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# Enjoining Injunctions: The Case Against Antitrust Liability for Standard Essential Patent Holders Who Seek Injunctions

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A standard essential patent (SEP) may give the patent holder market power in the market for an input that technology manufacturers need in order to make their products compatible with each other. Several commentators have argued that, when a patent becomes part of a standard pursuant to an agreement among competitors given in exchange for the patent holder's promise to license the technology under fair, reasonable, and non-discriminatory (FRAND) terms, antitrust law should limit the holder's right to seek an injunction to stop an infringing manufacturer from selling its standardized product. We disagree for two reasons: First, antitrust sanctions are not necessary, given the law of contracts and of injunctions, to avoid harm to consumers and, second, the application of antitrust law in this situation could, by undermining the ability of courts to tailor appropriate remedies, diminish the incentives for companies to innovate and for industries to adopt standards.

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## Background

Because the bargaining that takes place between standard-setting organizations (SSOs) and patent holders yields competitive benefits,<sup>1</sup> consumer welfare is undoubtedly at stake when a SEP holder refuses to license under FRAND terms, whatever those may be. If a SEP holder that has agreed to license on FRAND terms is able to breach its commitment without consequence, then it will be able to extract more of the value from standardization than its contracted-for share. That the legal regime encourages entering into and adhering to FRAND terms is important, therefore, not only to preserve the benefit of private ordering but also to ensure the public does not pay a monopoly price for standardization in addition to the monopoly price that is the reward for invention.<sup>2</sup>

Because it is not always clear, however, what the FRAND price may be—either ex ante or ex post—disputes inevitably arise. Courts can and do resolve those disputes as a matter of contract

<sup>1</sup> See Renata B. Hesse, Dep. Ass't Att'y Gen., Antitrust Div., U.S. Dep't of Justice, Six "Small" Proposals for SSOs Before Lunch, Remarks as Prepared for the ITU-T Patent Roundtable (Oct. 10, 2012), available at <http://www.justice.gov/atr/public/speeches/287855.pdf> ("The [U.S. antitrust] agencies recognize[] that standards serve the public interest in many ways and collaboratively-set industry standards may substantially reduce transaction costs by helping firms avoid wars between competing standards").

<sup>2</sup> Cf. *Allied Tube & Conduit Corp. v. Indian Head, Inc.*, 486 U.S. 492, 500–01 (1988) ("There is no doubt that the members of [SSOs] often have economic incentives to restrain competition and that the product standards set by such associations have a serious potential for anti-competitive harm. Agreement on a product standard is, after all, implicitly an agreement not to manufacture, distribute, or purchase certain types of products. Accordingly, private standard-setting associations have traditionally been objects of antitrust scrutiny. When, however, private associations promulgate . . . standards based on the merits . . . and through procedures that prevent the standard-setting process from being biased by members with economic interests in stifling product competition, those private standards can have significant pro-competitive advantages." (citations omitted)).

*The in terrorem effect of filing for an injunction depends upon the likelihood of it being granted.*

interpretation.<sup>3</sup> Nonetheless, some commentators have questioned whether the law of contracts is sufficient to achieve the FRAND price if the SEP holder can threaten the SEP user by filing for an injunction (or for an exclusion order from the International Trade Commission).<sup>4</sup> On that view, seeking an injunction violates Section 2 of the Sherman Act because it reduces the number of competitors practicing the standard contrary to the SEP holder's agreement to license all comers, and it allows the SEP holder to monopolize the market for the product incorporating the standardized technology.<sup>5</sup>

### An Antitrust Sanction for Seeking an Injunction Is Unnecessary

The in terrorem effect of filing for an injunction depends upon the likelihood of it being granted. In *eBay Inc. v. MercExchange, LLC*,<sup>6</sup> the Supreme Court established the test for granting an injunction when a manufacturer infringes a patent, which applies equally when a SEP user does not pay the FRAND terms for a license. The SEP holder must demonstrate that:

