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PATENTS V. ANTITRUST: PREEMPTING CONFLICT

MATTHEW G. SIPE[*]

The dissonance between patent law and antitrust law has persisted despite a century of attempts at harmonization. This Article suggests an elegant, novel solution: preemption doctrine. Recognizing the limits of and costs associated with antitrust law, the U.S. Supreme Court has already held that where an alternative regulatory authority exists—and overlapping application of antitrust regulation would lead to conflict—antitrust law may be implicitly preempted. But this doctrine remains almost entirely unexplored. This Article applies preemption doctrine precedent to the patent-antitrust context, analyzing where patent regulatory authority exists and where simultaneous antitrust regulation is likely to generate conflicting guidance and requirements. Under the Court's precedent, this combination of overlap and conflict should be enough to support preemption, at least within certain categories of patent cases. Moreover, this Article explores how the unique nature of patents and the interplay—and tension—that patent law alone has with antitrust law supports an even broader interpretation of existing preemption doctrine in this context.

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* J.D., *Yale Law School*; B.A., *University of Virginia*. For their insightful comments and feedback on this Article, special thanks go to Mark Lemley, Martin Adelman, Joshua Wright, Bruce Kobayashi, John Newman, Alvin Klevorick, Sheila Menz, Erica Bakies, David Louk, and Ryan Watzel.

"The conflict between the antitrust and patent laws arises in the methods they embrace that were designed to achieve reciprocal goals. While the antitrust laws proscribe unreasonable restraints of competition, the patent laws reward the inventor with a temporary monopoly that insulates him from competitive exploitation of his patented art."[1]

INTRODUCTION

The patent-antitrust paradox has generally defied resolution. Attempts to either "graft antitrust doctrines onto patent law" or vice versa have "spawned almost a century of consternation and conflict," and offered little in the way of clarity or progress.[2] This conflict has long inspired influential writing from a number of academics in its own

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1. SCM Corp. v. Xerox Corp., 645 F.2d 1195, 1203–04 (2d Cir. 1981).
2. Robin Feldman, *Patent and Antitrust: Differing Shades of Meaning*, 13 VA. J.L. & TECH., Spring 2008, at 1, 2–3.

right.[3] But the recent explosion of patent applications, grants, licenses, and infringement suits has made the dissonance between the two fields increasingly apparent—and redoubled efforts at harmonization.

Thus far, however, the discourse on patent law and antitrust law has largely overlooked a particularly elegant solution, informed by two relatively noncontroversial axioms. First: where two fields of law are in dire conflict, preemption dictates that one may retreat.[4] Second: antitrust law should generally be the solution of last resort to a given problem.[5] With these principles in mind, where patent law offers its own solutions to potentially anticompetitive patent schemes, preemption may eliminate the tension that would otherwise be created by allowing antitrust law to simultaneously—and discordantly—intervene.

In some ways, the preemption solution to the patent-antitrust puzzle is not novel. The aforementioned principles have, in fact, already been approved and used together by the U.S. Supreme Court in a different context. In *Credit Suisse Securities (USA) LLC v. Billing*,[6] the Court relied on those principles in holding that securities law can preempt antitrust law. And yet, the natural extension of this logic to *patent law* has received almost no attention.[7] This Article takes up the

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3. *See, e.g.*, LAURENCE I. WOOD, PATENTS AND ANTITRUST LAW xiv, 211 (1942) (discussing that courts must delineate between patent and antitrust conflicts on a case-by-case basis to determine when the "public good is [better] served by a given practice"); John H. Barton, *Patents and Antitrust: A Rethinking in Light of Patent Breadth and Sequential Innovation*, 65 ANTITRUST L.J. 449, 450–51, 465 (1997) (asserting that incentives for research and technological innovation must be considered when balancing antitrust and patent laws); Herbert Hovenkamp, *The Rule of Reason and the Scope of the Patent*, 52 SAN DIEGO L. REV. 515, 515–16, 553–54 (2015) (arguing that the "scope of the patent" metaphor is useful primarily in assessing conduct under patent law, not antitrust law); S. Chesterfield Oppenheim, *Patents and Antitrust: Peaceful Coexistence?*, 54 MICH. L. REV. 199, 200–03, 218 (1955) (concluding that "*patents and antitrust can lead a peaceful coexistence* . . . in fulfillment of the public interest"); George L. Priest, *Cartels and Patent License Arrangements*, 20 J.L. & ECON. 309, 309–10, 376–77 (1977) (proposing methods to better evaluate how certain patent license agreements affect antitrust principles).

4. The essential—though not exclusive—example, of course, being where state and federal law conflict. *See, e.g.*, U.S. CONST. art. VI, cl. 2 (establishing the supremacy of federal law over contrary state law); Jessica Bulman-Pozen & Heather K. Gerken, *Uncooperative Federalism*, 118 YALE L.J. 1256, 1303 (2009) (discussing how displacement of state law by federal law has "assumed an expansive breadth" in Supreme Court jurisprudence).

5. *See infra* Part I.

6. 551 U.S. 264 (2007).

7. The sole exception that this author found is Professors Kobayashi and Wright's article considering how *Credit Suisse* might be applied in one particular type

task of that extension, analyzing the merits of preemption as applied to the patent-antitrust context.

Part I of this Article describes the major criticisms and drawbacks of antitrust law and their recognition and incorporation into Supreme Court jurisprudence. Part I also explains how this antitrust skepticism crystallized into an antitrust-specific preemption test, as stated in *Credit Suisse*: where an alternative regulatory authority is exercising supervision, and simultaneously applying antitrust supervision would lead to conflict, antitrust law is preempted.

