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The Rule of Reason: From Balancing to Burden Shifting

*By Daniel C. Fundakowski**

Introduction

Though antitrust lawyers tend to associate the Sherman Act's Rule of Reason analysis with balancing procompetitive benefits against anticompetitive effects, the reality is that over 95% of Rule of Reason cases are decided without any such balancing test. In surveying the nearly 300 Rule of Reason cases decided by federal courts in the past 15 years, a clear pattern emerges—Rule of Reason cases are often decided by following a burden shifting framework, with less than 5% conducting any type of balancing. This Article explores the phenomenon and includes an illuminating question-and-answer section by Thomas (Tim) Greaney, a former DOJ Antitrust Division Assistant Chief and antitrust professor at Saint Louis University School of Law.

The Sherman Act

Named after Senator John Sherman (R-OH), the Sherman Antitrust Act was passed in 1890 and prohibits agreements that adversely affect consumers. The Sherman Act is comprised of two key provisions—Sections 1 and 2. Section 1 prohibits contracts, combinations, and conspiracies that “unreasonably” restrain trade. Section 2 prohibits monopolization, attempted monopolization, and conspiracies to monopolize. This Article primarily pertains to Section 1. Under Section 1, in determining whether an agreement unreasonably restrains competition, courts generally apply one of two analytical standards (depending on the nature of the agreement) known as per se and Rule of Reason.¹

The per se rule is generally reserved for the narrow range of conduct that almost always raises prices for consumers and has little or no redeeming procompetitive value (such as price fixing or bid rigging). Under the per se rule, such predictably pernicious restraints are deemed unlawful without any inquiry into asserted justifications or alleged reasonableness. The per se rule, however, is one of limited applicability. The Sherman Act presumptive standard is known as the

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Rule of Reason and it involves a more empirically rigorous inquiry into whether an agreement unreasonably restrains competition. Announced in *Standard Oil Co. v. United States* and later refined by *Board of Trade of City of Chicago v. United States*, the Rule of Reason standard requires that courts identify and balance the procompetitive benefits and anticompetitive effects of an opposed restraint to determine which predominate. 221 U.S. 1 (1911); 246 U.S. 231 (1918).

The Sherman Act Rule of Reason Analysis

The Rule of Reason inquiry into an alleged restraint of trade employs a burden shifting framework that involves three steps and a final balancing test. First, the plaintiff has the initial burden of demonstrating that the restraint produces, or will produce, significant anticompetitive effects within the relevant geographic and product markets. If the plaintiff is able to demonstrate anticompetitive effects, the burden then shifts to the defendant to come forward with a legitimate procompetitive justification for the restraint. If the defendant carries this burden, the burden returns to the plaintiff to demonstrate that the restraint is not reasonably necessary to achieve the restraint's objectives, or that those objectives can be achieved in a substantially less restrictive manner (circuits vary with regard to this third prong). The plaintiff will prevail upon showing that there is a less restrictive alternative or that the restraint is not reasonably necessary. If the plaintiff cannot make this showing, the court then reaches the point of balancing the procompetitive and anticompetitive effects of the restraint to determine which predominate. Predomination of anticompetitive effects will result in invalidation of the restraint, whereas predomination of procompetitive effects will result in upholding the restraint. Although this is the theoretical methodology, the reality is that courts very rarely reach the balancing exercise.

The Reality of the Rule of Reason Analysis

As discussed above, there are three burden shifts preceding the ultimate balancing exercise where courts can ably decide cases without having to balance anything: (1) by concluding that the plaintiff failed to demonstrate a significant anticompetitive effect;² (2) by concluding that the defendant failed to demonstrate a legitimate procompetitive justification for the restraint;³ and (3) by concluding that the plaintiff failed to show that the restraint is not reasonably necessary or that there are less restrictive alternatives.⁴ The vast majority—almost 90%—of the approximately 300 Rule of Reason cases decided in the past 15 years found that the plaintiff failed to demonstrate a significant anticompetitive effect. Based on these numbers, the logical inquiry then becomes, why are courts not reaching the balancing exercise?

Why Are Courts Not Balancing?