1. it has suffered an irreparable injury;
2. remedies available at law, such as monetary damages, are inadequate to compensate for that injury;

<sup>3</sup> See, e.g., *Microsoft Corp. v. Motorola, Inc.*, No. 10-1823, 2013 WL 2111217 (W.D. Wash. Apr. 25, 2013) (Judge Robart using a modified version of the *Georgia-Pacific* factors for determining "reasonable royalty" damages to set a FRAND range for fees to license a SEP); see also *Realtek Semiconductor Corp. v. LSI Corp.*, No. C12-3451, ECF No. 298, at 15–17 (N.D. Cal. Feb. 23, 2014) (instructing the jury specifically on the FRAND agreement "not [to] consider LSI's advantage resulting from the standard's adoption, if any, [but to] consider any advantage resulting from the technology's superiority"); *In re Innovatio IP Ventures, LLC Patent Litigation*, No. 11-9308, 2013 WL 5593609, at \*4–\*8 (N.D. Ill. Oct. 3, 2013) (adopting and modifying Judge Robart's FRAND analysis).

<sup>4</sup> See, e.g., Greg Sivinski, *Patently Obvious: Why Seeking Injunctions on Standard-Essential Patents Subject to a FRAND Commitment Can Violate Section 2 of the Sherman Act*, COMPETITION POL'Y INT'L, Oct. 2013; Am. Antitrust Inst., Request for Joint Enforcement Guidelines on the Patent Policies of Standard Setting Organizations 5–9, 14–15 (May 23, 2013), <http://www.antitrustinstitute.org/sites/default/files/Request%20for%20Joint%20Enforcement%20Guidelines%20on%20the%20Patent%20Policies%20of%20Standard%20Setting%20Organizations.pdf> (arguing an SSO agreement violates antitrust law if it does not prohibit the SEP holder from seeking an injunction); Wendy Fu, *Do SEP Holders Seeking Injunctions Violate Section 2?*, LAW360, Mar. 21, 2013, <http://www.law360.com/articles/425011/do-sep-holders-seeking-injunctions-violate-section-2> (warning SEP holders about potential Section 2 liability for seeking injunctions); Renata B. Hesse, Dep. Ass't Att'y Gen., Antitrust Div., U.S. Dep't of Justice, IP, Antitrust and Looking Back on the Last Four Years, Remarks as Prepared for the Global Competition Review 2nd Annual Antitrust Law Leaders Forum 15–19 (Feb. 8, 2013), available at <http://www.justice.gov/atr/public/speeches/292573.pdf> (suggesting Section 2 might create liability for SEP holders seeking injunctions: "This is an issue that we continue to look at and encourage members of the bar and academia to do so as well"). Although Hesse has never stated unequivocally that Section 2 liability should attach to seeking an injunction, commentators have attributed that view to her, see, e.g., Paul H. Saint-Antoine, *IP, Antitrust, and the Limits of First Amendment Immunity: Shouting "Injunction" in a Crowded Courthouse*, ANTITRUST, Summer 2013, at 41, 43 ("While Ms. Hesse's discussion of the FRAND issue was balanced, she left little doubt that her view was that, in some circumstances, antitrust enforcement might be warranted"), and she has not repudiated it, see Renata B. Hesse, *The Art of Persuasion: Competition Advocacy at the Intersection of Antitrust and Intellectual Property* 9 (Nov. 8, 2013), <http://www.justice.gov/atr/public/speeches/301596.pdf> ("We also continue to explore where there is room for liability under Section 2 of the Sherman Act in cases where holders of F/RAND-encumbered SEPs seek injunctive relief after a standard is in place. Even in cases where the patent holder did not intentionally deceive the SSO during the standards-setting process, competition and consumers can be harmed by the abrogation of the patent holder's F/RAND commitment, assuming there were alternative technologies or options available to the SSO.").