Parts II, III, and IV use this test as a framework to determine the types of cases in which patent law logically ought to preempt antitrust law. Specifically, Part II analyzes the sources of regulatory authority in the patent context—the Patent and Trademark Office, the International Trade Commission, and the Court of Appeals for the Federal Circuit—and their different spheres of authority and deference. Part III uses that analysis to create a hierarchy of potentially anticompetitive patent activities, categorizing them based on the degree to which they are already under supervision from patent authorities. Part IV then examines the potential for conflicting guidance and outcomes where antitrust supervision overlaps that patent supervision.

Part V moves beyond this framework, attempting to broaden the analysis underpinning the Supreme Court's antitrust-skeptical jurisprudence. It introduces additional arguments in favor of preemption based on the unique nature of patents and the interplay—and tension—that patent law alone has with antitrust law. It argues that because the Court's case law in this area has essentially elevated policy considerations into doctrinal ones, these additional arguments should be given significant weight moving forward.

I. ANTITRUST SKEPTICISM AND PREEMPTION

The profound criticisms leveled against antitrust law by academics should be deeply troubling to any jurist concerned with efficiency or fairness. The text of the antitrust statutes is highly vague and open-

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of patent case: patent "hold up." *See* Bruce H. Kobayashi & Joshua D. Wright, *Federalism, Substantive Preemption, and Limits on Antitrust: An Application to Patent Holdup*, 5 J. COMPETITION L. & ECON. 469, 469–70 (2009). Their analysis, however, exclusively covers the hold-up context and addresses a variety of potentially preempting areas of state and federal law. This Article focuses solely on the potential for patent law to preempt antitrust law and compares that potential across all types of patent cases. The professors' insightful and novel analysis inspired some of the central themes found herein, for which this author is significantly indebted.

ended,[8] leading to a common law—almost constitutional—approach to interpretation[9] that may be fundamentally incompatible with antitrust law's regulatory purpose.[10] The heavy penalties for antitrust violations—felony convictions and treble damages[11]—make concerns over vagueness all the more pressing; the cost of false positives or good-faith missteps is exceptionally high.[12] What's more, the highly technical analysis required for antitrust adjudication makes any given trial time-consuming and costly.[13] This technical focus tends to confound layperson juries,[14] who are already biased against large

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8. *See, e.g.*, Sherman Antitrust Act, 15 U.S.C. § 1 (2012) (forbidding any "contract, combination . . . or conspiracy, in restraint of trade or commerce"). Of course, all contracts restrain trade or commerce because they "bind[] two parties to each other in some fashion, thus preventing them from doing that business with anyone else without incurring the costs of breach." Matthew Sipe, *Patent Privateers and Antitrust Fears*, 22 MICH. TELECOMM. & TECH. L. REV. 191, 223 n.174 (2016).

9. *See, e.g.*, Leegin Creative Leather Prods., Inc. v. PSKS, Inc., 551 U.S. 877, 899 (2007) ("From the beginning the Court has treated the Sherman Act as a common-law statute."); State Oil Co. v. Khan, 522 U.S. 3, 20 (1997) ("[T]he general presumption that legislative changes should be left to Congress has less force with respect to the Sherman Act."); Sugar Inst., Inc. v. United States, 297 U.S. 553, 600 (1936) ("We have said that the Sherman Anti-Trust Act . . . has a generality and adaptability comparable to that found to be desirable in constitutional provisions.").

10. HERBERT HOVENKAMP, THE ANTITRUST ENTERPRISE: PRINCIPLE AND EXECUTION 10 (2005) ("Antitrust is an economic, not a moral, enterprise."); Daniel A. Crane, *Technocracy and Antitrust*, 86 TEX. L. REV. 1159, 1160–61, 1221 (2008) (advocating for greater technocracy in antitrust law and less reliance on the common-law adjudicatory approach).

11. *See* 15 U.S.C. §§ 2, 15(a).

12. *See* Kobayashi & Wright, *supra* note 7, at 472 (acknowledging that the application of antitrust laws can "trigger 'serious errors,'" and that limiting their enforcement can lead to "comparative advantages" from "alternative institutions . . . to antitrust"); *see also* Bruce H. Kobayashi, *The Law and Economics of Predatory Pricing*, *in* ANTITRUST LAW AND ECONOMICS 116, 130 (Keith N. Hylton ed., 2010) (recognizing the Supreme Court's concern with the "high relative costs of [antitrust regulation] falsely condemning pro-competitive pricing behavior").

13. *See* Rebecca Haw, *Adversarial Economics in Antitrust Litigation: Losing Academic Consensus in the Battle of the Experts*, 106 NW. U. L. REV. 1261, 1262, 1264–65 (2012) (analyzing methods to reduce the substantial time and cost associated with using economic expert witnesses in modern antitrust lawsuits).

