and expensive, regardless of how small or large of an impact the innovation may have. An individual or company that undertakes the costly process of innovating runs the risk that it will be unable to recoup millions, sometimes billions, of dollars in costs that it incurs.

Patents are the key to mitigating this risk. In exchange for publicly disclosing relevant methods for production such that others may be able to replicate the innovation, a patent gives the innovator exclusive rights to exclude others from using the patented technology for a limited time. This limited term exclusivity ensures that innovators may benefit from the fruits of their labor without fear of other individuals or companies free riding on their hard work. It creates substantial incentives for dynamic follow-on innovation, which is typically transmitted throughout the economy by a web of patent licensing agreements and other contracts.<sup>12</sup> (Much of the increase in economic welfare flowing from patents is due to follow-on innovation.) It also enables patents to serve as “beacons” for the investment capital that is vital to financing new products and processes and improving existing market offerings – thereby promoting competitive vigor.<sup>13</sup> In short, this process benefits the overall economy. It also enables patentee-innovators to receive appropriate remuneration that justifies the R&D needed to bring forth the new and improved products, processes, and services that are the fruits of innovation.

Unfortunately, over the last 15 years a variety of judicial decisions have tended to weaken patent rights, thereby threatening to slow the pace of innovation.

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<sup>11</sup> Adam Mossoff, “The Constitutional Protection of Intellectual Property,” HERITAGE FOUNDATION LEGAL MEMORANDUM No. 282, at 14 (Mar. 8, 2021), <https://www.heritage.org/sites/default/files/2021-03/LM282.pdf> (accessed July 6, 2021).

<sup>12</sup> See generally DANIEL SPULBER, THE CASE FOR PATENTS (2021). A patent licensing agreement, simply put, is a certain type of commercial contract. It provides that the patent holder will not sue the licensee for patent infringement if the licensee uses the patented invention, as long as the licensee adheres to the requirements set forth in the license. The license contract delineates the terms under which the licensee will compensate the patent holder for use of the patented technology. *Id.* at 165-166.

<sup>13</sup> See Views of the Hon. F. Scott Kieff, Commissioner, U.S. Int’l Trade Comm’n, on the U.S. Fed Trade Comm’n’s and the U.S. Dep’t of Justice Antitrust Division’s Joint Guidelines for the Licensing of Intellectual Property 5 (Sept. 23, 2016), <https://www.justice.gov/atr/file/897081/download>.

In *eBay*,<sup>14</sup> the U.S. Supreme Court overturned Federal Circuit precedent in rejecting the historical property rule presumption that a patentee is entitled to an injunction when it has successfully defended patent validity and shown infringement. An injunction flatly prohibits a party from using patented technology without the patent holder's permission. The *eBay* holding effectively weakened patent rights by making it more difficult for a patent holder to exclude an implementer from using the patent. *eBay* held that a court must weigh four equitable factors in deciding on a case-by-case basis whether an injunction is warranted.

This created significant uncertainty as to whether damages or an injunction would be granted in any particular patent licensing dispute. Subsequent court decisions interpreted *eBay* to make it very difficult for patent holders to obtain an injunction, exacerbating the harm to patent rights. This takes power away from patent holders because “no injunction threat can be credibly asserted.”<sup>15</sup> With respect to SEPs, a combination of judicial decisions and government policy pronouncements have created a situation in which SEP holders, by default, must rely on damages (based on judicially-determined royalties) to compensate them for patent infringement.

Two later Supreme Court decisions, *Mayo*<sup>16</sup> and *Alice*,<sup>17</sup> weakened patents in a different way: they made it easier for technology users to challenge issued patents as lacking patentable subject matter.<sup>18</sup> The subjective and unclear standards for patent eligibility stemming from these decisions further disincentivize the R&D underlying patents, tending to slow economically beneficial innovation.

While courts were undermining patent rights, government enforcers were taking positions that interjected a new category of risk – antitrust prosecution – into patent holders' decision-making regarding the licensing of their patents, particularly SEPs. To appreciate the nature of this risk, some background information on antitrust and standard setting is required.

Although they are not mentioned in the Constitution, the antitrust laws, similar to patent law, have long been seen as holding a special status in the federal statutory hierarchy. The U.S. Supreme Court, for example, famously stated that “[a]ntitrust laws in general, and the Sherman Act in particular, are the Magna Carta of free enterprise.”<sup>19</sup>

Since the late 1970s, mainstream American antitrust law (as reflected in U.S. Supreme Court decisions, enforcement policies, and scholarship) has emphasized the promotion of vigorous competition on the merits, with an eye to the ultimate goal of advancing consumer welfare. The focus has been on challenging only those business actions that harm the competitive process. Efficient business practices that harm individual competitors—but not the competitive process—have not been successfully challenged. Indeed, efficient business practices by a monopolist that allows it to maximize its profits are perfectly permissible, as the Supreme Court emphasized in

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<sup>14</sup> *eBay Inc. v. MercExchange, LLC*, 547 U.S. 388 (2006).

