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CHAPTER 24

INJUNCTIVE RELIEF AND THE FRAND COMMITMENT IN THE UNITED STATES

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Abstract: *This chapter analyzes the ability of a holder of standard-essential patents (SEPs) that has committed to license its SEPs on fair, reasonable, and nondiscriminatory (FRAND) terms to request and obtain injunctive relief in a U.S. court. I analyze whether, as a matter of contract interpretation, the FRAND commitment precludes the SEP holder from seeking an injunction in court. I then examine the legal standards that U.S. courts apply when deciding whether to grant an injunction, and I evaluate whether an SEP holder is likely to obtain an injunction against an infringer of SEPs. I also analyze the SEP holder's ability to request and obtain an exclusion order from the International Trade Commission (ITC)—a remedy that blocks the importation and sale in the United States of products that infringe a valid U.S. patent. Finally, I analyze whether the SEP holder's request for an injunction or exclusion order could expose the SEP holder to liability under U.S. antitrust law.*

Keywords: injunction, exclusion order, contractual waiver of a statutory right, *eBay* criteria, section 337 of the Tariff Act, duty of good faith, Presidential veto, antitrust, Sherman Act, section 5 of the FTC Act.

In the United States, a patent holder might be able to obtain several remedies against a patent infringer. Section 284 of the Patent Act provides that, upon a finding of infringement, "the court shall award the claimant damages adequate to compensate for the infringement, but in no event less than a reasonable royalty" (35 U.S.C. § 284). In addition, section 283 provides that a court "may grant injunctions in accordance with the principles of equity to prevent the violation of any right secured by patent" (*Id.* § 283). Pursuant to section 337 of the Tariff Act, a patent holder may also petition the U.S. International Trade Commission (ITC) to issue an exclusion order against an infringer—a remedy that denies importation and sale in the United States of products that infringe a valid U.S. patent (19 U.S.C. § 1337).

U.S. courts have confirmed that a holder of standard-essential patents (SEPs) that has committed to license its SEPs on fair, reasonable, and nondiscriminatory (FRAND) terms might be able to request an injunction or an exclusion order.[1] A typical FRAND contract does not constitute a waiver of the SEP holder's statutory rights to an injunction or an exclusion order. Hence, a FRAND commitment does not automatically preclude the SEP holder's right to request such remedies. An SEP holder's request for an injunction or an exclusion order would be considered a violation of the FRAND commitment only in specific circumstances—for example, if a FRAND commitment explicitly prohibits the use of injunctions or exclusion orders, or if the SEP holder requests an injunction before extending a FRAND license offer to the unlicensed implementer.

That an SEP holder has the right to request an injunction or an exclusion order does not imply, however, that the SEP holder can actually obtain such a remedy. There is no

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1. For purposes of discussion in this article, I follow the usual convention of making no legal or economic distinction between FRAND royalties and reasonable and nondiscriminatory (RAND) royalties. By making this assumption for present purposes, I do not exclude the possibility that someone might eventually make a compelling argument for why "fair" is not a throwaway word.

automatic right to an injunction under U.S. law. Although courts have confirmed that an SEP holder that has committed to license its SEPs on FRAND terms might be able to satisfy the *eBay* criteria—a four-factor test that U.S. courts apply to the specific circumstances of a case to determine whether the issuance of an injunction is appropriate (eBay Inc. v. MercExchange, L.L.C., 547 U.S. 388 (2006))—no court has granted an SEP holder's request for injunctive relief as of January 2016. Even though the ITC has confirmed that an SEP holder might meet the statutory conditions that govern the award of an exclusion order, as of January 2016, the ITC has granted only one exclusion order against an infringer of SEPs, which the president ultimately vetoed. Therefore, in the United States, it is exceptional for an SEP holder to obtain either an injunction or an exclusion order against an infringer of SEPs.

Less settled is whether an SEP holder's request for an injunction or an exclusion order exposes the SEP holder to antitrust liability. Enforcement guidance on that question from both the Antitrust Division of the U.S. Department of Justice (Antitrust Division) and the Federal Trade Commission (FTC)—the two U.S. antitrust authorities—is nonetheless vague and fails to deliver a straightforward answer. As of January 2016, no court has found an SEP holder to have violated the Sherman Act by requesting an injunction or an exclusion order against an infringer. The FTC has initiated several investigations against SEP holders that have requested an injunction against an infringer, alleging that such a practice could violate section 5 of the FTC Act. However, those FTC investigations resulted in consent orders and, consequently, did not establish whether and under what conditions an SEP holder's request for an injunction would violate section 5.

A. The FRAND Contract and the SEP Holder's Right to an Injunction or an Exclusion Order

U.S. courts recognize that an SEP holder's voluntary commitment to license its SEPs on FRAND terms constitutes a binding contract between the SEP holder and the standard-setting organization (SSO) (Microsoft Corp. v. Motorola, Inc., 696 F.3d 872, 878 (9th Cir. 2012); Realtek Semiconductor Corp. v. LSI Corp., 946 F. Supp. 2d 998, 1005 (N.D. Cal. 2013)). Courts also recognize that an implementer of an industry standard is an intended third-party beneficiary to the FRAND contract, and, consequently, has a legal right in the United States to enforce the SEP holder's obligations arising from a FRAND contract (*Microsoft*, 696 F.3d at 884; Sidak, 2016a). If the SEP holder fails to comply with its obligations arising from the FRAND contract, the implementer can sue the SEP holder for breaching its contract with the SSO.

Courts have found that an SEP holder's undertaking of a FRAND commitment does not automatically waive the SEP holder's right to request an injunction or an exclusion order. In *Microsoft Corp. v. Motorola, Inc.*, for example, Judge James Robart of the U.S. District Court for the Western District of Washington instructed the jury that a FRAND commitment "does not by itself bar standard essential patent owners from ever, in any circumstances, seeking injunctive relief to enforce their patents" (Jury Instructions § 21, at 29, Microsoft Corp. v. Motorola, Inc., No. 2:10-cv-01823 (W.D. Wash. Sept. 4, 2013), ECF No. 908).[2] Put differently, even after committing to license its SEPs on FRAND terms, the SEP holder might retain the right to request an injunction or an exclusion order against an infringer.

2. Note that Judge Robart gave those instructions *before* the IEEE amended its patent policy in March 2015 explicitly to limit the SEP holder's right to seek injunctive relief.

In specific circumstances, however, the SEP holder's request for an injunction or an exclusion order could be considered to violate the SEP holder's FRAND commitment. That would be the case if the FRAND commitment explicitly prohibits the use of such remedy, or if the SEP holder's request for that remedy fails to comply with its obligations arising from the FRAND commitment. I examine those cases in details in Parts A.1 and A.2.

1. Is a FRAND Commitment a Waiver of a Right to an Injunction or to an Exclusion Order?

A simple examination of most SSOs' FRAND contracts reveals no explicit or implicit waiver of the SEP holder's right to seek an injunction or an exclusion order. To determine whether the FRAND contract limits an SEP holder's right to seek either remedy, a court examines whether, by entering into a FRAND contract, an SEP holder has explicitly or implicitly waived its statutory right. The Supreme Court has said (in labor law) that it "will not infer from a general contractual provision that the parties intended to waive a statutorily protected right unless the undertaking is 'explicitly stated'" (Metropolitan Edison Co. v. NLRB, 460 U.S. 693, 708 (1983) (quoting Mastro Plastics Corp. v. NLRB, 350 U.S. 270, 283 (1956))). The Court said that to "waive a statutory right the duty must be established clearly and unmistakably" (*Id.* at 709).

Most FRAND agreements do not explicitly or implicitly prohibit an SEP holder from seeking an injunction or an exclusion order against an infringer of SEPs. For example, the IPR policy of European Telecommunications Standards Institute (ETSI), one of the largest SSOs in the field of telecommunications, does not specify any limitation on an SEP holder's right to injunctive relief (European Telecommunications Standards Institute [ETSI], ETSI Intellectual Property Rights Policy, Annex 6 (Nov. 18, 2015) [hereinafter ETSI IPR Policy], http://www.etsi.org/images/files/ipr/etsi-ipr-policy.pdf). Indeed, ETSI members considered and *rejected* the possibility of including an explicit waiver of the right to seek an injunction in ETSI's IPR policy. The interim IPR policy that ETSI adopted in 1993 contained, among other provisions, an explicit restriction on the SEP holder's right to request an injunction (ETSI/GA15 TD 25, § 13 ("The Signatory hereby undertakes not to seek an injunction against a Party in respect of any Essential IPR in respect of [enumerated situations]."); Brooks & Geradin, 2011). However, ETSI excluded that restriction from the policy that it adopted in 1994,[3] and it has not adopted such a policy since. One cannot plausibly argue that, even though ETSI decided to exclude that provision from its policy, ETSI nonetheless considers the SEP holder's waiver of its right to an injunction to be an implicit term of ETSI's FRAND contract.

The internal provisions of some SSOs might restrict, nonetheless, the SEP holder's right to request an injunction or an exclusion order. The patent policy of the Institute of Electrical

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3. Karl Rosenbrock, former director at ETSI, testified in 2012:

> I am not aware of any background discussions within ETSI in which it was agreed that ETSI Members are stopped from seeking a court order to prevent infringement of their ETSI essential patents. Early drafts of the ETSI IPR Policy included a provision that limited an essential patent holder's ability to seek injunctive relief for its essential patents, but this proposal was dropped from the Interim ETSI IPR Policy that was adopted in 1994.