A likely explanation for why courts are not reaching the Rule of Reason balancing test is because it is a conceptually onerous task that many courts are unfamiliar with—perhaps because Rule of Reason cases are not often fully litigated due to the evidentiary difficulty of proving that a defendant has sufficient market power to adversely affect competition in a relevant geographic and product market. This evidentiary hurdle has increased with the advent of *Bell Atlantic Corp. v. Twombly*, where plaintiffs' claims—including the proffered market definition—must be "plausible." 550 U.S. 544 (2007).

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Moreover, practically speaking, it is more expedient for a court to condemn a restraint during one of the first three Rule of Reason burden shifts than reach the point of having to expend tremendous resources on trying to meaningfully balance efficiencies against effects—an exercise that is extremely awkward to apply and curiously lacking in meaningful guidance. For example, in *Board of Trade of City of Chicago v. United States*, the Court articulated several cumbersome factors that courts should consider in the Rule of Reason analysis

[T]he court must ordinarily consider the facts peculiar to the business to which the restraint is applied; its condition before and after the restraint was imposed; the nature of the restraint and its effect, actual or probable. The history of the restraint, the evil believed to exist, the reason for adopting the particular remedy, [and] the purpose or end sought to be attained, are all relevant facts.⁵

Regardless of the reason for the paucity of Rule of Reason jurisprudence, the fact is that few Rule of Reason cases are fully litigated and, as a result, courts have few opportunities to become comfortable with and delineate what the Rule of Reason balancing test really means.

Is the Lack of Balancing Necessarily Bad?

Though courts are infrequently reaching the Rule of Reason balancing test, there is perhaps a silver lining that renders this phenomenon not necessarily a bad thing for courts, litigants, and antitrust practitioners.

First, maintaining the court's focus. A burden shifting framework has a structure that helps keep the court's focus on the key issues and from being misled by histrionics. For example, a plaintiff that has failed to demonstrate significant anticompetitive effects cannot remedy the deficiency by throwing hands in the air and underscoring the defendant's failure to exonerate its conduct. This framework may often prevent clever tactics from misguiding the tribunal.

Second, predictability. Well-counseled clients will not only be aware of the importance of demonstrating a significant anticompetitive effect at the onset of the case (due to how many cases are decided at this stage), but will also be apprised of the analytical vagaries of Rule of Reason balancing and the attendant risks of waging everything on such a subjective test. Many clients would prefer not to gamble when the result can be so unpredictable.

Third, judicial economy. It is beyond cavil that a full-blown Rule of Reason analysis requires a court—and litigants—to sequester tremendous resources. The review of Rule of Reason cases conducted when preparing this Article shows that courts are often able to reach the correct result by shifting burdens between the parties. If the courts can reach the correct result while preserving valuable time for the court and the parties, then perhaps there is nothing wrong with courts—consciously or unconsciously—not reaching the balancing test.

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Question & Answer Session with Tim Greaney

While preparing this Article, Tim Greaney was invaluable in sharing his broad antitrust expertise. My questions and his responses follow.

Fundakowski: Many antitrust practitioners would have difficulty naming a case where the court actually balances procompetitive benefits against anticompetitive effects. Why are there so few Sherman Act Rule of Reason cases where courts reach this exercise?

Greaney: The conventional wisdom is that the dearth is a function of both litigants and judges. For plaintiffs, the Rule of Reason is an exacting standard where the defendant usually has the strong upper hand and the plaintiff is hoping the judge will summarily condemn the agreement under the per se or “quick look” Rule of Reason. If not, the full-blown Rule of Reason process is attenuated, risky, and generally expensive for plaintiffs to endure. This is especially true post-*Twombly* where plaintiffs’ claims are scrutinized on a plausibility standard and it is arguably more difficult to survive motions to dismiss.

Fundakowski: It is unclear why courts so rarely get to the balancing stage. Do you think judges are troubled by the complexities of the Rule of Reason balancing test to the point where they would use burden shifting as a means of avoiding the balancing test?