<sup>5</sup> The same reasoning has been applied to argue that seeking an injunction (or exclusion order) is an unfair method of competition, in violation of Section 5 of the FTC Act. Complaint ¶¶ 20–21, *Robert Bosch GmbH*, FTC Docket No. C-4377 (Nov. 21, 2012), available at <http://www.ftc.gov/sites/default/files/documents/cases/2012/11/121126boschcmpt.pdf>; Complaint ¶¶ 25–26, 31, *Motorola Mobility LLC*, FTC Docket No. C-4410 (July 23, 2013), available at <http://www.ftc.gov/sites/default/files/documents/cases/2013/07/130724googlemotorolacmpt.pdf>. Some commentators believe Section 5 is a better option for imposing antitrust liability upon SEP holders for seeking an injunction. See, e.g., Saint-Antoine, *supra* note 4, at 47; Robert A. Skitol & Kenneth M. Vorrasi, *Patent Holdup in Standards Development: Life After Rambus v. FTC*, ANTITRUST, Summer 2009, at 26, 31.

<sup>6</sup> 547 U.S. 388 (2006).

3. considering the balance of hardships between the plaintiff and defendant, a remedy in equity is warranted; and
4. the public interest would not be disserved by a permanent injunction.<sup>7</sup>

Courts often deny SEP holders' requests for injunctions based upon the *eBay* factors.<sup>8</sup> The fourth factor—public interest—allows judges to consider harm to consumers. If the SEP holder could enjoin the sale of the end product that includes the SEP, then it could potentially exercise power in the market for the product incorporating the standardized technology by raising either the price of the product or the licensing fee it charges other sellers. It could in this way extract the entire benefit not only from standardization but also from any other cost savings or innovation that competing manufacturers contributed to the end product. Justice Kennedy, concurring in *eBay*, explained this situation, often referred to as a “patent hold-up,” as follows:

*The antitrust*

*enforcement agencies*

*themselves agree*

*the ITC can protect*

*consumer welfare*

*under these standards.*

When the patented invention is but a small component of the product the companies seek to produce and the threat of an injunction is employed simply for undue leverage in negotiations, legal damages may well be sufficient to compensate for the infringement and an injunction may not serve the public interest.<sup>9</sup>

Moreover, the SEP holder's promise, as part of the FRAND agreement, to license the patent for a fee is evidence under the first and second *eBay* factors that an injunction is not warranted because monetary damages are available and adequate to compensate the SEP holder. In most cases, therefore, an injunction will be inappropriate. Indeed, the Federal Circuit recently observed that “Motorola's FRAND commitments, which have yielded many license agreements encompassing the [SEP], strongly suggest that money damages are adequate to fully compensate Motorola for any infringement,” but the court prudently, we think, declined to adopt a per se rule against injunctions for SEPs subject to FRAND commitments.<sup>10</sup>

Although the ITC is not bound by the *eBay* factors in deciding whether to grant an exclusion order,<sup>11</sup> the factors it must consider under Section 337 of the Tariff Act perhaps go even more directly to protect the interests with which antitrust law is concerned. Those factors include:

1. the public health and welfare;
2. competitive conditions in the U.S. economy;
3. the production of like or directly competitive articles in the United States; and
4. U.S. consumers.<sup>12</sup>

The “welfare,” “competitive conditions,” and “consumer” considerations each point in the direction of denying an exclusion order that would allow a SEP holder to extract value from standardization or from other features of the end product not attributable to its IP if that value would normally be passed on to the consumer through competition. The antitrust enforcement agencies themselves agree the ITC can protect consumer welfare under these standards. The Federal Trade Commission, in testimony before the Congress in 2012, expressed the Commissioners' unanimous belief that “the ITC . . . has the authority under its public interest obligations to address

<sup>7</sup> *Id.* at 391.

<sup>8</sup> See *Saint-Antoine*, *supra* note 4, at 43 (collecting cases).