(Declaration of Karl Heinz Rosenbrock in Support of Samsung's Opposition to Apple's Motion for Partial Summary Judgement, ¶ 42, at 12, Apple, Inc. v. Samsung Elecs. Co., No. 11-cv-01846-LHK (N.D. Cal. Apr. 2, 2012), ECF No. 847, attachment 49).

and Electronics Engineers (IEEE), as amended in 2015, is the most prominent example of such a policy. In March 2015, the IEEE Board of Directors approved draft amendments to the patent policy of the IEEE Standards Association's Standards Board bylaws, which, among other things, categorically prohibited SEP holders from seeking an injunction. The IEEE Standard Board bylaws—as amended in March 2015—state that a FRAND commitment "precludes seeking, or seeking to enforce, a Prohibitive Order" except in specific cases that the IEEE policy identifies (IEEE, IEEE-SA Standards Board Bylaws, § 6.2, at 16 (Dec. 2015), http://standards.ieee.org/develop/policies/bylaws/sb_bylaws.pdf [hereinafter IEEE Standards Board Bylaws]). The IEEE's 2015 patent policy revisions allow the SEP holder to request an injunction on two occasions. First, if "the implementer fails to participate in, or to comply with the outcome of, an adjudication, including an affirming first-level appellate review," an SEP holder may request an injunction (*Id.* § 6.2, at 18). Second, "[i]n jurisdictions where the failure to request a Prohibitive Order in a pleading waives the right to seek a Prohibitive Order at a later time," an SEP holder may "conditionally plead the right to seek a Prohibitive Order to preserve its right to do so later" if the conditions for a Prohibitive Order obtain (*Id.*). By agreeing to license its SEPs in compliance with the provisions of the amended IEEE Standard Board bylaws, an SEP holder hence accepts a contractual waiver to its statutory right to request an injunction or an exclusion order. Seeking those remedies outside the two exceptions identified in the IEEE Standard Board bylaws would constitute a breach of the IEEE's FRAND commitment.

2. When Does the SEP Holder's Request for an Injunction or an Exclusion Order Violate the FRAND Commitment?

U.S. courts have confirmed that, even if a FRAND commitment does not contain a waiver of the SEP holder's right to an injunction or an exclusion order, in specific circumstances, the SEP holder's request for those remedies might still violate the FRAND commitment (Apple, Inc. v. Motorola Mobility, Inc., No. 11-cv-00178, 2012 WL 5416941, at *5 (W.D. Wis. Oct. 29, 2012); Microsoft Corp. v. Motorola, Inc., No. 2:10-cv-01823, 2012 WL 4827743, at *4 (W.D. Wash. Oct. 10, 2012)). That outcome would eventuate if the SEP holder sought an injunction or an exclusion order in breach of its obligations arising from its FRAND commitment.

Both the nature of the specific FRAND commitment and the IPR policies of the specific SSO determine the exact duties that arise from a contract between an SEP holder and that SSO. Those exact duties might differ across different contracts. However, a typical FRAND commitment represents the SEP holder's binding agreement *to offer to license* its SEPs on FRAND terms to someone seeking to implement the standard (*Apple*, 2012 WL 546941, at *5; *Microsoft*, 2012 WL 4827743, at *4). An SEP holder that requests an injunction against an implementer *before* fulfilling its duty to offer to license its SEPs on FRAND terms might be in breach of its FRAND contract.

In *Realtek Semiconductor Corp. v. LSI Corp.*, the U.S. District Court for the Northern District of California emphasized that an SEP holder must extend to an unlicensed implementer a clear and specific license offer before seeking injunctive relief against that implementer (946 F. Supp. 2d 998, 1003 (N.D. Cal. 2013)). Judge Ronald Whyte found that the SEP holder sent a letter to the implementer and, less than one week later, filed an action with the ITC to block the unlicensed importation of the implementer's allegedly infringing products (*Id.* at 1002). The SEP holder's letter did not include a license offer, but merely demanded that the unlicensed implementer immediately cease and desist from its alleged infringement. Judge Whyte found that the SEP holder's communication with the unlicensed implementer did not constitute a licensing offer and was insufficient to comply with the SEP holder's obligations arising from its FRAND commitment (*Id.* at 1007–08). The court concluded that, by requesting an exclusion order before extending a FRAND offer to the unlicensed implementer, the SEP holder "violated [its] contractual obligations to the IEEE and to Realtek to license [its] standard-essential patents under [F]RAND terms" (*Id.* at 1005).[4] Although the court's decision in *Realtek v. LSI* concerned an SEP holder's request for an exclusion order from the ITC—a remedy that I analyze in Part C—the same rationale would likely apply to a request for an injunction from a court.

An SEP holder's request for an injunction or an exclusion order might also violate the SEP holder's duty of good faith that is implicit in the FRAND contract (Microsoft Corp. v. Motorola, Inc., 795 F.3d 1024, 1045 (9th Cir. 2015); Jury Verdict at 3, Microsoft Corp. v. Motorola, Inc., No. 2:10-cv-01823 (W.D. Wash. Sept. 4, 2013), ECF No. 909). According to the Restatement (Second) of Contracts, "[e]very contract imposes upon each party a duty of good faith and fair dealing in its performance and its enforcement" (RESTATEMENT (SECOND) OF CONTRACTS § 205 (AM. LAW INST. 1981); Commercial Credit Corp. v. Nelson Motors, Inc., 147 S.E.2d 481, 484 (S.C. 1966); Seidenberg v. Summit Bank, 791 A.2d 1068, 1074 (N.J. Super. Ct. App. Div. 2002)). U.S. courts have confirmed that a contract between an SEP holder and an SSO is not an exception to that general rule (Apple Inc. v. Samsung Elecs. Co., No. 11-cv-01846, 2012 WL 1672493, at *12 (N.D. Cal. May 14, 2012); Microsoft Corp. v. Motorola Inc., 864 F. Supp. 2d 1023, 1038 (W.D. Wash. 2012)). Several U.S. courts have interpreted the FRAND contract to impose on the SEP holder a duty to negotiate FRAND license terms in good faith (*Apple*, 2012 WL 1672493, at *12 (emphasis omitted); Microsoft Corp. v. Motorola, Inc., 963 F. Supp. 2d 1176, 1184 (W.D. Wash. 2013) (citing Keystone Land & Dev. Co. v. Xerox Corp., 94 P.3d 945, 949 (Wash. 2004))).[5] An SEP holder might thus violate its FRAND contract if it violates its duty of good faith and fair dealing by requesting an injunction or an exclusion order.

At least one court has found that requesting an injunction during the negotiation of the license terms might violate the SEP holder's implied duty of good faith and fair dealing. In *Microsoft Corp. v. Motorola, Inc.*, Microsoft alleged that, in attempting to enforce its SEPs against Microsoft, Motorola had breached its duty of good faith in three ways: (1) Motorola's opening offer letters, which, Microsoft alleged, contained a royalty that was not FRAND; (2) Motorola's decision to seek an injunction against Microsoft; and (3) Motorola's refusal to license to Marvell, Microsoft's 802.11 chip supplier (Microsoft Corp. v. Motorola, Inc., No. 2:10-cv-01823, 2013 WL 6000017, at *3–4 (W.D. Wash. Nov. 12, 2013)). Microsoft also argued that all three of those actions, when considered together, established a breach of Motorola's duty of good faith (*Id.*). In his order denying both parties' motions for summary judgment, Judge Robart outlined the good faith standards that the jury should apply in deciding whether Motorola's conduct breached its duty of good faith. He emphasized that the fact finder should consider:

4. Note that this case occurred *before* the IEEE amended its patent policy in March 2015 to include a waiver of the SEP holder's right to seek an injunction.

5. Judge Robart found that the SEP holder's opening offer need not be in the FRAND range. He reasoned that SSOs "anticipate that the parties will negotiate towards a [F]RAND license, [and thus] it logically does not follow that initial offers must be on RAND terms (Microsoft Corp. v. Motorola, Inc., 864 F. Supp. 2d 1023, 1038 (W.D. Wash. 2012))." I have explained elsewhere that a more economically sound interpretation of the FRAND obligation and the duty of good faith that arises from that contract would require the SEP holder to make its *initial* offer within the FRAND range (Sidak 2015).

> (1) whether the defendant's actions were contrary to the reasonable justified expectations of other parties to the contract, . . . (2) whether the defendant's conduct would frustrate the purpose of the contract, . . . (3) whether the defendant's conduct was commercially reasonable, . . . (4) whether and to what extent the defendant's conduct conformed with ordinary custom or practice in the industry, . . . (5) to the extent the contract vested the defendant with discretion in deciding how to act, whether that discretion was exercised reasonably, . . . and (6) subjective factors such as the defendant's intent and motive (*Microsoft*, 963 F. Supp. at 1184–85).

At trial, the jury returned a verdict in Microsoft's favor, finding that Motorola's request for an injunction, combined with its other licensing practices, violated Motorola's duty of good faith (Jury Verdict at 2, Microsoft Corp. v. Motorola, Inc., No. 2:10-cv-01823 (W.D. Wash. Sept. 4, 2013), ECF No. 909).

