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SEPs and FRAND at the FTC and ITC: Current Policy Proposals and Respect for IP Rights

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Donald J. Boudreaux, former chair of the Economics Department at George Mason University, regularly asked: "What is the minimum amount of money that you would demand in exchange for your going back to live even as John D. Rockefeller lived in 1916?"[1] Take a moment to imagine the implications. Even if you were a billionaire in Rockefeller's time, it would take days to travel a distance that takes mere hours today.[2] Your riches could not buy you access to music (except for a limited selection available on a phonograph) or television (which did not exist).[3] You could build a mansion filled with the finest furniture, but your mansion likely would not benefit from air conditioning or central heating.[4] You could build your own movie theatre inside your mansion, but the selection of movies would be scarce.[5] You could even have your own chef, but you could not access the vast array of foods from around the world available to Americans today.[6] And of course, health care and dental care, even for the richest people, would be barbaric by today's standards.[7]

The 20th Century witnessed immense technological progress that John D. Rockefeller would have been hard-pressed to imagine. The significant improvements in living standards we have witnessed since 1916 are directly attributable to this technological progress. And

[1] Donald J. Boudreaux, *The Average American Today Is Richer than John D. Rockefeller*, FOUNDATION FOR ECONOMIC EDUCATION (Feb. 23, 2016) https://fee.org/articles/average-americans-today-are-richer-than-john-rockefeller-ever-was/.

[2] *Id.* ("If you were a 1916 American billionaire you could, of course, afford prime real estate. You could afford a home on 5th Avenue or one overlooking the Pacific Ocean or one on your own tropical island somewhere (or all three). But when you traveled from your Manhattan digs to your west-coast palace, it would take a few days, and if you made that trip during the summer months, you'd likely not have air-conditioning in your private railroad car.").

[3] *Id.* ("You could neither listen to radio (the first commercial radio broadcast occurred in 1920) nor watch television. You could, however, afford the state-of-the-art phonograph of the era. (It wasn't stereo, though. And — I feel certain — even today's vinylphiles would prefer listening to music played off of a modern compact disc to listening to music played off of a 1916 phonograph record.) Obviously, you could not download music.").

[4] *Id.* ("And while you *might* have air-conditioning in your New York home, many of the friends' homes that you visit — as well as restaurants and business offices that you frequent — were not air-conditioned. In the winter, many were also poorly heated by today's standards.").

[5] *Id.* ("There really wasn't very much in the way of movies for you to watch, even though you could afford to build your own home movie theater.").

[6] *Id.* ("Even when in residence at your Manhattan home, if you had a hankering for some Thai red curry or Vindaloo chicken or Vietnamese Pho or a falafel, you were out of luck: even in the unlikely event that you even knew of such exquisite dishes, your chef likely had no idea how to prepare them, and New York's restaurant scene had yet to feature such exotic fare.").

[7] *Id.* ("You (if you are a woman) or (if you are a man) your wife and, in either case, your daughter and your sister had a much higher chance of dying as a result of giving birth than is the case today. The child herself or himself was much less likely to survive infancy than is the typical American newborn today. Dental care wasn't any better. Your money didn't buy you a toothbrush with vibrating bristles. (You could, however, afford the very finest dentures.) Despite your vanity, you couldn't have purchased contact lenses, reliable hair restoration, or modern, safe breast augmentation. And forget about liposuction to vacuum away the results of your having dined on far too many cream-sauce-covered terrapin. Birth control was primitive: it was less reliable and far more disruptive of pleasure than are any of the many inexpensive and widely available birth-control methods of today.").

innovations like air travel and air conditioning developed during the 20th Century led not only to more comfortable lives, but also to economic growth. Joseph Brodley observed that "[i]nnovation efficiency or technological progress is the single most important factor in the growth of real output in the United States and the rest of the industrialized world."[8] But we cannot take continued innovation for granted, particularly if government policies disincentivize it. For the sake of its citizens and continued economic growth, the U.S. government should refrain from adopting policies that will hinder innovation.