Greaney: It is difficult to say whether judges would consciously decide a case based on one test to avoid another, but the fact is that Rule of Reason guidance is sparse and most judges are not intimately familiar with it. The *Chicago Board of Trade* factors [articulated above] to be weighed in the Rule of Reason exercise are famously without guidance—depicted by Judge Easterbrook as a muddled test where “everything is relevant, nothing is dispositive.” Moreover, antitrust cases are not terribly common. Most federal district court judges might see one antitrust case every few years at most, and likely never preside over one that is fully litigated. It is difficult to become comfortable with a complex test comprised of complex factors when so infrequently handling cases where it may be applied. Accordingly, it would not be inaccurate to say that some judges may find the Rule of Reason balancing test intimidating, but perhaps the more likely explanation is a pragmatic one. Most judges are thoughtful and pragmatic and use the tools they have—burden shifting in this instance—to reach a just and expeditious result for the parties. They may be reluctant to countenance ambiguous evidence of anticompetitive effects when they anticipate a long trial on the merits and an amorphous balancing test.

Fundakowski: Does it surprise you that federal courts are reaching the Rule of Reason balancing test even less frequently in the past 15 years than in the 15 years before that?

Greaney: A primary reason for that fact may be the developments in economic analysis that have gained traction between those periods. Today, most judges have the opportunity to review more rigorous statistical models and simulations that tend to offer more sophisticated proxies for anticompetitive effects, among other things. Using this information, judges may find they are well-positioned to

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make sound decisions earlier in litigation, without having to preside over an entire trial and reach the balancing test.

Conclusion

There is significant variation between the theoretical structure of the Rule of Reason analysis and the analysis that courts frequently conduct. Though antitrust lawyers tend to associate the Rule of Reason analysis with balancing procompetitive benefits against anticompetitive effects, the reality is that over 95% of Rule of Reason cases are decided without any such balancing test. In surveying the nearly 300 Rule of Reason cases decided in the past 15 years, almost 90% have been decided based on the plaintiff failing to demonstrate that a restraint produces or will produce a significant anticompetitive effect with less than 5% conducting any type of balancing.⁶ These aggregate figures include cases decided without burden shifting or balancing—such as those where the court affirms a jury or bench verdict, a motion to dismiss, summary judgment, or finds the restraint to be reasonable or unreasonable. Though statistically staggering, a burden shifting approach offers a variety of benefits for courts and litigants that seem to justify—or at least defend—how courts often stop short of the Rule of Reason balancing test.

The Right Tool for the Job: Limiting the Use of Section 5 of the FTC Act for Patent Hold-Up Cases

Wesley G. Carson

The Right Tool for the Job: Limiting the Use of Section 5 of the FTC Act for Patent Hold-Up Cases

By Wesley G. Carson*

Introduction

In two recent cases, the Federal Trade Commission (“FTC”) purported to exercise its authority under Section 5 of the FTC Act (“Section 5”) to investigate and settle cases of alleged refusals to honor agreements to license essential patents on fair, reasonable, and nondiscriminatory (“FRAND”) terms. *In the Matter of Google Inc.*, Statement of the Federal Trade Commission, FTC File No. 121-0120 at 1 (January 3, 2013) represents a broad settlement with Google, specifically requiring Google to “withdraw its claims for injunctive relief on FRAND-encumbered [patents]...and to offer a [FRAND commitment] to any company that wants to license Google’s SEPs in the future.” Similarly, *In the Matter of Robert Bosch GmbH*, Docket No. C-4377 at 5 (Nov. 21, 2012) (complaint), the FTC attempted to curb SPX Service Solutions’⁷ breach of its commitment to offer licenses for its standard-essential patents pursuant to standard setting organization guidelines. In both cases, the FTC purported to act pursuant to its Section 5 authority under the broad grounds that the breaches would “undermine the standard-setting process” and “risk[] harming American consumers.” *Id.* at 3.⁸

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This Article analyzes the utility of using independent and ambiguously-defined Section 5 theories to pursue this behavior, and suggests that existing Sherman Act Section 2 precedent provides a more judicious and appropriate avenue for relief in a majority of problematic cases. In situations not addressable by Section 2 theories, policy-makers should intervene and issue reasoned and explicit guidance for entities to effectively shape their behavior.