14. *See* Arthur Austin, *The Jury System at Risk from Complexity, the New Media, and Deviancy*, 73 DENV. U. L. REV. 51, 52–59 (1995) ("[T]he jurors were overwhelmed, frustrated, and confused by testimony well beyond their comprehension. . . . [A]t no time did *any* juror grasp—even at the margins—the law, the economics, or any other testimony relating to the allegations or defense."); Crane, *supra* note 10, at 1183 ("[M]odern antitrust cases consist of very few tasks that require identifying moral culpability, the degree of the defendant's wrongdoing, or other matters for which the jury's populist function is well suited.").

corporations and naïve to standard business practices.[15] In short, there is good reason to be skeptical of imbuing the antitrust laws with broad scope, particularly in areas where a less costly legal regime could be used to reach the same goals.[16]

These criticisms have gained significant traction outside of purely academic circles, finding footholds in the courts themselves. In particular, the Supreme Court has increasingly voiced serious skepticism towards a broadly-conceived role for antitrust law. Since what might be considered the "high-water mark" of aggressive antitrust enforcement in the 1960s and 70s,[17] the Court has expressed

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15. *See* RICHARD A. POSNER, ANTITRUST LAW 214–15 (2d ed. 2001) ("Especially misleading is the inveterate tendency of sales executives to brag to their superiors about their competitive prowess, often using metaphors of coercion that are compelling evidence of predatory intent to the naïve."); Barbara S. Swain & Dan R. Gallipeau, *What They Bring to Court: Juror Attitudes in Antitrust Cases*, 8 ANTITRUST, Summer 1994, at 14, 15–17 ("In some venues, as many as 75 percent of the jurors think that large corporations regularly use unethical and unfair tactics to bully smaller competitors and squeeze them out of the marketplace.").

16. Professor Jonathan Baker offers perhaps the most thorough critique of the antitrust-skeptical position. *See generally* Jonathan B. Baker, *Taking the Error out of "Error Cost" Analysis: What's Wrong with Antitrust's Right*, 80 ANTITRUST L.J. 1 (2015). In particular, Professor Baker examines certain assumptions underlying antitrust skepticism, ranging from economic (are cartels truly self-defeating?) to institutional (is antitrust liability truly uncertain *ex ante*?). *Id.* at 12–14, 30–32. To the extent that Professor Baker's arguments are persuasive regarding antitrust law generally, they are nevertheless not attuned to the specific context of antitrust law overlapping with patents—an overlap that offers significant and unique reasons to be skeptical. *See infra* Parts IV, V (discussing the risk of conflict between the goals of patent law and those of antitrust enforcement).

17. *See* KY P. EWING, JR., COMPETITION RULES FOR THE 21ST CENTURY: PRINCIPLES FROM AMERICA'S EXPERIENCE 128 (2d ed. 2006) (recognizing the period from the 1960s to 1970s as one where courts demonstrated great deference to government actions halting corporate mergers); *see also* BERNICE ROTHMAN HASIN, CONSUMERS, COMMISSIONS, AND CONGRESS: LAW, THEORY, AND THE FEDERAL TRADE COMMISSION 1968–1985, at 48 (1987) (describing court rulings that stopped corporate mergers as furthering the "judicial goal of small business protection" due to a "fear of economic concentration"); Dennis A. Yao, Commissioner, FTC, Prepared Remarks Before the Illinois State Bar Association and the Chicago Bar Association, Challenges in Merger Analysis: The 1992 Merger Guidelines and Beyond 1–4 (Dec. 2, 1992), https://www.ftc.gov/system/files/documents/public_statements/694541/19921202_yao_challenges_in_merger_analysis-_the_1992_merger_guidelines_and_beyond.pdf (stating that in previous years, only about two percent of pre-merger filings "required in-depth investigation" while the vast majority were allowed to proceed, in stark contrast to mergers halted by the Court in the 1960s and 70s). Ewing, Hasin, and Yao were all referring largely to the Court's holding in *United States v. Von's Grocery Co.*, 384 U.S. 270 (1966), which prohibited the merger of two grocery stores that had only single-digit market share when combined.

greater and greater cynicism about the efficiency and efficacy of antitrust law in practice.

For example, in *NYNEX Corp. v. Discon, Inc.*,[18] the Court held that the per se rule against group boycotts did not apply to a single "buyer's decision to buy from one seller rather than another."[19] While its holding rested "in large part upon precedent," the Court noted as additional support that other legal regimes—including "'unfair competition' laws, business tort laws, or regulatory laws"—could provide remedies in unilateral supplier-switching cases instead of antitrust law.[20] Moreover, the Court reasoned, those alternative regimes would be less likely to chill competitors from changing suppliers for legitimate business purposes.[21]

This idea of antitrust law as a blunt instrument of last resort was expanded further in *Verizon Communications Inc. v. Law Offices of Curtis V. Trinko, LLP*.[22] In *Trinko*, a class of local telephone service providers alleged that Verizon had failed to fulfill its obligation to share access to its telephone network and support systems as required by the Telecommunications Act of 1996 (TCA).[23] The class argued that this failure was part of an anticompetitive scheme to harm local providers, constituting a violation of the Sherman Act in addition to the TCA.[24] The Court disagreed, determining that "pre-existing antitrust standards" did not prohibit Verizon's conduct, and that an expansion of antitrust law to create such a prohibition was not warranted.[25] Despite the TCA having an antitrust-specific savings clause,[26] the Court's reluctance to expand antitrust law was largely predicated on the fact that the TCA existed as an alternative to police Verizon's allegedly anticompetitive conduct.[27] That is, even though the TCA by its own terms did not modify, impair, or supersede the antitrust laws, the Court nevertheless determined that its *existence* made antitrust intervention unnecessary, and the Court supported a narrow view of antitrust law in the telecommunications sphere, generally:

18. 525 U.S. 128 (1998).
19. *Id.* at 130.
20. *Id.* at 135, 137.
21. *See id.* at 136–37.
22. 540 U.S. 398 (2004).
23. *Id.* at 404–05; *see* 47 U.S.C. § 251(c)(2), (3) (2012).
24. *Trinko*, 540 U.S. at 404–05.
25. *Id.* at 407–08, 410–11.
26. 47 U.S.C. § 152(b)(1) ("[N]othing in this Act . . . or the amendments made by this Act shall be construed to modify, impair, or supersede the applicability of any of the antitrust laws.").
27. *Trinko*, 540 U.S. at 411–14.