This principle is particularly important when intellectual property is at issue. Choices regarding patent policy, in particular, can either hinder or facilitate innovation. Patents provide holders the right to exclude others. A strong patent system incentivizes innovation by giving innovators this legal protection. On a related note, interoperability and performance standards are critical for technological development.[9] The use of standard essential patents ("SEPs") and fair, reasonable, and non-discriminatory ("FRAND") licensing assurances are an integral part of standards development. Without standardization, and therefore without SEPs and FRAND assurances, we would lack a robust framework to encourage investment into further innovation and the implementation of new technologies.

To support continued advances through standardization, SEP and FRAND policy must strike a healthy balance between the interests of those that create the innovations embodied in standards and those that implement those standards. The debate around where to strike the balance has continued for many years. Through judicial decisions, a delicate consensus has formed in some areas. But in at least one fundamental aspect, the debate is as divided and concerning as ever. I am referring to the debate about the relative dangers of patent "holdup" (when a patent holder uses market power to extract a supracompetitive royalty from an implementer) and "holdout" (when an implementer employs tactics to delay constructive licensing negotiations), and how to balance the two.

Today, I will first provide an overview of this issue, which highlights a fundamental disagreement about the importance of property rights. I will then discuss the real-world

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[8] Joseph F. Brodley, *The Economic Goals of Antitrust: Efficiency, Consumer Welfare, and Technological Progress*, 62 N.Y.U. L. REV. 1020, 1026 (1987), https://heinonline.org/HOL/Page?handle=hein.journals/nylr62&div=39&g_sent=1&casa_token=&collection=journals.

[9] Congress recognized the important role of interoperability and performance standards and has chosen to encourage these practices and organizations. *See* Standards Development Organization Advancement Act of 2004, Pub. L. No. 108–237, https://www.govinfo.gov/content/pkg/PLAW-108publ237/pdf/PLAW-108publ237.pdf (codified as 15 U.S.C. §§ 4301-4306) (passed "[t]o encourage the development and promulgation of voluntary consensus standards by providing relief under the antitrust laws to standards development organizations with respect to conduct engaged in for the purpose of developing voluntary consensus standards[.]").

application of some policy proposals. Finally, I will provide some suggestions on a balanced approach.

Intellectual Property Rights at the FTC

I am increasingly concerned that some of my colleagues on the Commission place too little emphasis on the incentives for innovation afforded by strong IP rights, which could have serious implications for the U.S. economy.[10] This trend is pronounced when SEPs are involved, and hits its stride when discussing the relative threats of holdout and holdup.

In my time as a Commissioner, I have seen evidence that both holdup and holdout strategies appear in the real world. As a result, a contract dispute between sophisticated parties negotiating over IP rights could, at times, result in litigation. While my colleagues on the Commission recognize that both holdup and holdout "may well be a problem in the licensing world," they view only holdup as an antitrust issue.[11] In other words, the actions of SEP holders may be unlawful under the antitrust laws, but the actions of patent implementers are immune from scrutiny under those same laws.

Further, my colleagues applaud the broad use of the FTC's Section 5 authority to target innovators that hold SEPs.[12] In doing so, they cite the FTC's action against Qualcomm.[13] I have made my views on that case abundantly clear.[14] But the important issue today is not whether

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[10] Richard Gilbert, *Looking for Mr. Schumpeter: Where Are We in the Competition-Innovation Debate?*, 6 INNOVATION POLICY AND THE ECONOMY 159 (2006), https://www.nber.org/system/files/chapters/c0208/c0208.pdf (surveying the economic theory of innovation and finding that exclusive rights generally lead to greater innovation incentives in more competitive markets, while nonexclusive rights generally lead to the opposite conclusion.).

[11] SEPs, Antitrust, and the FTC Remarks of Commissioner Rebecca Kelly Slaughter As Prepared for Delivery, ANSI World Standards Week: Intellectual Property Rights Policy Advisory Group Meeting at 5 (October 29, 2021), https://www.ftc.gov/system/files/documents/public_statements/1598103/commissioner_slaughter_ansi_102921_final_to_pdf.pdf [hereinafter Commissioner Slaughter SEPs Speech] ("I want to take a brief detour to address the 'holdout' problem that is often purported to be a parallel problem to holdup. Holdout refers to a licensee unilaterally refusing to take a license or unreasonably delaying doing so. While this may well be a problem in the licensing world, it does not pose the same concerns from a competition standpoint as holdup, which has the potential to exclude firms from implementing a standard.").