The Ninth Circuit affirmed the decision, reasoning that there was a significant amount of evidence from which the jury could "infer that the injunctive actions violated Motorola's good faith and fair dealing obligations" (Microsoft Corp. v. Motorola, Inc., 795 F.3d 1024, 1046 (9th Cir. 2015)). The Ninth Circuit said that Motorola had demanded a royalty that exceeded the court-determined RAND royalty by several orders of magnitude. In the court's view, the discrepancy between Motorola's demanded royalty and the court-determined RAND royalty "suggested that Motorola sought to capture more than the value of its patents" (*Id.*).[6] The Ninth Circuit found that the timing of Motorola's request for an injunction, which was "*immediately* after the twenty-day acceptance window provided in the offer letters expired," also indicated Motorola's bad faith (*Microsoft*, 795 F.3d at 1046). In addition, the Ninth Circuit also observed that Motorola requested an injunction after Microsoft brought a breach of contract suit against Motorola for a failure to comply with its RAND commitment. The Ninth Circuit reasoned that, because, in that legal action, the court could have determined a RAND rate for the use of Motorola's SEPs, "[t]he jury could have inferred . . . that the injunctive actions were not motivated by a fear of irreparable harm" (*Id.*). The Ninth Circuit added that "the jury could have inferred that the real motivation [for Motorola's request for an injunction] was to induce Microsoft to agree to a license at a higher-than-RAND rate" (*Id.*). Finally, the Ninth Circuit found that there was evidence of "Motorola's knowledge that pursuing an injunctive action could breach its duty of good faith and fair dealing" (*Id.* at 1046). As I examine in detail in Part D.2, in 2012, the FTC initiated an investigation to determine whether Motorola breached its RAND commitment by seeking injunctions against willing licensees. The investigation ultimately resulted in a consent order. The Ninth Circuit said that Motorola "was aware the FTC found its conduct questionable, yet left its injunctive suits in place" (*Id.* at 1047). The Ninth Circuit found that "[t]his sequence provided some evidence that Motorola acted in bad faith" (*Id.*).

In sum, although the Ninth Circuit ultimately found that Motorola's conduct in seeking an injunction violated its duty of good faith, the court's finding did not follow from Motorola's mere request for an injunction. The court and the jury considered many other factors before determining that such a request violated the SEP holder's contractual obligations, which suggests that the determination of whether a request for an injunction violates the SEP holder's duty of good faith is a fact-specific inquiry.

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6. I have explained elsewhere that there is no valid economic justification to assume that the court's adjudicated rate was high enough to be RAND. For a discussion of the economic flaws of the methodology that the court applied in determining a RAND rate, see Sidak (2013).

B. Injunctions for FRAND-Committed SEPs

Although an SEP holder has the statutory right to request an injunction for patent infringement, it does not necessarily follow that the court will grant such a remedy against every infringer. Under U.S. common law, an injunction is an equitable remedy that a court may grant at its discretion. In deciding whether to grant a request for injunctive relief, a court typically applies the criteria that the Supreme Court enumerated in *eBay Inc. v. MercExchange, L.L.C.* (547 U.S. 388 (2006)). The Federal Circuit has clarified that an SEP holder that has committed to license its SEPs on FRAND terms might be able to meet the *eBay* criteria and therefore obtain an injunction (Apple Inc. v. Motorola, Inc., 757 F.3d 1286, 1332 (Fed. Cir. 2014), *overruled on other grounds by* Williamson v. Citrix Online, LLC, 729 F.3d 1339 (Fed. Cir. 2015)). Nevertheless, as of January 2016, no SEP holder has been able to obtain an injunction against an infringer of a FRAND-committed SEP.

1. The Principles of Equity for Granting an Injunction in the United States

In 2006, the Supreme Court held in *eBay* that district courts must exercise discretion when deciding whether to grant an injunction, "consistent with traditional principles of equity" (547 U.S. at 394). Specifically, the Court said that, to obtain a permanent injunction, a patent holder must prove four things:

> (1) that it has suffered an irreparable injury; (2) that remedies available at law, such as monetary damages, are inadequate to compensate for that injury; (3) that, considering the balance of hardships between the plaintiff and defendant, a remedy in equity is warranted; and (4) that the public interest would not be disserved by a permanent injunction (*Id.* at 391 (citing Weinberger v. Romero-Barcelo, 456 U.S. 305, 311–13 (1982); Amoco Prod. Co. v. Gambell, 480 U.S. 531, 542 (1987))).

The patent holder bears the burden of showing that it has satisfied the four conditions (Voda v. Cordis Corp., 536 F.3d 1311, 1329 (Fed. Cir. 2008)). When the specific facts of a case do not satisfy those four *eBay* conditions, the court will decline to issue an injunction.

Both before and after the Supreme Court's ruling in *eBay*, courts have interpreted irreparable injury to include harm from lost market share, lost revenues, lost market opportunities, debasement of a patent owner's brand recognition and reputation, and competition arising from the unauthorized use of the patent holder's invention (Douglas Dynamics, LLC v. Buyers Prods. Co., 717 F.3d 1336, 1344–45 (Fed. Cir. 2013); i4i Ltd. P'ship v. Microsoft Corp., 598 F.3d 831, 862 (Fed. Cir. 2010); Abbott Labs. v. Sandoz, Inc., 533 F.3d 1341, 1361–62 (Fed. Cir. 2008) (citing Purdue Pharma L.P. v. Boehringer Ingelheim GmbH, 237 F.3d 1359, 1368 (Fed. Cir. 2001)); Bio-Technology Gen. Corp. v. Genentech, Inc., 80 F.3d 1553, 1566 (Fed. Cir. 1996); Polymer Techs., Inc. v. Bridwell, 103 F.3d 970, 975–76 (Fed. Cir. 1996)); Sidak, 2011). Courts typically find irreparable injury when the patent holder and the infringer are direct competitors (*Douglas*, 717 F.3d at 1345; *i4i*, 598 F.3d at 861–62). However, the Supreme Court clarified in *eBay* that, even if a patent holder does not practice its patented technology (and consequently does not compete with the infringer), it could still suffer irreparable injury (*eBay*, 547 U.S. at 393). The Court said that "some patent holders, such as university researchers or self-made inventors, might reasonably prefer to license their patents, rather than undertake efforts to secure the financing necessary to bring their works to market themselves" (*Id.*). It emphasized that those patent holders still might be able to satisfy the traditional four-factor test (*Id.*). Therefore, the absence of competition between the patent holder and the infringer does not indicate the absence of irreparable injury.

When determining whether the plaintiff has demonstrated irreparable injury, courts have required the patent holder to show that there is a "causal nexus" between the "alleged [irreparable] harm" and "the alleged infringement" (Apple Inc. v. Samsung Elecs. Co., 695 F.3d 1370, 1374 (Fed. Cir. 2012); Apple Inc. v. Samsung Elecs. Co., No. 2014-1802, 2015 WL 9014387, at *3 (Fed. Cir. Dec. 16, 2015); Apple Inc. v. Samsung Elecs. Co., 735 F.3d 1352, 1361–64 (Fed. Cir. 2013)). To prove that causal nexus, some courts have required evidence that the patented technology "drives consumer demand for the accused product" (*Apple*, 695 F.3d at 1375 (citing Apple Inc. v. Samsung Elecs. Co., 678 F.3d 1314, 1324 (Fed. Cir. 2012))). Those courts reasoned that, "[i]f the patented feature does not drive the demand for the product, sales would be lost even if the offending feature were absent from the accused product" (*Id.* at 1374 (quoting *Apple*, 678 F.3d at 1324)). However, in its 2015 decision in *Apple Inc. v. Samsung Electronics Co.*, the Federal Circuit clarified that the causal nexus analysis does not require a patent holder to prove that its patented technology is the exclusive driver of consumers' demand for the infringing product (2015 WL 9014387, at *5). The Federal Circuit emphasized that "[s]uch a showing may . . . be nearly impossible from an evidentiary standpoint when the accused devices have thousands of features, and thus thousands of other potential causes that must be ruled out" (*Id.*; *Apple*, 735 F.3d at 1364 ("[The causal nexus requirement] do[es] not mean that [the patent holder] must show that a patented feature is the one and only reason for consumer demand. Consumer preferences are too complex—and the principles of equity are too flexible—for that to be the correct standard.")). The Federal Circuit said that it is sufficient to "show 'some connection' between the patented features and the demand for the infringing products," particularly in cases where the infringing product incorporates multiple components and functions that fall outside the scope of the infringed patent's claims (2015 WL 9014387, at *5 (quoting *Apple*, 735 F.3d at 1364)). In other words, it is sufficient to demonstrate that the patented feature affects consumers' decisions to purchase the infringing product to prove a casual nexus between the infringement and the alleged harm (*Id.*; *Apple*, 735 F.3d at 1364).

Under the second *eBay* factor, the court analyzes whether legal remedies, such as monetary damages, could compensate for the harm arising from the patent infringement. Courts have found that monetary damages might be insufficient if the suffered harm is difficult to quantify (*Apple*, 2015 WL 9014387, at *9; i4i Ltd. P'ship v. Microsoft Corp., 598 F.3d 831, 862 (Fed. Cir. 2010); Broadcom Corp. v. Qualcomm Inc., 543 F.3d 683, 703 (Fed. Cir. 2008)). In examining whether the harm is irreparable, courts also consider evidence that the patent holder has licensed its technology to other licensees, which "may indicate that a reasonable royalty does compensate for an infringement" (Acumed LLC v. Stryker Corp., 551 F.3d 1323, 1328 (Fed. Cir. 2008); *i4i*, 598 F.3d at 862). However, the Federal Circuit has said that that evidence alone is insufficient to prove the adequacy of monetary compensation (*Acumed*, 551 F.3d at 1328). The Federal Circuit reasoned that "the identity of the past licensees, the experience in the market since the licenses were granted, and the identity of the new infringer" are all factors that could affect the court's assessment of whether monetary damages could adequately compensate for the imposed harm (*Id.*). For example, even though the patent holder has licensed its technology to other licensees, monetary compensation might be insufficient to compensate for the harm if the infringer cannot pay the monetary damages in full. In that case, injunctive relief might be necessary to compensate for the harm (Robert Bosch LLC v. Pylon Mfg. Corp., 659 F.3d 1142, 1155–56 (Fed. Cir. 2011)). Consequently, evidence that the patent holder is willing to license its technology to other licensees does not necessarily imply that monetary damages will suffice to compensate the patent holder for the harm arising from the infringement.