Standard Setting Background

Many modern industries, particularly in the technology sector, make use of a process known as “standard-setting.” Standard setting involves agreement about how certain elements of a class of products will be created to promote interoperability for consumers.⁹ For example, cell phone companies typically agree on the format by which wireless data is transmitted and received to allow for the interoperability of phone equipment and cell phone towers across all users. These standards are typically set by organizations called “standard setting organizations” (“SSOs”) composed of companies within the relevant industry. Sometimes, these standards are subject to intellectual property rights held by a company in the industry. Patents necessary to a standard are known as “standard-essential patents” (“SEPs”). In these situations, the holder of an SEP is put in an elevated position when licensing those rights, as the standard setting process serves to essentially eliminate adequate substitutes for use of the property covered by the patent. *See Amer. Soc. Of Mech. Eng., Inc. v. Hydrolevel Corp.*, 456 U.S. 556, 559 (1982); U.S. Department of Justice and Federal Trade Commission, *Antitrust Enforcement and Intellectual Property Rights: Promoting Innovation and Competition* at 35-36 (April 2007). Given the often large investment that companies make to incorporate the standard, switching costs are extremely high. *See* Joseph Farrell, et al., *Standard Setting, Patents, and Hold-Up*, 74 Antitrust L.J. 603, 619-21 (2007). For this reason, SSOs typically require the holder of intellectual property rights for standards to commit to license the standard on “Fair, Reasonable, and Non-Discriminatory” (FRAND) or “Reasonable and Non-Discriminatory” (RAND) terms before the standard will be adopted. In most cases the definition of “FRAND” or “RAND” license terms are not provided up front, but negotiated after the fact.

Problems may occur in this process when the company holding a standard-essential patent promises to license a standard on FRAND terms, but such a license never materializes—either because of a lack of agreement between companies on what is “fair and reasonable” or a simple refusal by the patent-holding company to commit to its agreement. The entity holding the patent may subsequently attempt to obtain injunctions against any company arguably infringing absent this licensing agreement. These situations are referred to as “patent hold-ups,” and can undermine the benefits of the standard setting process by theoretically providing the single competitor holding an SEP a complete monopoly over the product requiring the standard.

Framework Exists Under Sherman Act Section 2 to Deal with Most FRAND Violations

In *Broadcom Corp. v. Qualcomm Inc.*, 501 F.3d 297 (3rd Cir. 2007), the Third Circuit considered antitrust claims by Broadcom, a wireless telephone company,

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against Qualcomm, another wireless company, on the grounds that Qualcomm went back on its word to offer its technology on fair and reasonable terms after that technology had been incorporated into a standard, and subsequently sued for injunctive relief for the use of the SEP. Although the district court dismissed the complaint, the Third Circuit reversed, finding that these FRAND commitments are intended as a “bulwark” against the accumulation of unlawful monopoly power in a standard setting environment. *Id.* at 305. Under *Broadcom*, upon a showing of market power, a FRAND commitment violation under Section 2 requires proof of anticompetitive conduct and effect: “(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 SDO’s [standards-determining organization’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.* at 314. *Broadcom* does not appear to be an outlier; indeed, other courts have explicitly recognized and applied the *Broadcom* standard. *See Apple, Inc. v. Samsung Electronics Co.*, 2012 WL 1672493, No. 11-CV-01846 at *7 (N.D. Cal. May 14, 2012); *Research In Motion Ltd. v. Motorola, Inc.*, 644 F. Supp. 2d 788, 796 (N.D. Tex. 2008).

a. Proof of Monopoly Power

At the outset, Section 2 violations require proof of monopoly power. In cases involving SEPs, such power will generally be assumed by the fact of ownership of an essential patent. *See Broadcom*, 501 F.3d at 315; *Apple*, 2012 WL 1672493 at *6 (upholding “allegations of market power conferred as a result of a patent [being] incorporated into a standard”); *Research in Motion*, 644 F. Supp. 2d at 793 (refusing to dismiss on grounds that defendant did not possess monopoly power because it owned an “essential patent”). This presumption may not hold true in cases where the patent covers an optional component of a particular standards. *See In the Matter of Negotiated Data Solutions LLC (“N-Data”)*, Dissenting Statement of Chairman Majoras, FTC File No. 0510094 at 2 (Jan. 23, 2008). In such cases, analysis of actual utilization of the optional technique would be appropriate for the calculation of market share.