[12] *Id.* at 2 ("I think the FTC has been correct in bringing SEP-related enforcement actions against anticompetitive conduct using its stand-alone Section 5 authority, and it should continue to do so with an emphasis on our authority to reach conduct beyond that which violates Section 2 of the Sherman Act. This is consistent with the policy statement the Commission issued in July regarding unfair methods of competition.").

[13] *Id.* at fn. 3 (referencing *Qualcomm* footnote in FTC Statement on the Withdrawal of the Statement of Enforcement Principles Regarding "Unfair Methods of Competition" Under Section 5 of the FTC Act.).

[14] Christine S. Wilson, Opinion, *A Court's Dangerous Antitrust Overreach*, WALL ST. J. (May 28, 2019), https://www.wsj.com/articles/a-courts-dangerous-antitrust-overreach-11559085055 (suggesting this concern in the context of an expansion of *Aspen Skiing*).

Qualcomm was a good case to bring, or whether the District Court[15] or Circuit Court[16] opinions were correct. If the policy proposed by my colleagues on the Commission is followed, companies that implement patents can hang potential antitrust damages over patent holders, distorting the negotiating leverage between implementers and innovators in favor of implementers. The FTC should embrace a balanced approach that favors neither innovators nor implementers, but instead focuses on incentivizing competition and innovation.

To defend their position, proponents of a pro-implementer approach claim that implementers are small firms that need FRAND licenses to advance their own innovations[17] and that these small firms lack the legal advice to negotiate.[18] This argument is frequently made even though implementer-over-innovator advocates at times admit that "implementers are often large, well-financed companies that can handle their market disputes just fine on their own."[19] For this reason, we are assured that the FTC will intervene only "where the market power abuse harms small and medium enterprise implementers."[20]

But, as stated earlier, these proponents point to the FTC's case against Qualcomm as an example of SEP-related enforcement that the FTC should continue to bring.[21] In that case, the District Court spent the bulk of its time on anticompetitive practices in patent license negotiations involving large and sophisticated OEMs like Sony, Samsung, Huawei, Motorola,

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[15] FTC v. Qualcomm Inc., 411 F. Supp. 3d 658 (N.D. Cal. 2019), *rev'd and vacated*, 969 F.3d 974 (9th Cir. 2020).

[16] FTC v. Qualcomm Inc., 969 F.3d 974 (9th Cir. 2020).

[17] Commissioner Slaughter SEPs Speech, *supra* note 11, at 2 ("Anticompetitive distortions to the bargaining process over FRAND royalties are especially harmful to innovative small businesses and start-ups, the "little engines that could" of our economy. In order to deploy standards in ground-breaking technological development, these small businesses need FRAND licenses to the intellectual property incorporated into standards").

[18] *Id.* at 3 ("Small firms, unlike large firms, often lack the resources for technical legal advice to counter holdup. They are more likely to cave to supra-FRAND rates out of fear of exclusion, rather than put themselves in legal peril by challenging the high rates.").

[19] *Id.* at 8 ("I routinely hear complaints that implementers are often large, well-financed companies that can handle their market disputes just fine on their own. This is absolutely the case. I want to be very clear: I think the FTC should investigate antitrust violations related to SEPs, but I think we should focus our energy on cases where the market power abuse harms small and medium enterprise implementers. I'm not interested in getting us involved in extensive cross-licensing disputes between large-well financed patent holders and implementers. My focus is entirely different from an enforcement perspective.").

[20] *Id.*

[21] *Id.* at 2 & fn. 3 ("I think the FTC has been correct in bringing SEP-related enforcement actions against anticompetitive conduct using its stand-alone Section 5 authority, and it should continue to do so with an emphasis on our authority to reach conduct beyond that which violates Section 2 of the Sherman Act. This is consistent with the policy statement the Commission issued in July regarding unfair methods of competition." and referencing the *Qualcomm* footnote in FTC Statement on the Withdrawal of the Statement of Enforcement Principles Regarding "Unfair Methods of Competition" Under Section 5 of the FTC Act.).