<sup>15</sup> JONATHAN M. BARNETT, *INNOVATORS, FIRMS, AND MARKETS* 161 (2021).

<sup>16</sup> *Mayo Collaborative Servs. v. Prometheus Labs Inc.*, 566 U.S. 66, (2012).

<sup>17</sup> *Alice Corp v. CLS Bank Int'l*, 573 U.S. 208 (2014).

<sup>18</sup> See Paul Michel and John Battaglia, “Flaws in the Supreme Court’s §101 Precedent and Available Ways to Correct Them,” *IP WatchDog*, Apr. 27, 2020,

<https://www.ipwatchdog.com/2020/04/27/flaws-supreme-courts-%C2%A7101-precedent/id=121038/>; Paul D.

Ackerman and Gregory Miller, “Six years after *Alice*, are we any closer to clarity on patent eligibility?,” *Thomson Reuters Westlaw*, Nov. 30, 2020,

<https://www.huntonak.com/images/content/7/1/v2/71977/six-years-after-alice-are-we-any-closer-to-clarity-on-patent-eli.pdf>.

<sup>19</sup> *United States v. Topco Assocs., Inc.*, 405 U.S. 596, 610 (1972).

its unanimous landmark 2004 *Verizon v. Trinko* decision.<sup>20</sup> Thus, for example, business practices that render a firm more efficient than its competitors and enhance consumer welfare, will not be challenged by antitrust enforcers, even though the competitors are harmed.

Contemporary (since the 1980s) mainstream antitrust law recognizes that, properly understood, antitrust is not in conflict with patent law. Rather, antitrust law complements patent law to stimulate innovation when applied in an appropriate fashion. Antitrust does this by safeguarding a vigorous competitive process – a process that is vital to enabling the innovators who develop patents, and the parties with whom they transact, to thrive in the marketplace and benefit American consumers.

The two federal antitrust agencies, the U.S. Department of Justice (DOJ) and the Federal Trade Commission (FTC), succinctly described the complementary nature of antitrust and intellectual property law (which includes patent law) in a joint report issued in 2007 (“2007 IP-Antitrust Report”), stating:

“[A]ntitrust and intellectual property are properly perceived as complementary bodies of law that work together to bring innovation to consumers: antitrust laws protect robust competition in the marketplace, while intellectual property laws protect the ability to earn a return on the investments necessary to innovate. Both spur competition among rivals to be the first to enter the marketplace with a desirable technology, product, or service.”<sup>21</sup>

The modern rejection of the notion that patents are problematic monopolies that merit special antitrust scrutiny is embodied in the consensus view of patent licensing found in the 2017 Antitrust Guidelines for the Licensing of Intellectual Property (2017 IP-Antitrust Guidelines), issued jointly by DOJ and the FTC.<sup>22</sup> The 2017 IP-Antitrust Guidelines (like the 1995 IP-Antitrust Guidelines that they update) explain: (1) for the purpose of antitrust analysis, DOJ and FTC regard a patent as being essentially comparable to any other form of property; (2) DOJ and FTC do not presume that a patent creates market power in the antitrust context; and (3) DOJ and FTC recognize that patent licensing allows firms to combine complementary factors of production and is generally procompetitive.

The fact that antitrust and patent law are now recognized to be complementary, does not, however, mean that business practices involving patents will never be challenged under the antitrust laws. The 2017 IP-Antitrust Guidelines explain:

“As with other forms of private property, certain types of conduct with respect to intellectual property may have anticompetitive effects against which the antitrust laws can and do protect. The exercise of intellectual property rights is thus neither particularly free from scrutiny under the antitrust laws, nor particularly suspect under them.”<sup>23</sup>

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<sup>20</sup> *Verizon Comm’ns Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398, 407 (2004) (“[t]he mere possession of monopoly power, and the concomitant charging of monopoly prices, is not . . . unlawful”).

<sup>21</sup> U.S. DEP’T OF JUSTICE & FED TRADE COMM’N, ANTITRUST ENFORCEMENT AND INTELLECTUAL PROPERTY RIGHTS: PROMOTING INNOVATION AND COMPETITION 2 (Apr. 2007).