b. Proof of Anticompetitive Conduct and Effect

After monopoly power is shown, the *Broadcom* four-element test for anticompetitive conduct and harm would adequately address the most problematic cases of patent hold-up in the FRAND and RAND contexts. Questions of whether the commitment took place in a private standard-setting environment and if a breach of FRAND commitments¹⁰ occurred are geared more towards the specific factual circumstances of individual cases. Thus, the remainder of this section focuses on the effect that requiring proof of an intentional false FRAND commitment and reliance on such a commitment would have on the availability of relief.

1. “Patent holder’s intentional false promise to license essential proprietary technology on FRAND terms”

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The requirement that plaintiffs show an “intentionally false promise” in Section 2 cases would not pose a complicated gating issue in a majority of cases. In instances where a single company agrees to license their patents on FRAND terms and then subsequently breaks that promise, plaintiffs must plead who made the FRAND commitment, when the FRAND commitment was agreed to, which patents the FRAND commitment covered, and that the FRAND commitment was false. *Compare Apple, Inc. v. Samsung Electronics Co.*, No. 11-cv-01846 at 6 (N.D. Cal. Oct. 10, 2011) (dismissing claims concerning false FRAND promises because plaintiff did not plead with specificity when and by whom the commitment was made, and which patents that declarations were made for) *with Apple, Inc. v. Samsung Electronics Co.*, 2012 WL 1672493, No. 11-CV-01846 at *7 (N.D. Cal. May 14, 2012) (finding amended allegations detailing when, by whom, and for which patents FRAND declarations were made sufficient at motion to dismiss stage). Courts have not yet enumerated what facts are necessary to prove an intentionally false FRAND promise at the summary judgment or trial stages. In other cases of antitrust deception, the law requires proof of fraud by clear and convincing—but allowedly circumstantial—evidence. *See Unitherm Food Sys., Inc. v. Swift-Eckrich, Inc.*, 375 F.3d 1341, 1360-62 (Fed. Cir. 2004) *rev’d on other grounds*, 546 U.S. 394, 126 S. Ct. 980, 163 L. Ed. 2d 974 (2006).

Further analysis is needed in circumstances where the company holding the key patents at issue purchased those patents from another company, and did not originally extend the promise to license on FRAND terms. In such a situation, the purchasing company could not provide an “intentionally false” promise to license the key patent, as they were not involved in the licensing negotiation. Consider *N-Data*, in which the FTC obtained a consent decree from a company for failure to honor FRAND commitments made by the original owner of standard-essential patents four years before the defendant company’s acquisition. *N-Data*, FTC File No. 0510094, Complaint at 4-5 (Sept. 23, 2008). In these situations, the purchasing company could not by definition make the false promise to license the SEP, as it did not own the patent at the time of the FRAND commitment.¹¹

In situations like *N-Data*, a few possibilities exist for dealing with the alleged anticompetitive conduct. One logical method for dealing with these instances of patent-transfer is the requirement that the transferring entity subsequently bind the purchasing entity to the FRAND commitments at play. Should this binding not occur, the selling entity arguably would be liable under the *Broadcom* test for anticompetitive conduct, as they are breaking their promise to ensure the essential propriety technology is licensed on FRAND terms. If this binding does occur, the purchasing company would be liable for breaking those FRAND commitments under breach of contract claims, and possible under a (slightly modified) *Broadcom* standard.

Another somewhat stronger solution borrows an essential principle from property law—that a property owner cannot transfer away a larger interest than it owns. Arguably, when an entity makes a FRAND commitment, it should encumber the patent in the same way that an easement encumbers a plot of land as it passes from owner to owner. *See generally* Herbert Hovenkamp, *Competition in Information Technologies: Standards-Essential Patents, Non-Practicing Entities and FRAND Bidding* (U. Iowa Legal Studies Research Paper No. 12-32, 2012). Thus, the deception element of *Broadcom* may be revived through

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the *purchase* of a patent known to be encumbered by FRAND obligations with the intention to not follow those obligations.