In interpreting the third *eBay* factor, which concerns the balance of hardships, courts have considered "the relative effect of granting or denying an injunction on the parties" (*i4i*, 598 F.3d at 862; *Apple*, 2015 WL 9014387, at *9; Douglas Dynamics, LLC v. Buyers Prods. Co., 717 F.3d 1336, 1345 (Fed. Cir. 2013); *Robert Bosch*, 659 F.3d at 1155). Typically, courts find that the balance of hardships favors the patent holder if there are readily available and acceptable noninfringing alternatives to the patented technology (*Douglas*, 717 F.3d at 1345). Another instance in which the balance of hardships would support an injunction is if a patent holder's patented technology is crucial to its business. In that scenario, the absence of an injunction might harm the patent holder by forcing it to compete against its own patented technology (*Robert Bosch*, 659 F.3d at 1156; *i4i*, 598 F.3d at 862–63). Nevertheless, the opposite proposition—that an infringer's infringing product is crucial to its business means that the balance of hardships favors denying a request for an injunction—is not necessarily true. The Federal Circuit has clarified that an infringer "cannot escape an injunction simply because . . . its primary product is an infringing one" (*Robert Bosch*, 659 F.3d at 1156 (citing Windsurfing Int'l, Inc. v. AMF, Inc., 782 F.2d 995, 1003 n.12 (Fed. Cir. 1986) ("One who elects to build a business on a product found to infringe cannot be heard to complain if an injunction against continuing infringement destroys the business so elected.")); *i4i*, 598 F.3d at 863; Broadcom Corp. v. Qualcomm Inc., 543 F.3d 683, 704 (Fed. Cir. 2008)).

The Federal Circuit has emphasized that the public interest factor—the fourth *eBay* factor—requires a court to evaluate whether an injunction "strikes a workable balance between protecting the patentee's rights and protecting the public from the injunction's adverse effects" (*i4i*, 598 F.3d at 863; *Apple*, 2015 WL 9014387, at *10; *Robert Bosch*, 659 F.3d at 1156). The argument that an injunction would decrease competition will typically not support the conclusion that an injunction would disserve the public interest (*Apple*, 2015 WL 9014387, at *10; *Douglas*, 717 F.3d at 1345; *Abbott Labs. v. Sandoz, Inc.*, 544 F.3d 1341, 1362 (Fed. Cir. 2008)). The Federal Circuit has acknowledged that patent infringement typically increases competition by bringing infringing products to the market (*Apple*, 2015 WL 9014387, at *10; *Douglas*, 717 F.3d at 1345 ("[A]ny infringer represents some form of competition with the originator of new technology."); *Abbott*, 544 F.3d at 1362). It emphasized, nonetheless, that the public does not benefit when "competition comes at the expense of a patentee's investment-backed property right" (*Apple*, 2015 WL 9014387, at *10; *Abbott*, 544 F.3d at 1362–63 (quoting *Abbott*, 500 F. Supp. 2d at 846)). The Federal Circuit said that, although increased competition serves the public interest in the short term by "ensur[ing] competitive pricing and foster[ing] innovation," in the long term, "cheap copies of patented inventions have the effect of inhibiting innovation and incentive" (*Douglas*, 717 F.3d at 1346). Therefore, the argument that an injunction would decrease market competition is typically insufficient to show that an injunction would disserve the public interest.

2. Can a Holder of FRAND-Committed SEPs Meet the *eBay* Criteria?

Some commentators have argued that, after making a FRAND commitment, an SEP holder can no longer meet the *eBay* requirements for obtaining an injunction. Mark Lemley and Carl Shapiro have posited that, by making a FRAND commitment, an SEP holder has conceded that monetary damages would suffice to compensate the SEP holder for the infringement of its SEPs (Lemley & Shapiro, 2013). They say that "the court may well not grant an injunction" if it concludes that, given the availability of monetary damages, the SEP holder will not suffer irreparable harm from the infringement of its SEPs (*Id.*; Brief of

Amicus Curiae Federal Trade Commission Supporting Neither Party, Apple Inc. v. Motorola, Inc., 2012 WL 6655899, at *14–15 (Fed. Cir. Dec. 14, 2012) (Nos. 12-1548, 12-1549); Brief of Amicus Curiae Law Professors Thomas F. Cotter, Shubha Ghosh, A. Christal Sheppard, & Katherine J. Strandburg in Support of Apple Inc. and Affirmance in Motorola, Inc.'s Cross-Appeal, Apple Inc. v. Motorola, Inc., 2013 WL 1151016, at *15 (Fed. Cir. Mar. 20, 2013) (Nos. 12-1548, 12-1549)). However, the Federal Circuit has rejected such an interpretation, emphasizing that "[w]hile . . . FRAND commitments are certainly criteria relevant to [a patent holder's] entitlement to an injunction, we see no reason to create . . . a separate rule or analytical framework for addressing injunctions for FRAND-committed patents" (*Apple Inc. v. Motorola, Inc.*, 757 F.3d 1286, 1331–32 (Fed. Cir. 2014), *overruled on other grounds by* Williamson v. Citrix Online, LLC, 792 F.3d 1339 (Fed. Cir. 2015)). The Federal Circuit said that "[t]he framework laid out by the Supreme Court in *eBay* . . . provides ample strength and flexibility for addressing the unique aspects of FRAND committed patents and industry standards in general" (*Id.* at 32). It added that, although "[a] patentee subject to FRAND commitments may have difficulty establishing irreparable harm[,] . . . an injunction may be justified [in some circumstances]" (*Id.*). The Federal Circuit thus rejected the interpretation that a FRAND commitment completely eliminates the SEP holder's ability to satisfy *eBay*'s four-factor test.

An analysis of decisions in cases in which an SEP holder has requested an injunction reveals nonetheless that, in each case, the SEP holder failed to meet the necessary criteria to obtain an injunction. For example, in *Apple Inc. v. Motorola, Inc.*, the Federal Circuit found that Motorola was not entitled to an injunction because it had failed to show that Apple's infringement of Motorola's SEPs had caused Motorola irreparable harm or that monetary damages would inadequately compensate Motorola for that harm (*Id.*). The Federal Circuit based its decision largely on Motorola's history of licensing the SEPs in suit (*Id.*). The court reasoned that, "considering the large number of industry participants that are already using the system claimed in the '898 patent, including competitors, Motorola has not provided any evidence that adding one more user would create [irreparable] harm" (*Id.*). The Federal Circuit also said that Motorola's many other comparable licenses covering the SEPs in suit "strongly suggested that money damages [were] adequate to fully compensate Motorola for any infringement" (*Id.*). The Federal Circuit thus concluded that Motorola was not entitled to an injunction.

Similarly, in *Microsoft Corp. v. Motorola, Inc.*, Judge Robart denied Motorola's request for an injunction against Microsoft's products that practiced Motorola's patents essential to the IEEE's WLAN standard and the ITU's H.264 video coding standard (Order Granting Microsoft's Motion Dismissing Motorola's Claim for Injunctive Relief at 2–3, Microsoft Corp. v. Motorola, Inc., No. 10-cv-01823 (W.D. Wash. Nov. 30, 2012), ECF No. 607). He found that remedies at law would suffice to compensate for the harm that Microsoft's infringement caused: "at some point in the future (either by agreement of the parties or by court adjudication) a license agreement for the Motorola Asserted Patents will become a reality" (*Id.* at 13–14). Judge Robart found that the license agreement would "make Motorola whole for Microsoft's use of any and all" of the SEPs in suit (*Id.* at 14), and consequently he concluded that there was no valid justification for enjoining Microsoft.

In short, even after committing to license its SEPs on FRAND terms, an SEP holder might be able to meet the *eBay* criteria to obtain an injunction. However, as of January 2016, no U.S. court has awarded an injunction against an infringer of a FRAND-committed patent (Gupta & Snyder, 2015 (observing that, from 2001 to 2013, "[n]o injunctions have been granted for any patents that were determined to be an SEP")). The low probability of successfully obtaining an injunction might have encouraged SEP holders to opt for alternative remedies, such as requesting that the court determine an ongoing royalty for the future use of the SEP holder's patented technologies (Ericsson Inc. v. D-Link Sys., Inc., No. 6:10-cv-00473, 2013 WL 4046225 (E.D. Tex. Aug. 6, 2013) (Davis, C.J.); Sidak, 2016b), or requesting that the International Trade Commission issue an exclusion order, a remedy that I examine in details in Part C (Realtek Semiconductor Corp. v. LSI Corp., 946 F. Supp. 2d 998, 1005 (N.D. Cal. 2013)).

C. Exclusion Orders for FRAND-Committed SEPs

In deciding whether to issue an exclusion order, the ITC is not bound by eBay criteria (Spansion, Inc. v. Int'l Trade Comm'n, 629 F.3d 1331, 1360 (Fed. Cir. 2010)); instead, it applies the criteria in section 337 of the Tariff Act of 1930 (19 U.S.C. § 1337). One might thus predict that it would be easier for an SEP holder to obtain an exclusion order from the ITC than to obtain an injunction in a district court. However, as of January 2016, no SEP holder has been able to enforce an exclusion order against an infringer of SEPs.