<sup>22</sup> U.S. DEP’T OF JUSTICE & FED TRADE COMM’N, ANTITRUST GUIDELINES FOR THE LICENSING OF INTELLECTUAL PROPERTY 2 (2017),

[https://www.ftc.gov/system/files/documents/public\\_statements/1049793/ip\\_guidelines\\_2017.pdf](https://www.ftc.gov/system/files/documents/public_statements/1049793/ip_guidelines_2017.pdf).

<sup>23</sup> 2017 Guidelines at 8.

The intersection of antitrust and patent law in the area of standard setting has attracted a substantial degree of antitrust enforcement attention over the years. In their 2007 IP-Antitrust Report, DOJ and FTC explained:

“Recognizing that collaboratively set standards can reduce competition and consumer choice and have the potential to prescribe the direction in which a market will develop, courts have been sensitive to antitrust issues that may arise in the context of collaboratively set standards. They have found antitrust liability in circumstances involving the manipulation of the standard-setting process or the improper use of the resulting standard to gain competitive advantage over rivals.”<sup>24</sup>

In short, the antitrust concern about standard setting traditionally has focused on the risk that firms brought together by an SSO would scheme to reduce competition among themselves, or to exclude competition from a rival outside the SSO.

Beginning over a decade ago, however, antitrust agencies began to focus less on collusion and exclusion of non-SSO members, and more on the supposedly wrongful exploitation of monopoly power by patent holders in connection with standard setting activities.<sup>25</sup> The agencies stressed that holders of SEPs – patents that cover the “winning” technologies that are incorporated into a widely-adopted standard – acquire additional “market power” that did not exist prior to the standard’s issuance. This extra market power allows the SEP holders to charge an overly high “anticompetitive” price for patent licenses to producers that are “locked in” to a standard (also called implementers) and therefore need to use SEP-based technology. The difference between this “anticompetitive price” and the lower price that implementers could have gotten before the standard reflects a “hold-up” premium. Hold-up occurs when implementers have to pay this premium in order to obtain a license that allows them to make their product. In order to forestall future hold-ups, many SSOs require SSO members to license their SEPs at “fair, reasonable, and non-discriminatory” (FRAND) rates. The FTC’s notion that FRAND calculations should be based on royalties that would have been negotiated before a standard was selected has been exposed as inadequate by three prominent experts on IP law and policy, Professors Richard Epstein, F. Scott Kieff, and Daniel Spulber:

“[I]f the FTC’s bargain prices were always available to infringers through the courts – or, worse yet, were used as a standard to accuse negotiated license terms retroactively of being ‘unreasonable’ – the result would be the destruction of private bargains and the generation of government-sponsored hold-up that would substantially reduce the terms to innovators and adopters alike.”<sup>26</sup>

The FTC was the first agency to take legal action, by imposing major limitations on the ability of SEP holders to exercise their rights. On three separate occasions it alleged that firms had engaged in illegal “unfair methods of competition” by renegeing on FRAND commitments in dealing with potential licensees. The Commission entered into legally binding consent decrees to settle these matters. In the 2008 N-Data case, the FTC required a firm that was allegedly demanding an overly

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<sup>24</sup> 2007 IP-Antitrust Report at 34-35 (citations omitted).

<sup>25</sup> The following discussion of FTC and DOJ actions regarding alleged monopolistic actions by SEP holders draws substantially on Alden F. Abbott, *US Government Intervention in the Standard Setting activities and the Competitive Process*, 18 VAND. J. ENT. & TECH L. 225 (2016).

<sup>26</sup> Richard A. Epstein, F. Scott Kieff, and Daniel F. Spulber, *The FTC, IP, and SSOs: Government Hold-Up Replacing Private Coordination*, 8 J. COMPETITION L. & ECON. 1, 27 (2012).

high price to offer one-time “paid-up” lifetime licenses to potential licensees for a mere \$1,000. In the 2013 Bosch case, the Commission barred the defendant from seeking injunctions. And in the 2013 Motorola Mobility case, the FTC imposed major limitations on the defendant’s ability to request an injunction.

DOJ has relied on policy actions rather than litigation in seeking to curb the alleged anticompetitive exploitation of SEPs. In 2013, a top Antitrust Division official stated publicly that DOJ would “continue to look at” whether an antitrust violation may occur when an SEP owner breaches its FRAND commitment. Also in 2013, DOJ and the U.S. Patent and Trademark Office issued a Policy Statement on SEPs that strongly suggested it was generally inappropriate for SEP holders to obtain an injunction in patent infringement litigation.<sup>27</sup>

More significantly, in 2015 DOJ issued a “business review letter” to the world’s largest high tech SSO, the IEEE, which stated that DOJ would not bring an antitrust action against a proposed new IEEE patent policy (subsequently adopted by the IEEE) that substantially limits the rights of SEP holders. Among other restrictions, the policy requires patentees to waive the right to seek an injunction against infringers in order to have their patents included in standards. It also imposes limitations on the valuation of license rights. In short, the IEEE policy puts SEP holders at a negotiating disadvantage with respect to licensees, and interferes in market processes by circumscribing the terms of licensing negotiations. Regrettably, DOJ did far more than “okay” the IEEE policy – it publicly praised it as a helpful guide to licensing negotiations and standards development.