Lenovo, BlackBerry, Apple, and ZTE.[22] It spent relatively little time discussing patent license negotiations involving smaller companies, including "smaller Chinese OEMs."[23] I am concerned that if the FTC inserts itself into FRAND licensing disagreements, the cases will look a lot like *Qualcomm*, where the FTC put its thumb on the scale to benefit large and sophisticated implementers like Apple and Huawei.

<u>Intellectual Property Rights at the ITC</u>

Chair Khan and Commissioner Slaughter recently advocated for pro-implementer policies in a submission to the International Trade Commission ("ITC"). The statement was submitted in response to a request for submissions in a dispute between Phillips and Thales, but the policy proposals advanced in the statement extend beyond the facts of that case. To be clear, they did not take a position on the facts of the case in their submission,[24] and I am not taking any position on that case today. Instead, I am highlighting this recent submission as a useful vehicle for discussing the varying policy positions the U.S. government could take.

Chair Khan and Commission Slaughter clearly articulate the question their advocacy seeks to address: "Is it in the public interest to issue an ITC exclusion order based on a [SEP] where a United States district court has been asked to determine [FRAND] licensing terms?"[25] Their submission argues that "where a complainant seeks to license and can be made whole through remedies in a different U.S. forum, an exclusion order barring standardized products from the United States will harm consumers and other market participants without providing commensurate benefits."[26] Further, they assert that a "royalty negotiation that occurs under threat of an exclusion order may be weighted heavily in favor of the patentee in a way that is in tension

[22] Qualcomm, 411 F. Supp. 3d at 698 ("To provide a coherent narrative, the Court organizes its discussion of Qualcomm's anticompetitive practices in patent license negotiations around Qualcomm's conduct toward the following OEMs: (1) LGE, (2) Sony, (3) Samsung, (4) Huawei, (5) Motorola, (6) Lenovo, (7) BlackBerry, (8) Curitel, (9) BenQ, (10) Apple, (11) VIVO, (12) Wistron, (13) Pegatron, (14) ZTE, (15) Nokia, and (16) smaller Chinese OEMs.").

[23] *Id.*

[24] Written Submission on the Public Interest of Federal Trade Commission Chair Lina M. Khan and Commissioner Rebecca Kelly Slaughter, in the Matter of Certain UMTS and LTE Cellular Communication Modules and Products Containing the Same, United States International Trade Commission, Inv. No. 337-TA-1240 at fn. 1 (May 16, 2022), https://www.ftc.gov/system/files/ftc_gov/pdf/Written_Submission_on_the_Public_Interest_if_Chair_Khan_and_Commissioner_Slaughter_to_ITC.pdf [hereinafter Chair Khan and Commissioner Slaughter ITC Submission] ("We take no position on the facts of Investigation No. 1240.").

[25] *Id.* at 1.

[26] *Id.*

with the FRAND commitment because a licensee may agree to pay supra-FRAND royalties to avoid being excluded from the market[.]"[27]

Let's consider the practical implications of the proposals that Chair Khan and Commissioner Slaughter advance in their submission. For example, they are concerned that "even firms that are *willing and able* to take FRAND licenses can be excluded from the market[.]"[28] Specifically, the submission states that "where the standard implementer is a *willing* licensee—including cases where the implementer commits to be bound by terms that either the parties themselves will determine are FRAND or that will be determined by a neutral adjudication/in a court proceeding—an exclusion order would be contrary to the public interest."[29]

The characterization of these hypothetical licensees as "willing" and "able" paints these unlicensed technology users in the best possible light. But this characterization does not acknowledge that the ITC's public interest analysis already accounts for these and other concerns raised by pro-implementer advocates. Deanna Tanner Okun, who served two terms as Chair of the ITC during her 12 years as a Commissioner, has explained the ITC's statutorily required public interest analysis:

> [T]he ITC is statutorily required to conduct a public interest analysis before issuing any relief. The ITC also must determine that either the patentee or its licensee has made significant investments in plants and equipment or has employed significant labor or capital in the United States directed to its own patented products, or otherwise made in the United States substantial investments in exploiting the asserted patent.
>
> In other words, to even get to the remedy phase of the process, the ITC's investigation needs to have found an imported product is implementing another party's patented invention without permission and that party is using the patented invention itself in the United States. By this point, the adversarial process has also provided the allegedly infringing company with an opportunity to argue the inventing company broke its commitment to standards-developing organizations by not offering licensing terms that are fair and reasonable, if that is the case.[30]

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[27] *Id.* at 4.