2. “[SSO’s] reliance on that promise when including the technology in a standard”

Reliance on a promise to include technology in a standard occurs when the “deceptive conduct induced relevant [SSOs] to incorporate a technology” into a standard that they “would not have considered absent a FRAND commitment.” *Broadcom*, 501 F.3d at 315. The *Broadcom* court implied that this element could turn on the existence of other technologies that would have been incorporated into the standard if the defendant corporation refused a FRAND commitment. *See id.* at 316 (discussing the district court’s assumption that the defendant’s patent was chosen to the “detriment of those patent-holders competing to have their patents incorporated into the standard”). It left open the possibility, however, that even if the technology in question is the “only candidate for inclusion in the standard,” parties could still make a showing that “foreclose[s] the possibility that [the patent’s] inclusion in the standard [is] inevitable.” *Id.*

Although this requirement removes some cases from prosecution, such a limitation is necessary to ensure that an actual anticompetitive effect has occurred as a result of deception in the standard setting process. As explained in *Rambus Inc. v. F.T.C.*, 522 F.3d 456,466-67 (D.C. Cir. 2008), deception cannot be said to have an “effect on competition,” or an effect generally, if the SSO would have “standardized the very same technologies” absent the deception.¹²

Unrestrained Expansion of Section 5 Power is Not Desirable

Although powers to address antitrust violations under Section 5 are generally co-extensive with existing antitrust laws, courts have found Section 5 to be broader than other antitrust laws in certain circumstances. Those circumstances are necessarily limited, however. As the Second Circuit postulated while striking down an expansion of Section 5 powers in *E.I. DuPont de Nemours & Co. v. FTC*, 729 F.2d 128, 139-40 (2d Cir. 1984), the use of Section 5 powers outside traditional contexts is only appropriate if there is “evidence of anticompetitive intent or purpose” or the “absence of an independent legitimate business reason” for conduct.¹³ Such a presumption of ill-intent is not present merely because a party is seeking an injunction on a patent—particularly if that company at no time promised to license the patent to competitors. If a promise not to seek an injunction is present, Section 2 and breach of contract claims exist to remedy the situations; if a promise is not present, the case for intent lessens. In addition, expansion of Section 5 beyond acceptable limits has previously been grounds for political backlash. *See* William E. Kovacic, *Congress and the Federal Trade Commission*, 57 Antitrust L.J. 869 (1989).

Given these concerns, the FTC should show restraint in its utilization of Section 5 power for cases of patent hold-up. When Section 2 can successfully deal with a majority of these cases, the benefit of Section 5 expansion for the remaining minority shrinks considerably. As Commissioner Ohlhausen noted in her *Bosch* dissent, the current expansion of Section 5 powers to mere refusals to honor FRAND commitments, without more, provides no “meaningful limiting

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principles” and is in essence advocating that the Commission should “polic[e] garden variety breach-of-contract and other business disputes between private parties.” This restraint should exist even in cases of patent transfer similar to *Google* and *Bosch*, as Section 5 should not merely be used in situations where proof of an already existing antitrust theory is difficult. It instead serves as a rare guard in truly unique cases of unanticipated consumer harm where traditional avenues are unavailable or impractical.

Conclusion

While at the margins, enforcement through Section 2 authority may reduce the quantity of patent hold-up cases that can be addressed under current antitrust law, it paves the way for a wider array of enforcement mechanisms. Although enforcement of Section 5 is available only to the FTC, Section 2 cases can be brought under FTC or DOJ authority. Further, Section 2 provides authority for private enforcement if breach of contract claims do not prove effective in company-to-company litigation. Finally, restricting the use of Section 5 would do nothing to stop legislation creating other obstacles to patent hold-up. Most likely, this legislation would be more effective in the patent law realm. For instance, the patent code could allow for standard-essential patents to provide mechanisms to recover damages, but not injunctive protection for companies utilizing the patent for the standard at issue.

There are a variety of options on the table to deal with patent hold-up. But extension of Section 5 powers should not be the first choice.