The federal antitrust agencies’ antitrust settlements and policy statements represented bad public policy. They artificially favored licensees’ interests over those of SEP patent holders at a time when patent rights were already being weakened by Supreme Court decisions (discussed above). They also violated the spirit, if not the letter, of the 1995 and 2017 IP-Antitrust Guidelines, which emphasize the significant efficiency benefits accruing to the economy that are generally associated with patent licensing. As a result, these agency actions tended to further reduce the expected value of patents.

A long-term logical consequence of “patent-skeptical” antitrust agency policy is a reduction in innovative patenting activity. This will lower the rate of innovation over time, thereby reducing future innovation-specific economic welfare gains.<sup>28</sup> Current and future consumers will enjoy fewer new goods and services, and have a lower standard of living.

Furthermore, the FTC’s and DOJ’s Obama-era actions were problematic as a matter of antitrust principle. Hold-up reflects an effort to obtain maximum royalties from a patent license. Such an attempt, however, does not harm competition (it only reflects an attempted exercise of existing market power). Accordingly, it does not present an antitrust violation under principles of U.S. monopolization law.<sup>29</sup>

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<sup>27</sup> U.S. Dep’t of Justice & U.S. Patent & Trademark Office, POLICY STATEMENT ON REMEDIES FOR STANDARDS-ESSENTIAL PATENTS SUBJECT TO VOLUNTARY F/RAND COMMITMENTS (Jan. 8, 2013), <https://www.justice.gov/atr/page/file/1118381/download>.

<sup>28</sup> For a discussion of empirical work documenting the relationship between strong patent rights and innovation, see Maureen K. Ohlhausen, *Patent Rights in a Climate of Intellectual Property Rights Skepticism*, 30 HARV. J. L. & TECH. 103 (2016).

<sup>29</sup> See Gregory J. Werden and Luke M. Froeb, *Why Patent Hold-Up Does Not Violate Antitrust Law*, 27 TEX. INTELL. PROP. L. J. 1 (2019). The FTC might maintain that its authority to attack “unfair methods of competition” goes beyond monopolization law as enforced by DOJ (under the Sherman Antitrust Act) and therefore would

The absence of antitrust as an appropriate tool to deal with SEP license disputes does not leave any party unprotected. Such disputes were and are being fully litigated in the courts under legal theories far-better suited to handling disputes in this area. Lawsuits centered on contract law, patent law, and various other “equitable” legal remedies are well tailored for resolving FRAND-related questions and for handling problems of opportunistic behavior.<sup>30</sup> Those areas of law fully recognize the rights of patentees, not just the interests of licensees.

### III. The New Madison Approach

Under the Trump administration, a new Assistant Attorney General for Antitrust, Makan Delrahim, sought to undo the damage created by DOJ’s misguided denigration of patent rights during the Obama administration. As such, DOJ cooperated with the U.S. Patent and Trademark Office (USPTO) and the National Institute for Standards and Technology (NIST) in issuing a joint 2019 Policy Statement (2019 SEP Policy Statement) clarifying that an SEP owner’s promise to license a patent on FRAND terms is not a bar to obtaining any particular remedy, including injunctive relief.<sup>31</sup> The agencies simultaneously withdrew the anti-SEP 2013 Policy Statement on SEPs (discussed above). On the antitrust policy front, in 2020 DOJ issued a “supplement” that effectively repudiated the anti-SEP bias of the 2015 IEEE business review letter.<sup>32</sup> The 2020 supplement explained that “aspects of the 2015 letter had become outdated based on recent jurisprudential and policy developments. . . . [W]e fear that reliance on its analysis, both in the United States and abroad, could actually harm competition and chill innovation.”

The 2019 Policy Statement and the 2020 supplement drew their inspiration from the core policy document delineating new DOJ antitrust policy regarding SEPs: the 2018 NMA.<sup>33</sup> The NMA has four basic premises that are aimed at ensuring that patent holders have adequate incentives to innovate and create welfare-enhancing new technologies, and that licensees have appropriate incentives to implement those technologies:

1. Hold-up is not an antitrust problem. Accordingly, an antitrust remedy is not the correct tool to resolve patent licensing disputes between SEP-holders and implementers of a standard.
2. SSOs should not allow collective actions by standard-implementers to disfavor patent holders in setting the terms of access to patents that cover a new standard.