<sup>9</sup> 547 U.S. at 396–97.

<sup>10</sup> *Apple Inc. v. Motorola*, 757 F.3d 1286, 1331–32 (Fed. Cir. 2014).

<sup>11</sup> See *Spansion, Inc. v. ITC*, 629 F.3d 1331 (Fed. Cir. 2010).

<sup>12</sup> 19 U.S.C. § 1337(d).

this concern and limit the potential for hold-up.”<sup>13</sup> Likewise, the Antitrust Division of the U.S. Department of Justice, along with the U.S. Patent & Trademark Office, just last year issued a policy statement urging the ITC, under its public interest mandate, to deny exclusion orders that would be anticompetitive.<sup>14</sup> The U.S. Trade Representative has seemingly adopted that position and has instructed the ITC to make findings on competitive issues before issuing exclusion orders.<sup>15</sup> The ITC has responded by asking parties for submissions on these issues.<sup>16</sup>

The end result is that, despite all the handwringing over the prospect of SEP holders using injunctions and exclusion orders to suppress competition and extract above-FRAND licensing fees, we have not found even one injunction or exclusion order that actually kept a product off the shelf because it infringed a SEP. Gupta and Snyder’s recent study of cases filed since 2000 in the “smart phone wars” found no injunction and only one exclusion order imposed for infringing a patent that was pled as a SEP, but even that exclusion order was vetoed by the U.S. Trade Representative as contrary to the public welfare.<sup>17</sup> The one example commonly invoked by concerned commentators, *Commonwealth Scientific & Industrial Research Organisation v. Buffalo Technology Inc.*,<sup>18</sup> involved a patent the holder did not plead as a SEP. In any event, the judge granted an injunction only after expressly considering the competitive conditions in the market and concluding the “public interest would not be disserved by a permanent injunction because [standardized end] products are obtainable from multiple sources other than [the infringer].”<sup>19</sup>

If a SEP holder cannot eliminate (or credibly threaten to eliminate) competition by getting an injunction, then it cannot distort licensing negotiations, contrary to what some commentators have suggested,<sup>20</sup> and contract law should provide SEP users with sufficient means for protecting their interests in a FRAND licensing rate. Antitrust enforcement is therefore an unnecessary response to a SEP holder seeking an injunction.

Some commentators have argued that manufacturers using SEPs will not bother to assert their contract rights, figuring they face no competitive disadvantage if the SEP holder extracts an above-FRAND price from every SEP user that manufactures the end product,<sup>21</sup> which would result in a uniformly higher cost being passed on to the consumer.<sup>22</sup> We depart for a moment from our

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<sup>13</sup> *Oversight of the Impact on Competition of Exclusion Orders to Enforce Standard-Essential Patents: Hearing Before the S. Comm. on the Judiciary*, 112th Cong. 1–2 (2012) (statement of the FTC), available at <http://www.ftc.gov/os/testimony/120711standardpatents.pdf>.

<sup>14</sup> U.S. Dep’t of Justice & U.S. Patent & Trademark Office, Policy Statement on Remedies for Standards-Essential Patents Subject to Voluntary FRAND Commitments (Jan. 8, 2013), <http://www.justice.gov/atr/public/guidelines/290994.pdf>.

<sup>15</sup> Letter from U.S. Trade Representative Michael B.G. Froman to U.S. ITC Chairman Irving A. Williamson Vetoing ITC-794 Exclusion Order (Aug. 3, 2013), [http://www.ustr.gov/sites/default/files/08032013%20Letter\\_1.PDF](http://www.ustr.gov/sites/default/files/08032013%20Letter_1.PDF) (citing the policy statement and instructing the ITC to make findings regarding the potential for patent hold-up).

<sup>16</sup> *See, e.g.*, Certain Audiovisual Components and Products Containing the Same, Inv. No. 337-TA-837 (Oct. 17, 2013) (review of final initial determination).