[28] *Id.* at 5 (emphasis added).

[29] *Id.* (emphasis added).

[30] Deanna Tanner Okun, *Policy Shift Against SEP Rights Poses Risks for U.S. Innovation and Undermines Mandate of the ITC*, IPWATCHDOG (May 18, 2022), https://www.ipwatchdog.com/2022/05/18/policy-shift-sep-rights-poses-risks-u-s-innovation-undermines-mandate-itc/id=149116/.

As Chair Khan and Commissioner Slaughter make clear near the end of their submission, their policy proposal extends beyond "willing licensees" and a faithful application of the ITC's public interest analysis. Instead, as the submission states, they support a per se proposition that "[a]s a general matter, exclusionary relief is incongruent and against the public interest where a court has been *asked* to resolve FRAND terms and can make the SEP holder whole."[31] But precluding exclusionary relief where a court has simply "been *asked* to resolve FRAND terms" again tips the balance heavily in favor of implementers over innovators.

An ongoing dispute between Apple and Ericsson provides a handy vehicle for us to consider the consequences of this approach.

<u>Application of an Anti-Innovator Approach</u>

Apple and Ericsson are embroiled in litigation regarding SEP and FRAND issues in U.S. and international courts. In a recent motion in front of the District Court for the Eastern District of Texas, Ericsson requested that Apple be ordered to confirm that "Apple has committed to accept and perform under the terms of Ericsson's offer if it is found to be FRAND."[32] Ericsson argued that this order would be appropriate because, after Apple rejected Ericsson's licensing offer and both parties filed infringement suits in jurisdictions around the world, "Apple asked various courts worldwide to stay or dismiss Ericsson's patent infringement cases by pointing to the [Texas litigation] and representing that Apple's agreement to be 'bound' effectively mooted the other cases."[33]

In response, Apple asserted that the case is "not a one-sided proceeding" and noted the inclusion of "several claims related to FRAND commitments and contractual disputes."[34] Among those varied claims, Apple has requested the "determination of FRAND terms for a global license between Apple and Ericson."[35] Apple also made its own licensing offer, but Ericsson has argued that the offer is irrelevant because it includes non-SEP patents of Ericsson while excluding the non-SEP patents of Apple.[36]

I lay out these facts not to suggest that either party is right or wrong, but for two specific reasons. First, I seek to underscore the complexity of these SEP and FRAND disagreements. While one party or the other may have relatively stronger or weaker claims in any given suit,

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[31] Chair Khan and Commissioner Slaughter ITC Submission, *supra* note 24, at 5 (emphasis added).

[32] Order, Ericsson Inc. v. Apple Inc., No. 2:21-CV-00376-JRG at 1 (E.D. Tex. May 3, 2022).

[33] *Id.* at 2.

[34] *Id.* at 3.

[35] *Id.* at 4.

[36] *Id.* at 2-3.

there is no side that the government should unequivocally favor in these disagreements. And note that my summary of this disagreement is only the tip of the iceberg because, as I noted, Apple and Ericsson are fighting this battle in jurisdictions across the globe.

Second, I highlight this case because of the conclusion that Judge Rodney Gilstrap reached in response to Apple and Ericsson's arguments. Specifically, Judge Gilstrap found "no justification for requiring Apple to accept the terms of Ericsson's … offer [even] if it is determined to be FRAND."[37] His Order explained that:

> if Ericsson's offer is found to be FRAND, then Apple may accept it and create a binding contract; Apple may reject it and not implement Ericsson's patented technology; or Apple may reject the FRAND offer, implement Ericsson's technology without the benefit of a license and subject itself to actions for infringement. The Court knows of nothing unique to the SEP scenario that alters these principles of black letter contract law.[38]

This ruling is noteworthy. According to this Order from Judge Gilstrap, even if a U.S. court finds that a SEP holder's offer is FRAND, an implementer does not need to accept that offer and take a license.[39] This ruling seems to provide support for innovators and commentators concerned about the ability of implementers to use lengthy negotiations and then litigation to advance a holdout strategy. A FRAND offer can be made, litigation can determine the offer is FRAND, and an implementer can still refuse to accept the offer.