1. The Legal Standard for Granting an Exclusion Order

Section 337 of the Tariff Act of 1930 states that the ITC

> shall direct that the articles concerned, imported by any person violating the provision of this section, be excluded from entry in the United States, unless, after considering the effect of such exclusion upon the public health and welfare, competitive conditions in the United States economy, the production of like or directly competitive articles in the United States, and United States consumers, it finds that such articles should not be excluded from entry (*Id.*).

Thus, an SEP holder might request that the ITC issue an exclusion order against an infringer, and thereby block the importation into the United States of products that infringe the SEPs.

To prevail in a patent infringement case before the ITC, the complainant must prove (1) infringement of a valid U.S. patent (using the same standard that a plaintiff would use in a federal district court) (35 U.S.C. § 271), (2) importation of the infringing product into the United States, and (3) the existence or development of a domestic industry that relates to "articles protected by the patent" in question (19 U.S.C. §§ 1337(a)(1)–(2)). To prove the existence or development of a domestic industry, the complainant must satisfy a "technical prong" and an "economic prong." Satisfying the technical prong requires evidence that a U.S. industry "produces articles covered by the [complainant's] asserted claims" (Alloc, Inc. v. Int'l Trade Comm'n, 342 F.3d 1361, 1375 (Fed. Cir. 2003)). Satisfying the economic prong requires the complainant to show that a significant or substantial amount of investment or employment relates to the patent at issue (19 U.S.C. § 1337(a)(3)).

If the complainant satisfies those three factors, the ITC then assesses whether the four public interest factors listed in section 337—that is, the effect of the exclusion on public health and welfare, on competitive conditions in the United States economy, on the production of "like or directly competitive" products in the United States, and on U.S. consumers—support the issuance of an exclusion order (*Id.* § 1337(d)(1)). The ITC's decision to grant an exclusion order is predicated not on equitable principles but instead on interpretation of section 337 (Spansion, Inc. v. Int'l Trade Comm'n, 629 F.3d 1331, 1359 (Fed. Cir. 2010)). The Federal Circuit has emphasized that the legislative history of the amendments to section 337 shows that Congress intended exclusion orders to be the "normal remedy" when the ITC finds patent infringement (*Id.* at 1358–59). Outside the context of SEPs, there have been, as of January 2016, only three investigations in which the ITC has refused to issue an exclusion order upon a finding of infringement (Certain Fluidized Supporting Apparatus and Components, Inv. No. 337-TA-182/188, USITC Pub. 1667 (Oct. 1, 1984) (final) [hereinafter USITC Inv. No. 337-TA-182/188 Final]; Certain Inclined-Field Acceleration Tubes and Components Thereof, Inv. No. 337-TA-67, USITC Pub. 1119 (Dec. 1, 1980) (final) [hereinafter USITC Inv. No. 337-TA-67 Final]; Certain Automatic Crankpin Grinders, Inv. No. 337-TA-60, USITC Pub. 1022 (Dec. 1, 1979) (final) [hereinafter USITC Inv. No. 337-TA-60 Final]; *Spansion*, 629 F.3d at 1360 ("[T]he Commission has found public interest considerations to outweigh the need for injunctive relief in protecting intellectual property rights found to have been violated under Section 337 in only three investigations."); Certain Wireless Devices with 3G and/or 4G Capabilities and Components Thereof at 174, Inv. No. 337-TA-868, USITC Pub. 2929 (June 13, 2014) (initial determination) [hereinafter USITC Inv. No. 337-TA-868 Initial Determination] ("The Commission has concluded that the public interest considerations outweighed the need to protect the intellectual property right of complainant in only three investigations, all of which were decided prior to the 1988 legislative amendments to Section 337 that removed the requirement that patentees show irreparable harm in order to obtain relief."); Riley & Allen, 2015). The Federal Circuit observed that, in those three cases, the ITC denied an exclusion order because it concluded that "an exclusion order would *deprive* the public of products *necessary* for some important health or welfare need: energy efficient automobiles, basic scientific research, or hospital equipment" (*Spansion*, 629 F.3d at 1360 (emphasis added) (citing USITC Inv. No. 337-TA-182/188 Final; USITC Inv. No. 337-TA-67 Final; USITC Inv. No. 337-TA-60 Final)). Thus, unless an exclusion order would pose "a real threat to the best interests of the country," the ITC will typically not decline to issue an exclusion order upon a finding of patent infringement (USITC Inv. No. 337-TA-868 Initial Determination, at 179).

If the ITC finds that an infringer has violated section 337, it may issue one or more of the following: a cease-and-desist order, a general exclusion order, and a limited exclusion order. A cease-and-desist order prohibits the further sale of units of an infringing product that are already in inventory in the United States (19 U.S.C. § 1337(f)(1)). A general exclusion order prohibits the importation of the infringing product by *any* party, including parties not named as respondents in the investigation (*Id.* § 1337(d)(2)). A limited exclusion order prohibits only the named respondents from importing the infringing product into the United States (*Id.* § 1337(d)(1)). It remains unclear whether the limited exclusion order includes downstream products that use the infringing inputs of the named respondents, even if the complainant did not name the producers of the downstream products as respondents (Certain Semiconductor Chips with Minimized Chip Package Size and Products Containing Same at 63–64, Inv. No. 337-TA-605, USITC Pub. 4282 (June 3, 2009) (final) [hereinafter USITC Inv. No. 337-TA-605 Final]). In a 1989 proceeding related to erasable programmable read-only memories (EPROMs), the ITC announced a nine-factor balancing test to determine whether it is appropriate to include downstream products in an exclusion order following a finding of patent infringement (Certain Erasable Programmable Read-Only Memories, Components Thereof, Products Containing Such Memories, and Processes for Making Such Memories at 124–25, Inv. No. 337-TA-276, USITC Pub. 2196 (May 1, 1989) [hereinafter *EPROMs*], *aff'd sub nom.* Hyundai Elecs.

Indus. Co. v. Int'l Trade Comm'n, 899 F.2d 1204 (Fed. Cir. 1990)).[7] However, in its 2008 decision in *Kyocera Wireless Corp. v. International Trade Commission*, the Federal Circuit found that the ITC lacked the authority to exclude from importation the products of entities that the complainant did not name as respondents (545 F.3d 1340, 1356 (Fed. Cir. 2008)). It remains an open question whether the *EPROMs* factors are relevant to the ITC's decision of whether to exclude a downstream product that incorporates infringing inputs of a named respondent (Certain Semiconductor Chips and Products Containing Same at 371–72, Inv. No. 337-TA-753, USITC Pub. 4386 (Mar. 2, 2012) (initial determination) (conducting an *EPROMs* analysis after the *Kyocera* decision); Certain Liquid Crystal Display Modules, Products Containing Same, and Methods for Using the Same at 172–83, Inv. No. 337-TA-634, USITC Pub. 4187 (June 12, 2009) (initial determination) (conducting an *EPROMs* analysis after the *Kyocera* decision)).

Once the ITC has issued an exclusion order, the ITC's decision is submitted to the President, who may, within 60 days of receipt, veto it "for policy reasons" (19 U.S.C. § 1337(j)(2)). The respondent may continue to import the infringing product during the 60-day presidential review period, provided that the respondent posts a bond in an amount that the ITC deems sufficient to protect the complainant from further injury during that period (*Id.* § 1337(e)(1)).

Although the ITC does not have the authority to award damages for patent infringement, it may impose "a civil penalty for each day on which an importation of articles, or their sale, occurs in violation of the order of not more than the greater of $100,000 or twice the domestic value of the articles entered or sold on such day in violation of the order" against any person who violates an ITC order (*Id.* § 1337(f)(2)). Because each day is considered a separate violation, the failure to comply with an exclusion order could result in a significant financial penalty.

2. Can a Holder of FRAND-Committed SEPs Obtain an Exclusion Order?

As of January 2016, I am aware of only one exclusion order that the ITC has issued against an infringer of SEPs, and I am not aware of *any* exclusion orders that the ITC has enforced against an infringer of SEPs (Certain Electronic Devices, Including Wireless Communication Devices, Portable Music and Data Processing Devices, and Tablet Computers at 13, Inv. No. 337-TA-794, USITC Pub. 2824 (July 5, 2013) (final) [hereinafter USITC Inv. No. 337-TA-794]).

Limits on the availability of exclusion orders for SEPs have largely arisen from concerns that exclusion orders might facilitate patent holdup. For example, in January 2013, the Antitrust Division and the U.S. Patent and Trademark Office (USPTO)—despite having no authority over the ITC's decision to grant an exclusion order—submitted a joint policy statement expressing concern regarding the effects that exclusion orders against infringers of SEPs could have on "competitive conditions in the United States" and on U.S. consumers (U.S. Dep't of Justice & U.S. Patent & Trademark Office, 2010). The Antitrust

7. The nine factors of the *EPROMs* test are: (1) the value of the infringing articles compared with the value of the downstream products in which they are incorporated, (2) the identity of the manufacturer of the downstream product, (3) the incremental value to the complainant of the exclusion, (4) the incremental detriment to the respondents of the exclusion, (5) the burdens imposed on third parties resulting from the exclusion, (6) the availability of alternative downstream products not containing the infringing articles, (7) the likelihood that the downstream products actually contain the infringing articles, (8) the opportunity for evasion of an exclusion order not including downstream products, and (9) the enforceability of an order by the U.S. Bureau of Customs and Border Control (CBP) (*EPROMS* at 125).