<sup>17</sup> Kirti Gupta & Mark Snyder, *Smart Phone Litigation and Standard Essential Patents* 13 (IP2 Working Paper No. 14006, 2014), available at <http://www.hoover.org/sites/default/files/ip2-wp14006-paper.pdf>; Froman Letter, *supra* note 15, at 3.

<sup>18</sup> 492 F. Supp. 2d 600 (E.D. Tex. 2007).

<sup>19</sup> *Id.* at 607.

<sup>20</sup> *See, e.g.*, Saint-Antoine, *supra* note 4, at 45.

<sup>21</sup> *See* Farrell et al., *Standard Setting, Patents, and Hold-Up*, 74 ANTITRUST L.J. 603, 645 (2007).

<sup>22</sup> *See* George S. Cary et al., *The Case for Antitrust Law to Police the Patent Holdup Problem in Standard Setting*, 77 ANTITRUST L.J. 913, 941 (2011).

Overdetering SEP holders from seeking an injunction . . . enables a SEP user to negotiate in bad faith, knowing its exposure is capped at the FRAND licensing rate, and requires a SEP holder to take a below-FRAND price from an unscrupulous or judgment-proof SEP user.

focus upon injunctions to point out that both theory and evidence make this concern implausible. If a manufacturer can undercut all its rivals' prices by going to court to vindicate its contract right to a FRAND price, then the incentive to do so, i.e., the opportunity to increase its sales and to capture the market even for a time, will be great. That SEP users are in fact modifying SSO contracts over time in order better to protect their rights<sup>23</sup> certainly suggests they intend to assert those rights.

### An Antitrust Sanction for Seeking an Injunction Would Be Harmful

An antitrust remedy is not only unnecessary to protect consumer welfare when the law of contracts and injunctions is sufficient, it would be harmful. First, a familiar point: antitrust liability comes with treble damages and so is most appropriate when anticompetitive conduct is difficult to detect or otherwise unlikely to be litigated. Because initiating litigation by filing for an injunction entails neither of these problems, treble damages will overdeter SEP holders that need an injunction to recoup the value added by their patents and have no other adequate remedy against an infringing user.<sup>24</sup> Indeed, excessive deterrence is particularly likely because the outcome of an antitrust case would be uncertain. Liability would attach based in significant part upon whether the SEP holder refused a FRAND offer, but what constitutes a FRAND price is far from clear. A SEP holder with a meritorious position reasonably may fear a contrary finding and abandon its right to an injunction in order to avoid the risk of being held liable for treble damages.

For instance, a SEP holder may require injunctive relief against a SEP user that is or appears or claims to be judgment proof or consistently and in bad faith rejected FRAND terms to gain leverage in negotiations by putting the SEP holder to the need for costly litigation. Bo Vesterdorf, the former president of the General Court of the European Union, makes the point with unmistakable clarity:

If such SEP owners, when they believe that the only way to get [a SEP user] to accept to take a license is to seek an injunction against the unauthorized and thus illegal use of the SEP, run the risk of being found to abuse a dominant position with the ensuing risk of potentially large fines, it puts them in a position of unwarranted legal uncertainty.<sup>25</sup>

This uncertainty is not only bad for private parties, it is contrary to the public interest in dynamic competition. Overdetering SEP holders from seeking an injunction effectively diminishes the value of their patents and hence their incentive to innovate.<sup>26</sup> It enables a SEP user to negotiate

<sup>23</sup> See Joanna Tsai & Joshua D. Wright, *Standard Setting, Intellectual Property Rights, and the Role of Antitrust in Regulating Incomplete Contracts*, 80 ANTITRUST L.J. (forthcoming 2015) (Working Paper available at <http://dx.doi.org/10.2139/ssrn.2467939>); Anne Layne-Farrar, Gerard Llobet & Jorge Padilla, *Preventing Patent Hold Up: An Economic Assessment of Ex Ante Licensing Negotiations in Standard Setting* 5–6 (Working Paper May 5, 2008), available at <http://dx.doi.org/10.2139/ssrn.1129551>.