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- ¹ There is a third, intermediate standard known as the “quick look” (or “abbreviated”) Rule of Reason that is outside the scope of this Article. Courts tend to apply this standard to restraints that have both obvious anticompetitive effects and plausible significant procompetitive justifications.
- ² See, e.g., *Bhan v. NME Hosps., Inc.*, 929 F.2d 1404, 1413 (9th Cir. 1991) (“[Bhan] fails to meet his burden of showing that the hospital’s policy substantially restrains competition in a relevant market.”).
- ³ See, e.g., *In re Detroit Auto Dealers Ass’n*, 955 F.2d 457, 471-72 (6th Cir. 1992) (“[T]he Commission found that petitioners had shown ‘no valid procompetitive justifications.’”).
- ⁴ See, e.g., *Hairston v. Pacific 10 Conference*, 101 F.3d 1315, 1319 (9th Cir. 1996) (“The [plaintiffs’] burden of proof at the summary judgment stage of the proceedings was not high; all they had to do was present more than a ‘mere scintilla of evidence to support [their] case.’ This they failed to do.”) (internal citation omitted).
- ⁵ 246 U.S. 231, 238 (1918).
- ⁶ In the past 15 years (between 1/1/1998 and 1/1/2013) there have been six cases where the fact-finder has conducted the Rule of Reason balancing test: *Reifert v. South Cent. Wis. MLS Corp.*, 450 F.3d 312, 321 (7th Cir. 2006) (“The balance between pro- and anti-competitive effects weighs heavily in favor of Article 16.”); *Palladin Assocs., Inc. v. Mont. Power Co.*, 328 F.3d 1145, 1158 (9th Cir. 2003) (“In sum, any anticompetitive effects of MPC’s assignments were far outweighed by their procompetitive benefits.”); *United States v. VISA, U.S.A., Inc.*, 344 F.3d 229, 243 (2d Cir. 2003) (“In sum, the defendants have failed to show that the anticompetitive effects of their exclusionary rules are outweighed by procompetitive benefits.”); *Cnty. of Tuolumne v. Sonora Cmty. Hosp.*, 236 F.3d 1148, 1160 (9th Cir. 2001) (“Because plaintiffs have failed to meet their burden of advancing viable less restrictive alternatives, we reach the balancing stage.”); *Cal. Dental Ass’n v. F.T.C.*, 224 F.3d 942, 957 (9th Cir. 2000) (“In order to prevail under rule-of-reason analysis, the FTC must show that CDA’s restrictions engendered a net harm to competition in the California dental service market. After weighing the evidence . . . we conclude that the FTC has not met that burden, and that substantial evidence therefore does not support the Commission’s determination.”); *Eleven Line, Inc. v. North Tex. State Soccer Ass’n, Inc.*, 1998 WL 574893, at *5 (N.D. Tex. 1998) (“Plaintiff thus sufficiently stated a claim for an unreasonable restraint of trade under Section One of

the Sherman Act. The Jury's conclusion, based on the evidence, that defendants' conduct did amount to such an unreasonable restraint will not be set aside.").

Later purchased by Robert Bosch GmbH.

Indeed, the majority agrees that not "every breach of a FRAND licensing obligation will give rise to Section 5 concerns." *Id.*

Standards are also adopted to establish minimum quality criterion for classes of products. For a discussion of standards generally, see Gregory Tasse, *Standardization in Technology-Based Markets*, 29 Res. Pol'y 587, 589-90 (2000).

A breach of FRAND commitments would depend on proof that the terms offered by the defendant company are not fair, reasonable, and non-discriminatory.

It appears that similar transfer issues were in play in *Google* and, arguably, *Bosch*.

Although *Rambus* involved failure to disclose patents in the standard setting process, the need for causation argument is analogous.

For instance, Section 5 has traditionally been used as a tool to address offers for anticompetitive collusion that cannot be prosecuted under Section 1 of the Sherman Act because there was no acceptance. See, e.g., *Precision Moulding Co.*, 61 Fed. Reg. 32,824 (FTC June 25, 1996) (proposed order and aid to public comment).

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