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authorize it to challenge hold-ups. This position has not been decided upon by a court, however, and it flies in the face of sound antitrust policy, which holds that monopolization law should be the same whether it is applied by DOJ or by the FTC.

<sup>30</sup> See Abbott, *supra* note 25, at 237.

<sup>31</sup> U.S. Dep’t of Justice, U.S. Patent and Trademark Office, and NIST, POLICY STATEMENT ON REMEDIES FOR STANDARDS-ESSENTIAL PATENTS SUBJECT TO VOLUNTARY F/RAND COMMITMENTS (Dec. 19, 2019), <https://www.justice.gov/atr/page/file/1228016/download>.

<sup>32</sup> U.S. Dep’t of Justice, Press Release, Justice Department Updates 2015 Business Review Letter To The Institute Of Electrical And Electronics Engineers, Sept. 10, 2020, <https://www.justice.gov/opa/pr/justice-department-updates-2015-business-review-letter-institute-electrical-and-electronics>.

<sup>33</sup> Former Assistant Att’y Gen. Makan Delrahim, Address Before the U. of Pennsylvania Law Sch., *The “New Madison” Approach to Antitrust and Intellectual Property Law*, Antitrust Div. of U.S. Dep’t of Just. (2018) (available at <https://www.justice.gov/opa/speech/file/1044316/download>).

3. A fundamental element of patent rights is the right to exclude. As such, SSOs and courts should be hesitant to restrict SEP holders' right to exclude implementers from access to their patents, by, for example, seeking injunctions.
4. Unilateral and unconditional decisions not to license a patent should be per se legal.

In discussing the NMA, Assistant Attorney General Delrahim emphasized that the threat of antitrust liability, specifically treble damages, distorts the incentives associated with good faith negotiations with SSOs over patent inclusion.<sup>34</sup> Contract law, he went on to note, is perfectly capable of providing an ex-post solution to licensing disputes between SEP holders and implementers of a standard. Unlike antitrust law, a contract law framework allows all parties equal leverage in licensing negotiations.<sup>35</sup>

Critics of the NMA have maintained, however, that antitrust is needed to prevent the exercise of excessive market power by SEP holders. Those critics tend to ignore basic principles of American antitrust law, already noted, that undermine their legal case. More fundamentally, their policy prescription is fatally flawed, because it fails to take into account the dynamic forward-looking nature of patents.

As discussed, patented technology serves as a catalyst for the wealth-creating diffusion of innovation. This occurs through numerous commercialization methods; in the context of standardized technologies, the development of standards is a process of discovery. At each SDO, the process of discussion and negotiation between engineers, businesspersons, and all other relevant stakeholders reveals the relative value of alternative technologies and tends to result in the best patents being integrated into a standard.

The NMA supports this process of discovery and implementation of the best patented technology born of the labors of the innovators who created it. As a result, the NMA ensures SEP valuations that allow SEP holders to obtain an appropriate return for the new economic surplus that results from the commercialization of standard-engendered innovations. It recognizes that dynamic economic growth is fostered through the incentivization of innovative activities backed by patents.

Economic analysis demonstrates that allowing patent holders to fully exercise their property rights, consistent with the NMA, will advance wealth-creating dynamic innovation. We have already seen that avoiding applying antitrust to SEP licensing disputes and discouraging SEP actions that favor implementers over patentees (the first two legs of the NMA) are economically desirable policies.

Support for SEP holders' right to seek injunctions (the third leg of the NMA) is welfare-enhancing as well. The threat of an injunction incentivizes implementers to come to the table and negotiate terms of a license, knowing that they will not be able to legally produce otherwise. SEP-holders thus have some leverage to bargain for and obtain compensation that appropriately rewards them for the innovative benefits their patents will confer on society.

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<sup>34</sup> Former Assistant Att'y Gen. Makan Delrahim, Remarks at the LeadershIP Virtual Series, *Broke...but Not No More: Opening Remarks--Innovation Policy and the Role of Standards, IP, and Antitrust*, Antitrust Div. of U.S. Dep't of Just. (2020) (According to Delrahim, negotiating in the shadow of dubious antitrust liability is not only unnecessary, but it also dramatically shifts bargaining power between patent holders and implementers in a way that distorts the incentives for real competition on the merits through innovation. Giving implementers the threat of treble damages in antitrust increases the perverse likelihood of "hold-out," which is the other side of the "hold-up" coin.").