> One factor of particular importance is the existence of a regulatory structure designed to deter and remedy anticompetitive harm. Where such a structure exists, the additional benefit to competition provided by antitrust enforcement will tend to be small, and it will be less plausible that the antitrust laws contemplate such additional scrutiny. Where, by contrast, "[t]here is nothing built into the regulatory scheme which performs the antitrust function," the benefits of antitrust are worth its sometimes considerable disadvantages.[28]

The Court's analysis was accompanied by a "realistic assessment" of the considerable disadvantages noted at the outset of this Part, including the high cost of "false positives," the potential to "chill" legitimate conduct, and the "highly technical" analysis required.[29]

Only three years later, the Supreme Court would crystallize this skepticism and concern into a more concrete form: antitrust preemption doctrine. In *Credit Suisse*, a group of investors alleged that a group of investment banks acting as underwriters had violated antitrust laws when they created syndicates to assist in executing initial public offerings for several hundred companies.[30] In particular, the investors claimed that the banks had agreed amongst themselves to only sell newly issued securities to buyers if the buyers agreed to certain terms, including a commitment to purchase additional shares later at a higher price.[31] The Court noted that, unlike in *Trinko*, the securities laws contained neither a savings clause nor a preemption clause, leaving only the possibility of implicit preemption.[32]

Determining that the key question was whether antitrust and securities law are "clearly incompatible,"[33] the Court set forth four factors to consider:

> (1) [T]he existence of regulatory authority under the securities law to supervise the activities in question; (2) evidence that the responsible regulatory entities exercise that authority; and (3) a resulting risk that the securities and antitrust laws, if both applicable, would produce conflicting guidance, requirements, duties, privileges, or standards of conduct. We also note (4) that in [prior cases] the possible conflict affected practices that lie

28. *Id.* at 412 (citation omitted) (quoting Silver v. N.Y. Stock Exch., 373 U.S. 341, 358 (1963)).

29. *Id.* at 414.

30. Credit Suisse Sec. (USA) LLC v. Billing, 551 U.S. 264, 269 (2007).

31. *Id.* at 269–70.

32. *Id.* at 270–71 ("Where regulatory statutes are silent in respect to antitrust . . . courts must determine whether, and in what respects, they implicitly preclude application of the antitrust laws.").

33. *Id.* at 275.

> squarely within an area of financial market activity that the securities law seeks to regulate.[34]

The Court found that all four factors counseled in favor of incompatibility, holding that the securities laws had implicitly preempted the antitrust laws in that context—"efforts jointly to promote and to sell newly issued securities"—and rejecting the investors' antitrust claims as a result.[35]

The Court devoted most of its attention in *Credit Suisse* to the third factor: whether the securities and antitrust laws, when both are applicable, would produce conflicting guidance, requirements, duties, privileges, or standards of conduct. Noting the "fine, complex, detailed line" separating activity the U.S. Securities and Exchange Commission (SEC) permits and activity the SEC forbids,[36] the "need for securities-related expertise" in adjudication, the "contradictory inferences" that antitrust law and securities law draw, and the "risk of inconsistent court results," the Court determined that "antitrust courts are likely to make unusually serious mistakes" where they intervene with securities law.[37] The Court coupled this analysis with a reiteration of the arguments in *Trinko* and the discussion above, including the high cost of false positives with antitrust law and the accompanying "chilling effect," as well as the "unusually small" need for antitrust intervention where an alternative regulatory framework operates.[38] Discussing the different procedural requirements for antitrust and securities lawsuits, the Court also highlighted the risk of "permitting plaintiffs to dress what is essentially a securities complaint in antitrust clothing" to avoid securities procedures.[39]

The Court has not since revisited its analysis in *Credit Suisse* or provided further examples of what fields of law might be clearly incompatible with—and, hence, preempt—antitrust law.[40] With

34. *Id.* at 275–76.
35. *Id.* at 276, 285.
36. *Id.* at 279.
37. *Id.* at 281–82.
38. *Id.* at 283.
39. *Id.* at 284.
40. Nor have any lower courts addressed the relationship between patent laws and antitrust laws under the *Credit Suisse* preemption framework. Lower courts have, however, applied the *Credit Suisse* test to preempt antitrust law in other cases. *See, e.g.*, Elec. Trading Grp., LLC v. Banc of Am. Sec. LLC, 588 F.3d 128, 133, 137–38 (2d Cir. 2009) (holding that securities regulations regarding certain short-selling practices had preempted the antitrust laws); Horisons Unlimited v. Santa Cruz-Monterey-Merced Managed Med. Care Comm'n, No. 1:14-CV-00123-LJO-MJS, 2014 WL

Credit Suisse in mind, however, the prima facie case for patent law preempting antitrust law is strong. Even the most basic activity permitted by a patent—excluding and eliminating direct competition—would attract antitrust scrutiny in any other context. The same cannot be said for the mere buying and selling of securities. This does not simply suggest that patent law and antitrust law have a unique tension between them—although that alone does indicate that permitting the two to overlap will likely produce dissonant results. Rather, it suggests that the basic elements of patent law *must* exist as a carve-out or exception to antitrust law to begin with. Merely extending that carve-out to encompass more complex patent activities through preemption is, therefore, in some ways a smaller and more straightforward step than the one the Court made in *Credit Suisse*.