<sup>24</sup> Cf. Bruce H. Kobayashi & Joshua D. Wright, *The Limits of Antitrust and Patent Holdup: A Reply to Cary et al.*, 78 ANTITRUST L.J. 505, 510–11 (2012) (“Because multiple damages are not required to generate optimal deterrence, remedies for breach of contract, or preventing the enforcement of the patent through estoppel, waiver, or other equitable doctrines, can serve to optimally deter undesirable patent holdup if they impose approximately single damages.”).

<sup>25</sup> Bo Vesterdorf, *Antitrust Enforcement and Civil Rights: SEPs and FRAND Commitments*, COMPETITION POL’Y INT’L, Aug. 2014, at 3.

<sup>26</sup> See *id.* (a prohibition on seeking an injunction “may discourage [SEP holders] from contributing their technology to standards and from accepting to commit to license on FRAND terms, or even discourage them from investing in R&D as much as they would otherwise have done”); Bernhard Ganglmair, Luke M. Froeb & Gregory J. Werden, *Patent Hold-Up and Antitrust: How a Well-Intentioned Rule Could Retard Innovation*, 60 J. INDUS. ECON. 249 (2012).

in bad faith, knowing its exposure is capped at the FRAND licensing rate, and requires a SEP holder to take a below-FRAND price from an unscrupulous or judgment-proof SEP user.<sup>27</sup>

Moreover, a patent holder may not want to contribute its technology to an SSO under FRAND terms if doing so will require it to give up the option to protect its rights by seeking an injunction against infringing users.<sup>28</sup> These possibilities, far from protecting the public interest in competition and innovation, actually threaten the gains from innovation and standardization.

### What About the Noerr-Pennington Doctrine?

We have shown above that, for two reasons, antitrust law should not be invoked against a SEP holder for seeking to enjoin infringement of its patent: antitrust law is not needed to protect consumers from injunctions that suppress competition, and overdeterrence of SEP holders seeking injunctions would be harmful to the public interest in competition and innovation. We turn now to the question whether antitrust law could constitutionally be put to that use. Does the *Noerr-Pennington* doctrine,<sup>29</sup> which precludes antitrust liability for the act of petitioning the government and conduct incidental to petitioning the government, protect a SEP holder that files for an injunction or an exclusion order?

In our view, the *Noerr-Pennington* doctrine most assuredly does protect a SEP holder that sues for an injunction or threatens to do so, for the fundamental reason that petitioning is protected by the First Amendment and the court (or the ITC) works as a gatekeeper against requests for injunctions that would harm the public, just as the legislature works as a gatekeeper balancing the interests affected by a petition for anticompetitive legislation.<sup>30</sup> Asking for the relief alone does not monopolize the market because courts independently assess the proper outcome.

Furthermore, inasmuch as the harm is said to be complete with the mere threat of an injunction,<sup>31</sup> that threat is only as powerful as the standards for getting an injunction are weak. When the

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<sup>27</sup> For a model of FRAND licensing negotiations, see James Ratliff & Daniel L. Rubinfeld, *The Use and Threat of Injunctions in the RAND Context*, 9 J. COMPETITION L. & ECON. 1, 9 (2013):

The crucial element of this model that substantially diminishes the likelihood that the injunctive threat will have real bite against an implementer willing to license on RAND terms is the assumption that an SEP owner maintains its obligation to offer a RAND license even if its initial offer is challenged by the implementer and, further, even if the court agrees with the SEP owner that its initial offer was indeed RAND. Thus any implementer that is willing to license on court-certified RAND terms can avoid an injunction by accepting those RAND terms without eschewing any of its challenges to the RANDness of the SEP owner's earlier offers.