<sup>35</sup> *Id.*

In contrast, if SEP holders are denied any possibility to obtain an injunction, they face a serious problem. If they seek infringement damages in litigation, they are stymied by the fact that U.S. courts have treated reasonable royalties for patent infringement as tantamount to FRAND license rates.<sup>36</sup> This means, in effect, that an implementer does not face serious consequences if it fails to negotiate with the SEP holder for a license. As a group of leading patent scholars have explained:

“[A]n opportunistic manufacturer of standardized products could decide that the most efficient course of action is not to seek a FRAND license from a SEP holder at all, but instead to delay until it is sued for infringement, at which point its maximum liability (assuming that both patent validity and infringement are established) would only be the FRAND royalty it otherwise would have paid ex ante. As discussed elsewhere, this form of conduct by standards implementers has been termed ‘hold out.’”<sup>37</sup>

This limitation seriously disincentivizes investment in beneficial patent-based innovation directed toward potential standardized technologies. By eliminating an innovator SEP-holder’s leverage, it disproportionately benefits the implementer. The implementer may effectively use standardized technology “for free” until it is hauled into court. What’s more, if and when that happens, it must pay no more than a FRAND license rate it might have bargained for in the first place. The SEP-holder is a net loser under such a scenario.

#### IV. The FTC’s *Qualcomm* Case

Unlike the DOJ, the FTC did not fundamentally retool its approach to SEPs and patent rights during the Trump administration. While it avoided public policy pronouncements on SEPs, it continued to pursue an antitrust suit against Qualcomm that had been filed in federal court during the closing days of the Obama administration.<sup>38</sup> The FTC’s Qualcomm complaint reflected the anti-SEP bias present during the Obama administration. If it had been successful, the FTC’s prosecution would have seriously undermined the freedom of the company to engage in efficient licensing of its SEPs.

Qualcomm is perhaps the world’s leading wireless technology innovator. It has developed, patented, and licensed key technologies that power smartphones and other wireless devices, and continues to

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<sup>36</sup> Curtis Dodd, *Damages for Patent Infringement versus FRAND Licensing Rates*, IPWATCHDOG (Dec. 8, 2020), <https://www.ipwatchdog.com/2020/12/08/damages-patent-infringement-versus-frand-licensing-rates/id=128050/>).

<sup>37</sup> Jorge L. Contreras et al., *The Effect of FRAND Commitments on Patent Remedies*, Utah L. Fac. Scholarship 160, at 295 (2018).

<sup>38</sup> FTC Press Release, *FTC Charges Qualcomm with Monopolizing Key Semiconductor Device Used in Cell Phones*, Jan. 17, 2017, <https://www.ftc.gov/news-events/press-releases/2017/01/ftc-charges-qualcomm-monopolizing-key-semiconductor-device-used>. The FTC is an independent agency whose enforcement initiatives are voted on by a majority of its sitting Commissioners, no more than three of whom may be affiliated with the same political party. Although the FTC has five statutorily authorized Commissioner positions, in January 2017 only three Commissioners remained in office. The *Qualcomm* complaint was voted out by a 2 to 1 Commission majority, over the objections of Commissioner Maureen Ohlhausen, who shortly thereafter was named Acting Chairman by President Trump. The *Qualcomm* matter continued to be prosecuted by Commission staff during the Trump administration, based solely on the original vote. It proceeded despite being openly opposed by Commissioner Christine Wilson (who joined the FTC in the fall of 2018) as well as Acting Chairwoman Ohlhausen (who left the FTC in April 2018).

do so.<sup>39</sup> Many of Qualcomm's key patents are SEPs subject to FRAND, directed to communications standards adopted by wireless devices makers. Qualcomm also makes computer processors and chips embodied in cutting edge wireless devices. Thanks in large part to Qualcomm technology, those devices have improved dramatically over the last decade, offering consumers a vast array of new services at a lower and lower price, when quality is factored in. Qualcomm thus is the epitome of a high tech American success story that has greatly benefited consumers.

Qualcomm: (1) sells its chips to "downstream" original equipment manufacturers (OEMs, such as Samsung and Apple), on the condition that the OEMs obtain licenses to Qualcomm SEPs; and (2) refuses to license its FRAND-encumbered SEPs to rival chip makers, while allowing those rivals to create and sell chips embodying Qualcomm SEP technologies to those OEMs that have entered a licensing agreement with Qualcomm.