Although the prima facie case for preemption is thus reasonably clear, it is worth noting that in *FTC v. Actavis, Inc.*,[41] the Court's most recent examination of overlapping patent law and antitrust law, there is no mention of *Credit Suisse* or preemption. *Actavis* concerned the practice of so-called reverse-payment settlements: the owner of a drug patent, rather than risk a finding of non-infringement or invalidity at trial, simply pays the creator of a generic substitute to not bring its drug to market.[42] The Court rejected the Eleventh Circuit's conclusion that "a reverse payment settlement agreement generally is 'immune from antitrust attack so long as its anticompetitive effects fall within the scope of the exclusionary potential of the patent,'" holding that dismissal of the FTC's complaint was therefore improper.[43] One might plausibly extrapolate from the opinion that a marriage of equals between patent law and antitrust law is forthcoming or that the opinion signals a trend away from antitrust skepticism generally. This Article, however, argues that *Actavis* is actually in harmony with *Credit Suisse* and guided at least in part by the same principles. Specifically, applying the four-factor test in *Credit Suisse* in the patent law context, this Article finds that reverse-payment settlements fit perfectly into the subcategory of patent activities that would not preempt antitrust law,

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3342565, at *10 (E.D. Cal. July 2, 2014) (holding that Medicaid regulations regarding managed care plans preempted the antitrust laws). *But see In re* Wellbutrin XL Antitrust Litig., Nos. 08-2431 (direct), 08-2433 (indirect), 2012 WL 1657734, at *29–30 (E.D. Pa. May 11, 2012) (rejecting the argument that FDA regulations had preempted the antitrust laws in pharmaceutical conspiracy cases).

41. 133 S. Ct. 2223 (2013).

42. *Id.* at 2227.

43. *Id.* (quoting FTC v. Watson Pharm., Inc., 677 F.3d 1289, 1312 (2012), *rev'd*, *Actavis*, 133 S. Ct. 2223.

anyway.[44] That is, on the merits, reverse-payment settlements—and, likewise, the holding in *Actavis*—constitute one of a handful of built-in exceptions to *Credit Suisse* rather than a negation of the rule. This synchronicity suggests that a close re-examination of *Credit Suisse* and its guiding principles may provide insight or predictive power as to how the Court will strike a balance between the two spheres moving forward: whether or not the Court explicitly invokes *Credit Suisse* or preemption in such cases.[45]

With that payoff in mind, the next three Parts use *Credit Suisse*'s four-factor test as a basic framework to engage with its analytical structure on its own terms, thereby creating a taxonomy of patent activities according to preemption potential. Specifically, Parts II and III answer the questions posed by the first, second, and fourth prongs of the *Credit Suisse* test: Where does regulatory authority exist in the patent sphere and what kinds of activities does that authority supervise?[46] Part IV is devoted to answering the question posed by the third prong, which occupied most of the Court's attention in *Credit Suisse*: How severe is the risk that overlapping patent and antitrust authority will lead to conflict?[47] After engaging directly with the Court's test, Part V broadens the analysis by introducing additional arguments in favor of preemption for which *Credit Suisse* and its doctrinal predecessors, such as *NYNEX* and *Trinko*, appear to pave the way.

II. THE SOURCES OF PATENT REGULATORY AUTHORITY

The first two prongs of the *Credit Suisse* test ask whether regulatory authority exists to "supervise the activities in question," and whether "the responsible regulatory entities" actually exercise their authority in practice.[48] The fourth prong asks the similar question of whether the activities in question lie "squarely within an area" that the preempting law "seeks to regulate."[49] Where regulatory authority already exists and supervises conduct, the need for antitrust

44. *See infra* Section III.C.
45. In the alternative, if *Actavis* does signal a more fundamental regime change moving forward, this Article provides an instrument to measure precisely how the Court's position shifts. In other words, whether the Court is becoming more confident in antitrust law across contexts, becoming more skeptical of patent law across contexts, or adjusting the balance only where the two genuinely overlap and conflict may be determined by how the Court departs from the conclusions herein.
46. Credit Suisse Sec. (USA) LLC v. Billing, 551 U.S. 264, 275–76 (2007).
47. *Id.*
48. *Id.*
49. *Id.* at 276.

intervention is reduced and weighs in favor of preemption.[50] This Part offers broad answers to the initial questions posed by the first, second, and fourth prongs, outlining the sources of regulatory authority over patents and their general scope.

Of course, the *Credit Suisse* test is activity-specific,[51] and the argument that patent law features a sufficiently robust regulatory apparatus to preempt antitrust law will not be equally persuasive for all types of patent activity. This variation in patent regulatory potential is explored in greater detail in Part III, which creates a rough taxonomy of potentially anticompetitive patent activities and the degree to which they are already under supervision. This Part lays the groundwork for that analysis by first answering the surprisingly complex question of where and in what form patent regulatory authority exists at all.

Regulatory authority within the patent world stems primarily from three remarkably different sources: (1) the Patent and Trademark Office (PTO), (2) the International Trade Commission (ITC), and (3) the U.S. Court of Appeals for the Federal Circuit. The PTO is an agency only recently coming into its full strength, thanks to a legislative overhaul. The ITC is an agency with considerable longstanding authority but more limited policy levers. And the Federal Circuit, using its unique position within the Article III judiciary to act as a de facto agency, has filled much of the unoccupied regulatory space between the two.[52]

A. The Patent and Trademark Office: An Agency on the Rise

Historically, the PTO has suffered from a surprising dearth of administrative authority. Upon its creation, the Patent Office was afforded seemingly broad powers:

> [T]here shall be established . . . an office to be denominated the Patent Office . . . whose duty it shall be . . . to superintend, execute, and perform, all such acts and things touching and respecting the granting and issuing of patents for new and useful discoveries,

50. *Id.*

51. *See id.* (acknowledging that the underwriters' activities were "central to the proper functioning of well-regulated capital markets").