<sup>28</sup> See Microsoft Corp., Comments on FTC Workshop on Patents and Standard Setting, Project No. P111204, at 3–5 (June 14, 2011), available at [http://www.ftc.gov/sites/default/files/documents/public\\_comments/request-comments-and-announcement-workshop-standard-setting-issues-project-no.p111204-00009%2%A0/00009-60523.pdf](http://www.ftc.gov/sites/default/files/documents/public_comments/request-comments-and-announcement-workshop-standard-setting-issues-project-no.p111204-00009%2%A0/00009-60523.pdf) (noting that “[m]ost SSOs have an IPR (or patent) policy that seeks to balance the rights and interests of their stakeholders by seeking commitments from participating patent holders that they will offer patent licenses for their essential patent claims on reasonable and non-discriminatory (RAND) terms and conditions,” and that “[s]tandards will not fulfill their salutary purposes if standards policies deter innovators from contributing patented technologies or investing in further innovation related to standardized technology”); Josh Lerner & Jean Tirole, *A Model of Forum Shopping*, 96 AM. ECON. REV. 1091 (2006) (describing the SSO as a two-sided market balancing interests of implementers and innovators and competing to offer favorable terms to attract members).

<sup>29</sup> Eastern R.R. Presidents Conf. v. Noerr Motor Freight, Inc., 365 U.S. 127 (1961); United Mine Workers v. Pennington, 381 U.S. 657 (1965); see also Cal. Motor Transp. Co. v. Trucking Unlimited, 404 U.S. 508, 510 (1972) (“[T]he right to petition extends to all departments of the Government. The right of access to the courts is indeed but one aspect of the right of petition.”); A.D. Bedell Wholesale Co. v. Philip Morris Inc., 263 F.3d 239, 251 (3d Cir. 2001) (“if . . . conduct constitutes valid petitioning, the petitioner is immune from antitrust liability whether or not the injuries are caused by the act of petitioning or are caused by government action which results from the petitioning”).

<sup>30</sup> See *Noerr*, 365 U.S. at 137 (stating one rationale for immunizing petitioning from the Sherman Act is that the government is vested with the power to decide between competing interests and operates best when an interested party can make its position known).

<sup>31</sup> See Saint-Antoine, *supra* note 4, at 45.

threat of litigation has the potential to harm the public interest, the Supreme Court, in cases such as *Twombly*<sup>32</sup> and *Wal-Mart*,<sup>33</sup> has responded not by constricting the constitutionally protected right to sue, but by raising the bar for success.<sup>34</sup> This is precisely the effect of *eBay* as well. To introduce antitrust liability into the interplay of these forces would undermine the ability of the courts to determine the public interest case-by-case and to grant or deny injunctions as appropriate.

### Conclusion

As the courts hear more cases in which a SEP holder subject to a FRAND commitment seeks an injunction against an unlicensed user, and as they apply to SEP holders the law governing the issuance of injunctions, it will become clear both to commentators and to the holders and the users of SEPs engaged in negotiations that an injunction is not ordinarily a credible threat. When it is a credible threat, the SEP holder should not be deterred by possible antitrust liability from exercising its right to relief. Otherwise, antitrust law will have the perverse effects of diminishing the incentive to innovate while simultaneously impugning the ability of the judicial system to balance the particular interests at stake in each case and to tailor remedies accordingly. ●

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<sup>32</sup> *Bell Atl. Corp. v. Twombly*, 550 U.S. 544 (2007).

<sup>33</sup> *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541 (2011).

<sup>34</sup> As Paul Saint-Antoine points out, *Twombly* and the line of class certification cases originating with *Wal-Mart* turned at least in part upon the concern that litigation costs could lead defendants to settle non-meritorious claims. In those cases the Court addressed the welfare concern by making it more difficult for plaintiffs to advance beyond, respectively, the motion to dismiss and class certification stages. St. Antoine, *supra* note 4, at 45.