Allow me to underscore: I am not drawing conclusions about Apple's conduct or its motives, but instead highlighting the implications of this ruling. Recall that Chair Khan and Commissioner Slaughter argued that an injunction at the ITC should be unavailable if "a court has been asked to resolve FRAND terms and can make the SEP holder whole."[40] In light of Judge Gilstrap's ruling, one might be tempted to ask how long it will take for the SEP holder to be made whole, and to inquire about the consequences in the interim. This approach interferes with timely royalty payments, which fund future research and further innovation. It compromises procompetitive standards development.[41] It also harms the implementers that paid FRAND rates

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[37] *Id.* at 4.

[38] *Id.*

[39] While I question the implications of the ruling, it does appropriately point to the outcomes one would expect under contract law. A defendant in an antitrust case would not be characterized as free to continue the unlawful conduct.

[40] Chair Khan and Commissioner Slaughter ITC Submission, *supra* note 24, at 5.

[41] *See* Letter from Makan Delrahim, Assistant Att'y Gen., Antitrust Div., U.S. Dep't of Justice to Sophia A. Muirhead, General Counsel and Chief Compliance Officer Institute of Electrical and Electronics Engineers,

on a timely basis and must compete with implementers that engage in holdout. If the companies that engage in holdout are large companies like Apple that can fund ongoing litigation, then favoring implementers in FRAND disputes will help large companies over small competitors.

At bottom, I am concerned that an approach prohibiting injunctions if a court has simply been *asked* to resolve FRAND terms will, in the long run, disincentivize innovation.

A Balanced Approach

Competition law and patent law share the same goal of fostering competition and innovation. I had the honor of serving as Chief of Staff to FTC Chairman Tim Muris when we launched the Hearings on Competition and Intellectual Property Law and Policy in the Knowledge-Based Economy. In announcing the hearings, Chairman Muris explained a fundamental principle: properly understood, "IP law and antitrust law both seek to promote innovation and enhance consumer welfare."[42] "IP law, properly applied, preserves incentives for … innovation" – and innovation (i) "benefits consumers through the development of new and improved goods and services" and (ii) "spurs economic growth."[43] "Similarly, antitrust law, properly applied, promotes innovation and economic growth by combatting … anticompetitive arrangements and monopolization" that deter vigorous economic activity.[44]

To achieve these goals, policymakers must focus on both the short-term and long-term implications of their proposals. One important element of the analysis requires striking a balance between static and dynamic considerations – essentially, between instant and delayed gratification.[45] Short term competition arising from a disregard for patent rights will undermine long term innovation – which benefits neither consumers nor the economy. In addition, policymakers should acknowledge the potential for opportunistic behavior by both innovators and implementers. And finally, policymakers should exercise restraint, acknowledging the sound

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Incorporated at 9 (Sept. 10, 2020), www.justice.gov/atr/page/file/1315291/download (explaining the harm to innovation and the standards development process as a result of a standards development organization policy that tipped the balance away from innovators).

[42] Timothy J. Muris, Competition and Intellectual Property Policy: The Way Ahead, Prepared Remarks of before American Bar Association, Antitrust Section Fall Forum (Nov. 15, 2001), https://www.ftc.gov/public-statements/2001/11/competition-and-intellectual-property-policy-way-ahead.

[43] *Id.*

[44] *Id.*

[45] *See* Thomas O. Barnett, Maximizing Welfare Through Technological Innovation, Presentation to the George Mason University Law Review 11th Annual Symposium on Antitrust (Oct. 31, 2007), https://www.justice.gov/atr/file/519216/download.

limits of antitrust and avoiding the injection of competition law into purely contractual matters.[46] Taken together, these principles suggest that a mere request for an injunction, absent sham litigation, should not trigger antitrust liability. Contract law and patent law are better-suited to resolving those disputes.