52. *See infra* notes 94–96 (explaining that the Federal Court Improvement Act established the Federal Circuit to have exclusive subject matter jurisdiction over patent law cases).

> inventions, and improvements, as are herein provided for, or shall hereafter be, by law, directed to be done and performed . . . .[53]

This authority was expanded in the Patent Act of 1952, which granted the PTO the power to "prescribe regulations governing the recognition and conduct of . . . parties before the Patent Office."[54] Nevertheless, the Federal Circuit interpreted these grants narrowly, rejecting the proposition that the PTO had the authority to receive *Chevron* deference for any substantive, rather than merely procedural, rules.[55] This lack of deference led to the perception of the PTO as a relatively "weak agency."[56]

However, developments within the past five years have opened the door to a much more robust and broad regulatory role for the PTO, which the PTO has already begun to embrace. First and foremost, the 2011 passage of the Leahy-Smith America Invents Act (AIA)[57] has, in

53. Patent Act of 1836, ch. 357, § 1, 5 Stat. 117, 117–18. Prior to that point, patent applications were examined by the Secretary of State, the Secretary of War, and the Attorney General. *See* Patent Act of 1790, ch. 7, § 1, 1 Stat. 109, 109–10.

54. Patent Act of 1952, Pub. L. No. 82-593, §§ 6, 31, 66 Stat. 792, 793, 795 (codified at 35 U.S.C. §§ 1–376 (2012)), *amended by* Leahy-Smith America Invents Act, Pub. L. No. 112-29, 125 Stat. 284 (2011) (codified as amended in scattered sections of 15, 28, 35, 42, and 51 U.S.C.).

55. In *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, the Supreme Court held that when a federal agency charged with enforcing a statute interprets ambiguous provisions within that statute, courts should apply a very high level of deference to that interpretation. 467 U.S. 837, 844 (1984). The Federal Circuit has generally held that this level of deference does not apply to the PTO's substantive interpretations of the patent laws. *See, e.g.*, Koninklijke Philips Elecs. N.V. v. Cardiac Sci. Operating Co., 590 F.3d 1326, 1336 (Fed. Cir. 2010) ("The PTO lacks substantive rulemaking authority."); Merck & Co. v. Kessler, 80 F.3d 1543, 1549–50 (Fed. Cir. 1996) ("[T]he broadest of the PTO's rulemaking powers . . . does NOT grant the Commissioner the authority to issue substantive rules."); Animal Legal Def. Fund v. Quigg, 932 F.2d 920, 930 (Fed. Cir. 1991) ("The authority granted [to the PTO] is directed to the 'conduct of proceedings' before the Office. A substantive declaration with regard to the Commissioner's interpretation of the patent statutes . . . does not fall within the usual interpretation of such statutory language.").

56. *See, e.g.*, Arti K. Rai, *Patent Validity Across the Executive Branch: Ex Ante Foundations for Policy Development*, 61 DUKE L.J. 1237, 1238–39 (2012) (recognizing that prior to the passage of the AIA, the patent debate focused on Federal Circuit decisions, not the PTO, which lacked any substantive rulemaking power); Samiyyah R. Ali, Note, *The Great Balancing Act: The Effect of the America Invents Act on the Division of Power Between the Patent and Trademark Office and the Federal Circuit*, 69 VAND. L. REV. 217, 222–23 (2016) (finding that the lack of both a congressional delegation and Federal Circuit deference to the PTO created the perception of a "weak administrative agency").

57. Pub. L. No. 112-29, 125 Stat. 284 (2011) (codified as amended in scattered sections of 15, 28, 35, 42, and 51 U.S.C.).

the eyes of then-Director of the PTO, David Kappos, provided "the most significant overhaul to our patent system[] since the founding fathers."[58] This overhaul includes new adjudicative, standard-setting, and policymaking powers for the PTO.[59] Next, even outside of the AIA context, courts have begun to increasingly recognize that the PTO is entitled to deference on substantive matters. These shifts signal a significant increase in regulatory power for the PTO moving forward, and they implicate *Credit Suisse*'s antitrust preemption analysis.

Turning first to the AIA, by granting the PTO increased control through new adjudicative proceedings and a broadly-defined prioritization power, the AIA "appears to vest the [PTO] with substantive rulemaking authority."[60] In terms of new proceedings, the AIA has created post-grant review[61] and inter partes review,[62] wherein third parties may challenge the validity of a recently issued patent; derivation proceedings, wherein multiple parties contest ownership of a single invention;[63] and supplemental examinations, wherein a patent owner may seek to correct errors made during prosecution.[64] These adjudicative proceedings are formal and "trial-like"[65]—including pretrial discovery, witness testimony with cross-examination, rules of evidence, and oral arguments[66]—which weighs considerably in favor of granting the PTO *Chevron* deference for regulations or rulings resulting from these proceedings.[67] Moreover,

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58. David Kappos, *Re-Inventing the US Patent System*, U.S. PAT. & TRADEMARK OFF. (Sept. 16, 2011), http://www.uspto.gov/blog/director/entry/re_inventing_the_us_patent.

59. 125 Stat. at 313, 329–33.

60. Sarah Tran, *Patent Powers*, 25 HARV. J.L. & TECH. 609, 626 (2012).

61. *See* 35 U.S.C. § 321(b) (2012).

62. *Id.* § 311.

63. *See id.* §§ 135, 146, 291.

64. *See id.* § 257(a).