The FTC's 2017 antitrust complaint, filed in federal district court in San Francisco, charged that Qualcomm's "no license, no chips" policy allegedly "forced" OEM cell phone manufacturers to pay elevated royalties on products that use a competitor's baseband processors. The FTC deemed this an illegal "anticompetitive tax" on the use of rivals' processors, since phone manufacturers "could not run the risk" of declining licenses and thus losing all access to Qualcomm's processors (which would be needed to sell phones on important cellular networks). The FTC also argued that Qualcomm's refusal to license its rivals despite its SEP FRAND commitment violated the antitrust laws. Finally, the FTC asserted that a 2011-2016 Qualcomm exclusive dealing contract with Apple (in exchange for reduced patent royalties) had excluded business opportunities for Qualcomm competitors.

The federal district court held for the FTC. It ordered that Qualcomm end these supposedly anticompetitive practices and renegotiate its many contracts.

Qualcomm appealed, and a panel of the Ninth Circuit Court of Appeals reversed the district court, holding for Qualcomm. Some of the key points underlying this holding were: (1) Qualcomm had no antitrust duty to deal with competitors, consistent with established Supreme Court precedent (a very narrow exception to this precedent did not apply); (2) Qualcomm's rates were chip supplier neutral because all OEMs paid royalties, not just rivals' customers; (3) the lower court failed to show how the "no license, no chips" policy harmed Qualcomm's competitors; and (4) Qualcomm's agreements with Apple did not have the effect of substantially foreclosing the market to competitors. The Ninth Circuit as a whole rejected the FTC's "en banc" appeal for review of the panel decision.<sup>40</sup>

The appellate decision in Qualcomm largely supports pillar four of the NMA, that unilateral and unconditional decisions not to license a patent should be deemed legal under the antitrust laws. More generally, the decision evinces a refusal to find anticompetitive harm in licensing markets without hard empirical support. The FTC and the lower court's findings of "harm" had been essentially speculative and anecdotal at best. They had ignored the "big picture" that the markets in which Qualcomm operates had seen vigorous competition and the conferral of enormous and growing welfare benefits on consumers, year-by-year. The lower court and the FTC had also turned a deaf ear to a legitimate efficiency-related business rationale that explained Qualcomm's "no license,

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<sup>39</sup> See generally <https://www.qualcomm.com/company/about> for an overview of Qualcomm's cutting edge innovations and product offerings.

<sup>40</sup> Federal Trade Commission v. Qualcomm Inc., No. 19-16122, ECF 270 (9th Cir. Oct. 28, 2020).

no chips” policy – a fully justifiable desire to obtain a fair return on Qualcomm’s patented technology.<sup>41</sup>

Qualcomm is well reasoned, and in line with sound modern antitrust precedent, but it is only one holding. The extent to which this case’s reasoning proves influential in other courts may in part depend on the policies advanced by DOJ and the FTC going forward. Thus, a preliminary examination of the Biden administration’s emerging patent-antitrust policy is warranted.

## V. Early Biden Administration Developments Are Discouraging

Regrettably, initial signs are that the enlightened procompetitive, pro-consumer policies embodied in the Ninth Circuit’s Qualcomm decision and in the NMA are being rejected by the new Biden administration.

In July 2021, by a 3-2 Commission vote (accompanied by two written dissents), new FTC leadership rescinded a 2015 bipartisan FTC antitrust Policy Statement regarding challenges to “unfair methods of competition” under Section 5 of the FTC Act. The 2015 statement commendably had focused on consumer welfare and weighing of efficiencies against consumer harms as the principles guiding enforcement of section 5 of the FTC Act.<sup>42</sup> In rescinding the 2015 Statement, the Commission majority provided no clear guidance, but rather merely stated that “the Statement has doubled down on the Commission’s longstanding failure to investigate and pursue ‘unfair methods of competition.’”<sup>43</sup> This language telegraphs an even more aggressive posture toward antitrust enforcement than the Commission majority that brought Qualcomm.<sup>44</sup> This is bad news for SEP holders whose agreements may be investigated by the FTC.

DOJ meanwhile has been even more explicit in signaling a possible rejection of the NMA’s principles. In April 2021, the DOJ Antitrust Division in effect restored the anti-SEP policy of the 2015 IEEE business review letter by denigrating the Division’s 2020 supplement to the letter as mere “advocacy.”<sup>45</sup> A subsequent statement in May by the Acting Assistant Attorney General for Antitrust that DOJ is developing a new “balanced” stance on intellectual property,<sup>46</sup> while not explicit, implicitly suggests that NMA-based analysis is in jeopardy. And in September 2021, the Antitrust Division’s Economics Director of Enforcement delivered remarks that effectively

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<sup>41</sup> In addition, Qualcomm’s decision not to sell its chips to its rivals made good business sense, given the doctrine of patent exhaustion, which bars patent holders from collecting additional license payments downstream from the licensee. “[A]uthorized sale of an article that substantially embodies a patent exhausts the patent holder’s rights and prevents the patent holder from invoking patent law to control post-sale use of the article.” *Quanta Computer, Inc. v. LG Electronics, Inc.*, 553 U.S. 617, 638 (2008).