Division and the USPTO said that an SEP holder might use the threat of an exclusion order "to pressure an implementer of a standard to accept more onerous licensing terms than the patent holder would be entitled to receive consistent with the F/RAND commitment" (*Id.* at 6). They opined that, in such circumstances, the issuance of an exclusion order "may harm competition and consumers by degrading one of the tools [that SSOs] employ to mitigate the threat of such opportunistic action" (*Id.*). The Antitrust Division and the USPTO suggested that, if the SEP holder is attempting to engage in patent holdup, the ITC "may conclude, after applying its public interest factors, that exclusion orders are inappropriate" (*Id.* at 10). They also suggested that, in some circumstances, the ITC may find it appropriate "to delay the effective date of an exclusion order for a limited period of time to provide parties the opportunity to conclude a F/RAND license" (*Id.*).

The Antitrust Division and the USPTO emphasized that one should not construe their policy statement to "say that consideration of the public interest factors set out in the statute would always counsel against the issuance of an exclusion order to address infringement of a F/RAND-encumbered standards-essential patent" (*Id.* at 7). They recognized that an exclusion order might be appropriate in some circumstances, for example, when "the putative licensee is unable or refuses to take a F/RAND license and is acting outside the scope of the patent holder's commitment to license on F/RAND terms" (*Id.*). The Antitrust Division and the USPTO recognized that the implementer's refusal to take a FRAND license could take the form of "a constructive refusal to negotiate, such as by insisting on terms clearly outside the bounds of what could reasonably be considered to be F/RAND terms in an attempt to evade the putative licensee's obligation to fairly compensate the patent holder" (*Id.*). The Antitrust Division and the USPTO also suggested that an exclusion order might be warranted "if a putative licensee is not subject to the jurisdiction of a court that could award damages" (*Id.*).

In July 2013, the ITC issued its first and only exclusion order against an infringer of SEPs (USITC Inv. No. 337-TA-794, at 13). During the ITC's investigation, Apple—the respondent—and other public commentators had argued that an exclusion order against Apple's infringing products would facilitate patent holdup (*Id.* at 113). However, the ITC found that Apple had presented no empirical evidence that supported the allegation that patent holdup was actually harming consumers or innovation (*Id.* at 113, 113 n.23). The ITC found that, "[a]bsent empirical evidence of actual harm to consumers or innovation," concerns of patent holdup were "policy arguments that the risk of hold-up occurring [was] sufficiently great to warrant denying an exclusion order" (*Id.* at 113 n.23). The ITC emphasized that it "is not a policymaking body and [was] not empowered to make that [policy] decision" (*Id.*). Instead, the ITC found that it had the jurisdiction to evaluate only the potential adverse effects that an exclusion order against Apple might have on the four public interest factors listed in section 337, and whether those adverse effects outweighed the benefits of an exclusion order (*Id.* at 114). The ITC concluded that the exclusion order would not be "unduly adverse" to the public interest factors and issued a limited exclusion order against Apple, prohibiting the sale of certain Apple products in the United States. The ITC noted that the parties could "raise these arguments [of patent holdup] to the President during the 60-day review period," and that he could "weigh the relative risks of hold-up and reverse hold-up" in his decision whether to veto the ITC's exclusion order (*Id.* at 13 n.23).

In August 2013, President Obama, acting through the U.S. Trade Representative Michael Froman, vetoed the exclusion order that the ITC had issued against Apple on the grounds that the exclusion order would not serve the public interest (Letter from Michael B.G.

Froman, Exec. Office of the President, to the Honorable Irving A. Williamson, Chairman, U.S. Int'l Trade Comm'n (Aug. 3, 2013), https://ustr.gov/sites/default/files/08032013%20Letter_1.PDF). Ambassador Froman—noting that "[l]icensing SEPs on FRAND terms is an important element of the Administration's policy of promoting innovation and economic progress"—explained that "the President is required to engage in a policy evaluation" of the ITC decision and that the "President may disapprove an order on policy grounds" (*Id.* at 1, 3). Ambassador Froman approvingly recited the Antitrust Division's and the USPTO's concerns about patent holdup and reasoned that, in that specific case, the exclusion order would allow patent holdup to affect adversely the U.S. economy's competitive conditions and consumers (*Id.* at 1–3). He thus disapproved the ITC's order. However, Ambassador Froman's disapproval did not imply that exclusion orders should *never* be available to SEP holders (*Id.* at 2–3). Ambassador Froman suggested that, in future cases, the ITC should decide on a case-by-case basis whether an exclusion order against an SEP-infringing product would contravene the public interest (*Id.* at 2). Ambassador Froman urged the ITC (1) to "examine thoroughly and carefully on its own initiative the public interest issues presented both at the outset of its proceeding and when determining whether a particular remedy is in the public interest" and (2) to "seek proactively to have the parties develop a comprehensive factual record . . . including information on . . . the presence or absence of patent hold-up or reverse hold-up" (*Id.* at 3). Ambassador Froman clarified that he would look for those elements when reviewing the ITC's future decisions.[8]

Following President Obama's veto in 2013, the ITC's initial determinations whether to issue an exclusion order against infringers of SEPs have examined actual evidence of holdup and reverse holdup (Certain 3G Mobile Handsets and Components Thereof at 42–67, Inv. No. 377-TA-613, USITC Pub. 4145 (initial determination on remand) (Apr. 27, 2015)). For example, in April 2015, Administrative Law Judge Theodore Essex examined evidence of patent holdup in his initial determination on remand for *Certain 3G Mobile Handsets and Components Thereof* (*Id.* at 30). In that case, InterDigital sought an exclusion order against Nokia's and Microsoft Mobile's products that allegedly infringed InterDigital's SEPs. Judge Essex emphasized that an infringer that seeks to avoid an exclusion order bears the burden of providing evidence of patent holdup (*Id.* at 43–44 (citing *Ericsson*, 773 F.3d at 1234)). He found, however, that Nokia and Microsoft Mobile "fail[ed] to carry that burden" (*Id.* at 44). Judge Essex noted that, "[w]hile many professors and several government agencies have noted that it would be possible for a company with a SEP to be in a position to engage in hold-up, there was no evidence presented in this hearing that [InterDigital] had done so" (*Id.* at 30). He added that "[r]espondents even seem to surrender this point in their brief, by arguing that if [InterDigital] were to be granted an exclusion order, they could engage in hold-up after the case" (*Id.* at 31). Judge Essex consequently concluded that there was no evidence that InterDigital had attempted to engage in patent holdup (*Id.* at 48). Ultimately, however, the ITC did not issue an exclusion order, because the full Commission found that Nokia and Microsoft Mobile did not infringe the asserted claims of InterDigital's SEPs, and hence there was no violation of section 337 (Certain 3G Mobile Handsets and Components Thereof at 44, 46, 50, Inv. No. 377-TA-613 (final) (Sept. 21, 2015)). In sum, although recent legal developments have made it more difficult for SEP holders to obtain an exclusion order, Judge Essex's initial determination

8. Ambassador Froman's instructions comport with the Federal Circuit's requirement to support allegations about patent holdup or royalty stacking with empirical data (*Commonwealth Sci. & Indus. Research Org. v. Cisco Sys., Inc.*, No. 2015-1066, 2015 WL 7783669, at *11 (Fed. Cir. Dec. 3, 2015); *Ericsson, Inc. v. D-Link Sys., Inc.*, 773 F.3d 1201, 1233–34 (Fed. Cir. 2014)).

in *Certain 3G Mobile Handsets and Components Thereof* indicates that such a remedy is still available against infringers of SEPs.

D. Injunctions, Exclusion Orders, and Antitrust Law

An important question concerning the SEP holder's right to seek an injunction or an exclusion order is whether such a request could expose the SEP holder to liability under U.S. antitrust law. Despite challenges by the Antitrust Division and the FTC, as of January 2016, no court has found an SEP holder's request for an injunction or an exclusion order to be anticompetitive. To the contrary, at least one court has found that the *Noerr-Pennington* doctrine—which immunizes from antitrust liability someone who exercises his First Amendment right to petition the government for a redress of grievances (United Mine Workers of Am. v. Pennington, 381 U.S. 657, 670 (1965); Eastern R.R. Presidents Conference v. Noerr Motor Freight, Inc., 365 U.S. 127, 136 (1961))—would bar an antitrust claim against an SEP holder's request for an injunction or an exclusion order. Nevertheless, it remains an open question whether an SEP holder's request for an injunction or an exclusion order could constitute a standalone violation of section 5 of the FTC Act.

1. Section 2 of the Sherman Act

Section 2 of the Sherman Act prohibits acts that "monopolize, or attempt to monopolize, or . . . conspire . . . to monopolize any part of . . . trade or commerce" (15 U.S.C. § 2). For a monopolization claim to succeed, the plaintiff must prove that the defendant maintained or obtained market power through anticompetitive acts (United States v. Grinnell Corp., 384 U.S. 563, 570–71 (1966)). For an attempted monopolization claim to succeed, the plaintiff must prove that the defendant "has engaged in anticompetitive conduct with . . . a specific intent to monopolize and . . . a dangerous probability of success of achieving monopoly power" (Spectrum Sports, Inc. v. McQuillan, 506 U.S. 447, 456 (1993)).