65. Melissa F. Wasserman, *The Changing Guard of Patent Law:* Chevron *Deference for the PTO*, 54 WM. & MARY L. REV. 1959, 1983 (2013) (observing that the AIA's legislative history reveals Congress's intent to establish a formal adjudication process); *see also* Tran, *supra* note 60, at 631 (noting that the AIA "give[s] the USPTO broad control over its new trial-like proceedings").

66. *See* USPTO Trial Practice Guide, 77 Fed. Reg. 48,756, 48,761, 48,768 (Aug. 14, 2012).

67. United States v. Mead Corp., 533 U.S. 218, 229 (2001) ("We have recognized a very good indicator of delegation meriting *Chevron* treatment in express congressional authorizations to engage in the process of rulemaking or adjudication that produces regulations or rulings . . . ."); *see also* Rai, *supra* note 56, at 1280 ("In fact, the executive branch could also use the postgrant-review authority conferred upon the PTO by the AIA to go one step further. As a doctrinal matter, under current Supreme Court precedent, . . . the government could ask for *Chevron* deference toward decisions made in postgrant review proceedings."); Wasserman,

the AIA explicitly grants the PTO rulemaking powers over these new procedures—rulemaking that encompasses not only "procedures" but also clearly substantive "standards."[68] By setting the standard for what constitutes "derivation," for example, the PTO can control "whether some inventions are patentable" at all.[69]

On top of all of this, the AIA has created a new prioritization power, granting the PTO the ability to fast-track inventions based solely on policy considerations.[70] By enabling the PTO to "set standards that affect core patent rights" and rank the relative importance of patent applications for policy reasons, the AIA has defined the PTO's role in shaping patent law and enhanced its role beyond mere patent application review.[71]

Turning next to the courts, case law has begun to bolster the general level of deference afforded to the PTO for interpretations of patent laws. While the PTO still lacks *Chevron* deference for its

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supra note 65, at 1989 ("[I]f a court determines that Congress intended the postgrant review proceedings to be effectuated through formal adjudication, the PTO's interpretation of ambiguous terms of the Patent Act announced during postgrant review proceedings should be entitled to *Chevron* deference."). To wit, the Federal Circuit has recognized *Chevron* deference for the ITC's section 337 determinations for exactly this reason. *See, e.g.*, Suprema, Inc. v. Int'l Trade Comm'n, 796 F.3d 1338, 1346 (Fed. Cir. 2015) (noting that because the ITC's "investigations under Section 337 require adequate notice, cross-examination, presentation of evidence, objection, motion, argument, and all other rights" associated with a trial-like hearing, *Chevron* deference applies). *See generally infra* text accompanying notes 83–85 (reviewing the difference in levels of deference courts apply to the ITC's section 337 interpretations versus its Patent Act interpretations).

68. *See, e.g.*, 35 U.S.C. § 135(b) (granting the PTO authority to set forth "standards" of "sufficient evidence to prove and rebut a claim of derivation"); *id.* § 316(a)(2) (granting the PTO authority to set forth "the standards for the showing of sufficient grounds to institute" inter partes review); *id.* § 362(a)(2) (granting the PTO authority to set forth "the standards for the showing of sufficient grounds to institute" post-grant review); *id.* § 316(a)(5) (granting the PTO authority to set forth the "standards" for "necessary . . . discovery"); *id.* § 316(a)(9) (granting the PTO authority to set forth "standards" for when amending a patent is proper). Courts generally recognize "standard-setting" as a form of substantive rulemaking. *See, e.g.*, Whitman v. Am. Trucking Ass'ns, 531 U.S. 457, 472–77 (2001); JEM Broad. Co. v. FCC, 22 F.3d 320, 327 (D.C. Cir. 1994).

69. Tran, *supra* note 60, at 644.

70. 35 U.S.C. § 2(b)(2)(G) ("[The PTO] may, subject to any conditions prescribed by the Director and at the request of the patent applicant, provide for prioritization of examination of applications for products, processes, or technologies that are important to the national economy or national competitiveness . . . .").

71. Tran, *supra* note 60, at 640.

interpretations of the Patent Act,[72] its entitlement to the lesser *Skidmore* deference[73] has become increasingly accepted.[74] The difference between the two may be more academic than practical; a comprehensive empirical study by Professors Kristin Hickman and Matthew Kreuger found that federal courts of appeals applying *Skidmore* are "highly deferential," with outcomes "weighted *heavily* in favor of government agencies."[75] Even where courts have not explicitly invoked a standard of deference, core PTO interpretations have been gaining traction, causing "substantial legal effect" and, in some cases, being adopted wholesale.[76]

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72. In *Cuozzo Speed Technologies, LLC v. Lee*, the Supreme Court did extend *Chevron* deference to the PTO's interpretations of certain statutes relating to inter partes review. 136 S. Ct. 2131, 2144 (2016); *see, e.g.*, 35 U.S.C. § 314(d) (2012) (making "final and nonappealable" the Patent Trial and Appeal Board's (PTAB) decision to institute an IPR petition). However, the PTO's interpretations of statutory patentability requirements—i.e., 35 U.S.C. §§ 101–103—still do not receive such deference.

73. In *Skidmore v. Swift & Co.*, the Supreme Court held that even when an agency's rulings and interpretations lack the authority to control in the courts, certain agency judgments—those that demonstrate thorough consideration, valid reasoning, and consistency with previous pronouncements—may have the "power to persuade." 323 U.S. 134, 140 (1944). This has generally been considered a basis for agency deference independent from (and "weaker" to) *Chevron* deference. *See, e.g.*, Gonzales v. Oregon, 546 U.S. 243 (2006); *see also* Jim Rossi, *Respecting Deference: Conceptualizing* Skidmore *Within the Architecture of* Chevron, 42 WM. & MARY L. REV. 1105, 1125–27 (2001).