To find a balanced approach, examine past judicial decisions. The European Court of Justice's (ECJ) opinion in *Huawei v. ZTE* provides a framework that imposes obligations on both innovators and implementers and addresses the injunction concern.[47] For SEP holders, the ECJ established a safe harbor from antitrust liability. Under this approach, the holder of a SEP does not violate antitrust law by requesting an injunction if, before bringing that action, the SEP holder: (1) alerts the alleged infringer of the infringement by designating the patent and specifying how it has been infringed; and (2) presents to that infringer a written offer for a license specifying the royalty and how it is calculated.[48] The alleged infringer is obligated to respond in good faith to a SEP holder's offer and (1) accept the offer; (2) make a FRAND counter-offer; or (3) provide appropriate security if its counter-offer is rejected.[49] If a patent holder follows the framework, it can seek an injunction without risking antitrust liability. I believe this is a balanced approach that is more likely to facilitate both short-term competition and long-term innovation.[50]

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In considering the debate regarding the role of antitrust in SEP and FRAND disputes and the balance that must be struck, it may be helpful to consider an analogue: the essential facilities doctrine. The essential facilities doctrine identifies an asset created or controlled by one competitor and concludes that access would be helpful for other competitors. This doctrine has long been dormant in the U.S., given that it creates disincentives for rivals themselves to innovate. Why would a company spend money on its own R&D if the antitrust laws can be used

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[46] *See* Commissioner Slaughter SEPs Speech, *supra* note 11, at 5 ("I want to take a brief detour to address the 'holdout' problem that is often purported to be a parallel problem to holdup. Holdout refers to a licensee unilaterally refusing to take a license or unreasonably delaying doing so. While this may well be a problem in the licensing world, it does not pose the same concerns from a competition standpoint as holdup, which has the potential to exclude firms from implementing a standard.").

[47] Case C-170/13 Huawei Technologies Co. Limited v. ZTE Corp. (Fifth Chamber, 16 July 2015), https://curia.europa.eu/juris/document/document.jsf?text=&docid=165911&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=4251024.

[48] *Id.* at ¶ 71.

[49] *Id.* at ¶¶ 65-67.

[50] *See also* MLEX, *Top EU enforcer questions antitrust law's role in solving patent-licensing disputes* (Oct. 8, 2021) (quoting Olivier Guersent, Director-General of the European Commission's Directorate General for Competition, saying he does not "believe competition law or policy should be used to solve every problem under the sun" and while "there is a tendency to do that — to instrumentalize, to weaponize competition [law], [he is] not sure this is right").

to commandeer its competitors' innovations? Unfortunately, recent (and ill-advised) proposals would resuscitate the essential facilities doctrine.[51] I have previously expressed concerns about how the essential facilities doctrine may be used to help competitors rather than foster competition, and I reiterate those concerns here. But my point is a broader one: forced sharing substantially diminishes the incentive to innovate.

One closing thought. The submission that Chair Khan and Commissioner Slaughter filed at the ITC was not subject to a Commission vote and therefore did not represent the views of the Federal Trade Commission. The document departed from tradition by omitting the standard disclaimer that "[t]he views reflected in [the] statement are [their] own and do not necessarily reflect the views of the Commission or of any other Commissioner."[52] So for the sake of clarity, I would like to state explicitly here that I disagree with the policy positions advanced by my colleagues. As I have explained, I am concerned that putting a thumb on the scale for implementers will undermine incentives to innovate. I applaud the ITC's history of protecting U.S. intellectual property rights. And I encourage my colleagues on the Commission to have the same regard for those rights, which – if respected and protected – will lead to further improvements in living standards that we can only begin to imagine now.

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[51] MAJORITY STAFF OF H. COMM. ON THE JUDICIARY, 116TH CONG., INVESTIGATION OF COMPETITION IN DIGIT. MKTS. 397-398 (2020), https://judiciary.house.gov/uploadedfiles/competition_in_digital_markets.pdf ("[T]he Subcommittee recommends that Congress consider revitalizing the 'essential facilities' doctrine, the legal requirement that dominant firms provide access to their infrastructural services or facilities on a nondiscriminatory basis. To clarify the law, Congress should consider overriding judicial decisions that have treated unfavorably essential facilities- and refusal to deal-based theories of harm.").

[52] *See, e.g.*, Statement on the Public Interest, Fed. Trade Comm'n Chairwoman Edith Ramirez, In re Certain 3G Mobile Handsets and Components Thereof, Inv. No. 337-TA-613 at fn. 1 (July 10, 2015), https://www.ftc.gov/system/files/documents/public_statements/682011/150714publicinterestftc1.pdf.