Several plaintiffs have challenged SEP holders' conduct under the section 2 of the Sherman Act (Broadcom Corp. v. Qualcomm Inc., 501 F.3d 297, 307 (3d Cir. 2007); Apple Inc. v. Samsung Elecs., Ltd., No. 11-cv-01846, 2011 WL 4948567, at *3 (N.D. Cal. Oct. 18, 2011); Research in Motion Ltd. v. Motorola, Inc., 644 F. Supp. 2d 788, 791 (N.D. Tex. 2008); Complaint, ¶ 74, at 21, ASUS Comput. Int'l v. InterDigital, Inc., No. 5:15-cv-01716 (N.D. Cal. Apr. 15, 2015)). For example, in *Broadcom Corp. v. Qualcomm Inc.*, the plaintiff alleged that Qualcomm had monopolized the market for cellular telephone technology and components by, among other things, intentionally deceiving a private SSO (501 F.3d at 303). More specifically, Broadcom alleged that "Qualcomm induced the ETSI and other [SSOs] . . . to include its proprietary technology in the UMTS standard by falsely agreeing to abide by the [SSO's] . . . policies on IPRs, but then breached those agreements by licensing its technology on non-FRAND terms" (*Id.* at 304). The U.S. Court of Appeals for the Third Circuit found that the SEP holder's allegedly deceptive behavior during the standardization process was anticompetitive conduct actionable under the provisions of section 2 of the Sherman Act (*Id.* at 314). The court reasoned that "[d]eception in a consensus-driven private standard-setting environment harms the competitive process by obscuring the costs of including proprietary technology in a standard and increasing the likelihood that patent rights will confer monopoly power on the patent holder" (*Id.*). It consequently held that

> (1) in a consensus-oriented private standard-setting environment, (2) a patent holder's intentionally false promise to license essential proprietary technology on FRAND terms,

> (3) coupled with an [SSO's] . . . reliance on that promise when including the technology in a standard, and (4) the patent holder's subsequent breach of that promise, is actionable anticompetitive conduct (*Id.*).

In *Rambus Inc. v. FTC*, the U.S. Court of Appeals for the District of Columbia clarified that, for deceptive behavior to be anticompetitive, the plaintiff needs to prove that the relevant SSO would *not* have chosen to adopt the SEP holder's patented technology into its standard but for the SEP holder's deceptive behavior (522 F.3d 456, 467–68 (D.C. Cir. 2008); *id.* at 464 ("Deceptive conduct—like any other kind—must have an anticompetitive effect in order to form the basis of a monopolization claim.")). Showing merely that the SEP holder behaved deceptively during the standardization process is not sufficient to prove an antitrust violation.

In the years after *Broadcom*, plaintiffs used allegation of deceptive behavior to challenge the SEP holder's request for an injunction or exclusion order under the provisions of the Sherman Act. For example, after Motorola filed a request with the ITC for an exclusion order against Apple's infringing products, Apple filed a complaint in the U.S. District Court for the Western District of Wisconsin alleging, among other things, that Motorola had engaged in a "pattern of unfair, deceptive, and anticompetitive conduct" in violation of section 2 of the Sherman Act (Apple, Inc. v. Motorola Mobility, Inc., 886 F. Supp. 2d 1061, 1066 (W.D. Wis. 2012)). Judge Barbara Crabb rejected Apple's allegation, reasoning that the *Noerr-Pennington* doctrine, which provides immunity from antitrust claims that are filed in response to nonfrivolous lawsuits, barred Apple from challenging Motorola's request for an exclusion order as anticompetitive (*Id.* at 1076). Apple contended that *Noerr-Pennington* immunity did not apply to its claims, because its antitrust allegations did not focus on Motorola's request for an exclusion order, but instead on Motorola's deceptive behavior during the standardization process (*Id.*). However, Judge Crabb did not find Apple's argument persuasive. She emphasized that Apple contended that its antitrust claim arose when Motorola offered to license its SEPs on allegedly exorbitant license terms and Apple failed to present any evidence that Motorola's offer resulted in an antitrust injury. Judge Crabb found that Apple's only alleged injury "was the attorney fees and costs that it has incurred responding to the patent litigation initiated by Motorola" (*Id.*). Judge Crabb consequently found that Apple's antitrust claim was "necessarily based" on Motorola's attempt to enforce its patents at the ITC (*Id.*). Judge Crabb concluded that, because the "enforcement of its patents is privileged conduct protected by the First Amendment, the *Noerr-Pennington* doctrine applies" (*Id.*). It consequently dismissed Apple's antitrust claim.

In 2014, the Antitrust Division scrutinized an SEP holder's use of an exclusion order in a formal investigation that it initiated against Samsung Electronics (Press Release, U.S. Dep't of Justice, Statement of the Department of Justice Antitrust Division on Its Decision to Close Its Investigation of Samsung's Use of Its Standards-Essential Patents (Feb. 7, 2014), http://www.justice.gov/atr/public/press_releases/2014/303547.pdf [hereinafter DOJ Closes Its Samsung Investigation]). The Antitrust Division was concerned that Samsung would use the threat of an exclusion order to hold up other implementers (*Id.* at 1). However, the Antitrust Division decided to close the investigation against Samsung after it became clear that Samsung could not enforce the obtained exclusion order (*Id.*). As I explained in Part C, President Obama vetoed the ITC's decision on the grounds that the exclusion order would disserve the public interest (Letter from Michael B.G. Froman, Exec. Office of the President). Following the veto of the exclusion order, the Antitrust

Division found that “no further action [was] required” with respect to its investigation (DOJ Closes Its Samsung Investigation, at 1).

Unfortunately, the Antitrust Division’s notice terminating its investigation of Samsung’s conduct did not articulate a theory of harm under antitrust law. The Antitrust Division did not clarify whether it would challenge Samsung’s behavior under the Sherman Act or under a different act. The Antitrust Division stated merely that the SEP holder could use the threat of an exclusion order to “exploit [its] market power obtained through the standards-setting process” (*Id.*), without clarifying how that conduct would violate U.S. antitrust law. It is questionable, however, whether the Antitrust Division’s action against Samsung would have been successful if challenged in court. The only appropriate antitrust tool that the Antitrust Division might have had in its arsenal to challenge Samsung’s behavior would have been section 2 of the Sherman Act. However, one could question whether the *Noerr-Pennington* doctrine would bar the Antitrust Division’s antitrust action. In addition, even assuming that the *Noerr-Pennington* doctrine did not apply, it is unclear whether Samsung’s behavior would fall under the domain of section 2. It is well established that U.S. antitrust law does not prohibit the exploitation of monopoly power. The Supreme Court has emphasized that the “charging of monopoly prices, is not only not unlawful; it is an important element of the free-market system” (Verizon Commc’ns Inc. v. Law Offices of Curtis V. Trinko, LLP, 540 U.S. 398, 407 (2004)). Thus, merely showing that Samsung sought to extract exorbitant royalties would be insufficient to prove a violation of the Sherman Act. One can thus conclude that, unless Samsung’s request for an exclusion order enabled the company to obtain or maintain market power—or unless there was a reasonable probability that Samsung could achieve such an effect—it is implausible that the Antitrust Division could have successfully challenged Samsung’s actions under section 2 of the Sherman Act.

Despite the investigation of Samsung’s conduct, recent statements of the Antitrust Division suggest that the Division has taken a step back in its intent to challenge the SEP holder’s conduct through the antitrust provisions. In a speech in February 2013, Deputy Assistant Attorney General Renata Hesse said that the Antitrust Division “has . . . been focused on the role that Section 2 of the Sherman Act might play in protecting competition in high-technology industries from certain exclusionary practices involving patent licensing” (Renata B. Hesse, Deputy Assistant Attorney Gen., Antitrust Div., U.S. Dep’t of Justice, Speech at the Global Competition Review’s 2nd Annual Antitrust Law Leaders Forum 15 (Feb. 8, 2013), http://www.justice.gov/atr/public/speeches/292573.pdf). However, in a speech given in September 2015, Assistant Attorney General William Baer said that “the ability of F/RAND-encumbered patent holders to get an injunction in U.S. federal courts has been appropriately limited” (Bill Baer, Assistant Attorney Gen., Antitrust Div., U.S. Dep’t of Justice, Remarks as Prepared for Delivery at the 19th Annual International Bar Association Competition Conference, Reflections on the Role of Competition Agencies When Patents Become Essential 5 (Sept. 11, 2015), http://www.justice.gov/opa/file/782356/download), which suggests that the Antitrust Division might find it unnecessary to address SEP holders’ requests for injunctions through antitrust law.

2. Section 5 of the FTC Act

A separate question is whether the SEP holder’s request for an injunction might violate section 5 of the FTC Act (15 U.S.C. § 45). Section 5 gives the FTC authority to prohibit “unfair methods of competition” and “unfair or deceptive acts or practices” (*Id.*). The FTC typically applies section 5 to address firm conduct that section 2 of the Sherman Act prohibits (Kovacic & Winerman, 2010). However, the Supreme Court held in *FTC v. Sperry & Hutchison Company* that section 5 applies to acts even "beyond simply those enshrined in the letter or encompassed in the spirit of the antitrust laws" (405 U.S. 233, 244 (1972)). Put differently,

> Section 5's ban on unfair methods . . . encompasses not only those acts and practices that violate the Sherman or Clayton Act but also those that contravene the spirit of the antitrust laws and those that, if allowed to mature or complete, could violate the Sherman or Clayton Act (Federal Trade Comm'n, Statement of Enforcement Principles Regarding "Unfair Methods of Competition" Under Section 5 of the FTC Act (Aug. 13, 2015), https://www.ftc.gov/system/files/documents/public_statements/735201/150813section5enforcement.pdf [hereinafter FTC Statement of Enforcement Principles under Section 5 of the FTC Act]).