<sup>42</sup> Fed. Trade Comm’n, Press Release, *FTC Rescinds 2015 Policy that Limited Its Enforcement Ability Under the FTC Act*, July 1, 2021, <https://www.ftc.gov/news-events/press-releases/2021/07/ftc-rescinds-2015-policy-limited-its-enforcement-ability-under>.

<sup>43</sup> *Id.*

<sup>44</sup> All three Democratic Commissioners, including the two Commissioners who voted to authorize the 2017 *Qualcomm* lawsuit, had voted in favor of the 2015 Policy Statement.

<sup>45</sup> Noah Brumfield *et al.*, *DOJ Antitrust Division quietly walks back prior administration-era support of Standard Essential Patent holders*, White & Case, May 26, 2021, <https://www.whitecase.com/publications/alert/doj-antitrust-division-quietly-walks-back-prior-administration-era-support>.

<sup>46</sup> Ben Remaly, *Powers: DOJ developing “balanced” stance on intellectual property*, GCR, June 4, 2021, <https://globalcompetitionreview.com/gcr-usa/departments-of-justice/powers-doj-developing-balanced-stance-intellectual-property>.

repudiated the 2019 SEP Policy Statement and announced that the Division would work with the FTC, USPTO, and NIST to develop “a more procompetitive and balanced policy.”<sup>47</sup> All told, these statements are not good news for SEP holders.

## VI. Concluding Comments

The dissemination of new technologies throughout the economy via patent licensing has been a key to dynamic U.S. economic growth and enhanced welfare for American consumers. Patents that “read on” standards – SEPs – have been particularly important in helping generate and rapidly spread technological improvements that underlie the high tech American economy, including innovative digital platforms. As such, DOJ and FTC OBAMA administration antitrust policies that undermined SEP holders’ rights were harmful for the U.S. economy and for consumers. Court decisions that inappropriately weakened patent rights also were not helpful.

By promulgating the NMA, the Trump administration DOJ took a major step forward toward restoring appropriate protections for SEP holders’ rights (though the FTC unfortunately failed to follow DOJ’s lead). Most recently, however, the new Biden administration antitrust agencies appear poised to return to the counterproductive anti-patent anti-SEP policies of the Obama era.

Rather than acting precipitously, the Biden Administration, in consultation with Congress, should step back and take a closer look at the role of SEPs and patent licensing policies in promoting U.S. economic growth and technological leadership. In the near term, two actions would be particularly helpful.

First, rather than repudiating the NMA, the FTC and DOJ would be well advised to issue new antitrust guidelines that explicitly adopt the four core NMA principles. New guidelines, backed by sound analysis, could prove helpful in removing uncertainty and helping incentivize innovative private sector patent licensing that promotes consumer welfare and wealth creation. Such guidelines could also prove persuasive to the judiciary, and thereby move patent-antitrust jurisprudence in a welfare-enhancing direction.

Second, Congress should adopt legislation overruling the Supreme Court’s eBay holding to restore the presumption that any patentee may obtain an injunction against proven infringement of its patent. Such a legislative change, which has previously been advanced in a bipartisan legislative proposal,<sup>48</sup> would restore balance to patentee-innovator licensing negotiations. It would thereby facilitate agreements that provide patent holders the compensation needed to encourage their investment in technologies that, when spread throughout the economy, generate novel products and services that dramatically raise economic welfare.

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<sup>47</sup> Jeffrey Wilder, Economics Director of Enforcement, Antitrust Div., Remarks at the IAM and Global Competition Review Summit on Standard Essential Patents, *Leveling the Playing Field in the Antitrust Ecosystem: Principles for a Balanced Enforcement Approach to Standards-Essential Patents*, Antitrust Div. of U.S. Dep’t of Justice (2021) (available at <https://www.justice.gov/opa/speech/file/1437421/download>).

<sup>48</sup> Stronger Patents Act, S.2082, 116th Cong. (2019) (would among other things overrule eBay). *See Sens. Coons and Cotton, Reps. Stivers and Foster introduce bipartisan, bicameral bill to protect US patent holders, inventors* (July 10, 2019), <https://www.coons.senate.gov/news/press-releases/sens-coons-and-cotton-reps-stivers-and-foster-introduce-bipartisan-bicameral-bill-to-protect-us-patent-holders-inventors>).

The Framers of our Constitution believed, and history has shown, that strong patent rights are key to continued innovation and prosperity in this country. Let us hope that current policymakers keep that lesson firmly in mind as they develop their patent and antitrust policy agendas.