Therefore, a conduct that does not fall under the prohibition of the Sherman Act might still constitute a standalone violation of the section 5 of the FTC Act. It is nonetheless worth nothing that the FTC Act provides no private right of action (*The Antitrust Laws*, FTC, https://www.ftc.gov/tips-advice/competition-guidance/guide-antitrust-laws/antitrust-laws). Only the FTC can initiate an investigation of conduct that allegedly violates section 5 of the FTC Act.

The FTC has analyzed an SEP holder's request for an injunction as a standalone violation of section 5 on two occasions. First, in 2013, the FTC addressed the issue when it reviewed the acquisition of SPX Service Solutions by Robert Bosch GmbH (Decision and Order, Robert Bosch GmbH, No. C-4377, at 1 (F.T.C. Apr. 23, 2013) [hereinafter Decision and Order in Robert Bosch]). The FTC alleged that, by requesting an injunction against a willing licensee, SPX (the SEP holder) engaged in unfair acts of competition in violation of section 5. The FTC reasoned that the threat of an injunction "has the potential to cause substantial harm to U.S. competition, consumers and innovation" (Statement of the Federal Trade Comm's, Robert Bosch GmbH, No. C-4377, at 1-2 (F.T.C. Apr. 23, 2013)). The Decision and Order, through which the FTC approved the merger between the two companies, required Bosch to make a binding commitment to license SPX's SEPs on FRAND terms (Decision and Order in Robert Bosch, § IV.D). The order also prohibited Bosch from seeking an injunction for any alleged infringement of SPX's SEPs (*Id.* § IV.E). The order allowed Bosch to seek an injunction against an implementer only if (1) a court determined that the implementer used the SEP for a purpose other than complying with the standard, (2) the implementer refused in writing to accept the SEP holder's offer of a license on FRAND terms, or (3) the implementer refused to license the SEPs for a court-determined FRAND royalty (*Id.*; Letter of Assurance, Robert Bosch GmbH, No. C-4377, app. E at 1 (F.T.C. Apr. 23, 2013)).

Second, the FTC scrutinized the SEP holder's request for an injunction under section 5 in its 2013 investigation of Motorola Mobility (Decision and Order, Motorola Mobility, L.L.C., No. 121-0120 (F.T.C. July 24, 2013) [hereinafter FTC Decision and Order in *Motorola Mobility*]). The FTC alleged that Motorola Mobility, following its acquisition by Google, engaged in "unfair methods of competition and unfair acts or practices" when it sought injunctions against allegedly willing licensees of its SEPs for smartphones and tablet computers (Complaint, Motorola Mobility, L.L.C., No. 121-0120, at 1 (F.T.C. Jan. 3, 2013)). The FTC charged Motorola Mobility with violating section 5 by engaging in unfair practices that harmed competition in the market for electronic devices and that were "likely to cause substantial injury to consumers" (Analysis of Proposed Consent Order to

Aid Public Comment, Motorola Mobility, L.L.C., No. 121-0120, at 6 (internal citations omitted) ("[C]onsumers will likely pay higher prices because many consumer electronics manufacturers will pass on some portion of unreasonable or discriminatory royalties they agree to pay to avoid an injunction or exclusion order.")). The FTC claimed that Motorola Mobility's conduct would reduce incentives for the development of standard-compliant products, potentially exclude important consumer products, and allow SEP holders to realize higher royalty payments—the cost of which the FTC believed that licensees would pass on to consumers (*Id.*). As in *Bosch*, the FTC settled its *Motorola Mobility* investigation with a consent agreement requiring Motorola to cease and desist from seeking injunctions against alleged infringers. The FTC's consent agreement prohibits Motorola Mobility (and its owner, Google) from "directly or indirectly making any future claims for Covered Injunctive Relief based on alleged infringement" unless a potential licensee (1) refuses a FRAND offer either in writing or in sworn testimony, (2) refuses court-ordered or binding arbitration-determined FRAND terms, or (3) fails to communicate in writing its acceptance to an SEP holder (FTC Decision and Order in *Motorola Mobility*, §§ II.B, II.E). The consent agreement also dictates that "challenging the validity, value, [i]nfringement or [e]ssentiality of an alleged infringing [SEP]" should not be considered evidence of the implementer's refusal of a FRAND offer (*Id.* § II.E). However, FTC Commissioner Maureen Ohlhausen criticized the FTC's application of section 5 to a patent holder's request for injunctive relief, a position she also expressed in *Bosch* (Dissenting Statement of Commissioner Maureen K. Ohlhausen, Motorola Mobility, L.L.C., No. 121-0120 (F.T.C. Jan. 3, 2013) [hereinafter Dissenting Statement of Commissioner Maureen K. Ohlhausen], http://www.ftc.gov/sites/default/files/documents/public_statements/statement-commissioner-maureen-ohlhausen/130103googlemotorolaohlhausenstmt.pdf; Statement of Commissioner Maureen K. Ohlhausen, Robert Bosch GmbH, No. C-4377 (F.T.C. Nov. 21, 2012), http://www.ftc.gov/sites/default/files/documents/cases/2012/11/121126boschohlhausenstatement.pdf). She reasoned that the *Noerr-Pennington* doctrine (which rests on the petition clause of the First Amendment) "precludes Section 5 liability for conduct grounded in legitimate pursuit of an injunction or any threats incidental to it" (Dissenting Statement of Commissioner Maureen K. Ohlhausen, at 1).

The FTC's investigations in *Bosch* and *Motorola Mobility* demonstrate the FTC's willingness to initiate standalone section 5 proceedings to prevent an SEP holder from seeking an injunction against an alleged infringer of its SEPs. However, because the FTC settled its claims against Bosch and Motorola Mobility, its consent agreements serve neither as an admission of liability by the parties nor as legal authority supporting the conclusion that an SEP holder that seeks an injunction would face liability under section 5. It is telling that the FTC emphasized in *Motorola Mobility* that section 5 can compensate for the fact that courts have found that section 2 of the Sherman Act applies only in cases of bad faith or deceptive behavior during the standardization process (Analysis of Proposed Consent Order to Aid Public Comment, Motorola Mobility, L.L.C., No. 121-0120 (F.T.C.), at 4, https://www.ftc.gov/sites/default/files/documents/cases/2013/01/130103googlemotorolaanalysis.pdf). The FTC said that, by pursuing actions under section 5, it "can reach opportunistic conduct that takes place *after* a standard is adopted that tends to harm consumers and undermine the standard-setting process" (*Id.* (emphasis added)). That statement suggests that, in the absence of deceptive behavior during the standard-setting process, the SEP holder's request for an injunction might fall outside the domain of the Sherman Act.

In August 2015, the FTC issued guidelines regarding its enforcement of section 5 of the FTC Act (FTC Statement of Enforcement Principles Under Section 5 of the FTC Act). The statement reiterated that the FTC brings actions under section 5 of the FTC Act against conduct that falls outside the scope of the Sherman Act (*Id.*). Specifically, the statement outlined three general principles that the FTC will follow when considering allegations of opportunistic conduct under section 5:

> In deciding whether to challenge an act or practice as an unfair method of competition in violation of Section 5 on a standalone basis, the Commission adheres to the following principles:
>
> - the Commission will be guided by the public policy underlying the antitrust laws, namely, the promotion of consumer welfare;
> - the act or practice will be evaluated under a framework similar to the rule of reason, that is, an act or practice challenged by the Commission must cause, or be likely to cause, harm to competition or the competitive process, taking into account any associated cognizable efficiencies and business justifications; and
> - the Commission is less likely to challenge an act or practice as an unfair method of competition on a standalone basis if enforcement of the Sherman or Clayton Act is sufficient to address the competitive harm arising from the act or practice (*Id.*).

Unfortunately, those principles provide little guidance regarding the conditions under which an SEP holder's request for an injunction or an exclusion order could constitute a standalone violation of section 5 of the FTC Act. Thus, the exact scope that section 5 of the FTC Act has in addressing the SEP holder's conduct remains unclear.

E. Conclusion

U.S. courts have confirmed that a typical FRAND commitment does not waive the SEP holder's statutory right to request an injunction or an exclusion order against an infringer of its SEPs. Even after committing to license its SEPs on FRAND terms, an SEP holder has the right to request an injunction or an exclusion order against an infringer. An SEP holder's request for such a remedy would constitute a breach of a FRAND contract only in limited circumstances. Nonetheless, the SEP holder's obtainment of an injunction or an exclusion order is rare. As of January 2016, no court has granted an SEP holder's request for an injunction, and the ITC has issued only one exclusion order against an infringer of SEPs, which President Obama ultimately vetoed.

It remains unclear whether an SEP holder's request for an injunction or an exclusion order could trigger liability under U.S. antitrust law. Statements from the Antitrust Division and the FTC suggest that an SEP holder's request for an injunction might constitute an anticompetitive act. However, as of January 2016, no court has found an SEP holder's request for an injunction or an exclusion order in violation of section 2 of the Sherman Act. The FTC conducted two investigations in which it challenged the SEP holder's request for an injunction as a "standalone" violation of section 5 of the FTC Act, but each investigation culminated in a consent order. Although a consent order reflects the policy and interpretative positions of the FTC, it does not have the precedential value as a litigated case. Therefore, it remains undetermined whether and under what conditions seeking an injunction or an exclusion order could violate section 5 of the FTC Act.