74. *See, e.g.*, Ass'n for Molecular Pathology v. U.S. Patent & Trademark Office, 689 F.3d 1303, 1357 (Fed. Cir. 2012) ("[W]e owe deference [to the PTO] only commensurate with 'the thoroughness of its consideration and the validity of its reasoning.'" (quoting Merck & Co. v. Kessler, 80 F.3d 1543, 1550 (Fed. Cir. 1996))), *aff'd in part and rev'd in part sub nom.* Ass'n for Molecular Pathology v. Myriad Genetics, Inc., 133 S. Ct. 2107 (2013); Univ. of Mass. v. Kappos, 903 F. Supp. 2d 77, 84 (D.D.C. 2012) ("[T]he PTO's determination is not entitled to *Chevron* deference [but is] entitled to deference under *Skidmore*."). *But see* Photocure ASA v. Kappos, 603 F.3d 1372, 1376 (Fed. Cir. 2010) (denying the PTO *Skidmore* deference for its interpretation of patent-term extensions because of previously inconsistent interpretations by the PTO).

75. Kristin E. Hickman & Matthew D. Krueger, *In Search of the Modern* Skidmore *Standard*, 107 COLUM. L. REV. 1235, 1280 (2007) (emphasis added); *see also* William N. Eskridge, Jr. & Lauren E. Baer, *The Continuum of Deference: Supreme Court Treatment of Agency Statutory Interpretations from* Chevron *to* Hamdan, 96 GEO. L.J. 1083, 1099 (2008) (finding that agency win rates under *Chevron* and *Skidmore* standards from 1983 to 2005 were 76.2% and 73.5%, respectively).

76. John M. Golden, *Patentable Subject Matter and Institutional Choice*, 89 TEX. L. REV. 1041, 1110 (2011) (highlighting the acceptance and adoption of the PTO's utility and written-description guidelines into Federal Circuit case law); Rai, *supra* note 56, at 1255 (same). For examples of this adoption, see *Ariad Pharmaceuticals,*

In short, the AIA expanded the PTO's substantive rulemaking power considerably, and—even where it failed to do so—the PTO has already "demonstrated an ability to use rulemaking" to "steer substantive patent law's development in important ways."[77] Combined, these increases in authorized and utilized regulatory control support a narrowing role for antitrust law in the patent world under the preemption analysis of *Credit Suisse*.

B. The International Trade Commission: Longstanding Regulatory Authority

In comparison to the relatively weak historical power of the PTO, the ITC has long wielded considerable administrative power. Under section 337 of the Tariff Act,[78] the ITC has the authority to investigate and rule on "[u]nfair methods of competition," including "[t]he importation into the United States . . . of articles that . . . infringe a valid and enforceable United States patent."[79] In terms of remedies, the ITC has a relatively unique form of injunctive relief at its disposal: the exclusion order.[80] These orders block importation of the

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Inc. v. Eli Lilly & Co., 598 F.3d 1336, 1347, 1352–53 (Fed. Cir. 2010) ("If the law of written description is to be changed, contrary to sound policy and the uniform holdings of this court . . . and PTO practice, such a decision would require good reason and would rest with Congress."); *In re Fisher*, 421 F.3d 1365, 1372, 1379 (Fed. Cir. 2005) (finding the PTO's utility standards to be consistent with the court's understanding of the statutory requirement); *Enzo Biochem, Inc. v. Gen-Probe Inc.*, 323 F.3d 956, 964 (Fed. Cir. 2002) (adopting the PTO's standard for evaluating compliance with written description requirements).

77. John M. Golden, *The USPTO's Soft Power: Who Needs* Chevron *Deference?*, 66 SMU L. REV. 541, 551 (2013).

78. Tariff Act of 1930, ch. 497, 46 Stat. 703 (1930) (codified as amended at 19 U.S.C. § 1337).

79. 19 U.S.C. § 1337(a)(1)(B)(i) (2012).

80. § 1337(d)(2); *see, e.g.*, Fuji Photo Film Co. v. Int'l Trade Comm'n, 386 F.3d 1095, 1108 (Fed. Cir. 2004). In practice, once infringement is found, an exclusion order is almost always granted. *See* Sapna Kumar, *Expert Court, Expert Agency*, 44 U.C. DAVIS L. REV. 1547, 1557 n.45 (2011) ("There have only been three cases since 1974 where the ITC has found an imported good to infringe a valid patent, but declined to issue an exclusion order . . . ."). This is in large part because the ITC's exclusion power is granted by statute rather than traditional principles of equity such that the typical (and difficult to satisfy) four-part test for a permanent injunction is not used. *See* eBay Inc. v. MercExchange, LLC, 547 U.S. 388, 391 (2006) (noting that a plaintiff seeking a permanent injunction in equity must show: "(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").

infringing product, including downstream-implementing products.[81] Along similar lines, the ITC may issue cease and desist orders to direct a company within the United States to "cease its unfair acts, including selling infringing imported articles out of U.S. inventory."[82]

The courts have already determined that the ITC receives *Chevron* deference in interpreting section 337.[83] This allows the ITC considerable power over not only its own internal procedures but also in setting standards for what constitutes, for example, "[u]nfair methods of competition . . . in the importation of articles."[84] Such an interpretation might reasonably include certain patent activity short of or distinct from infringement that nevertheless implicates competitive equilibria.

While the overwhelming majority of section 337 actions require adjudicating claims of patent infringement—and, therefore, defenses to infringement[85]—the ITC does not currently receive *Chevron* deference for its interpretations of the Patent Act itself.[86] Moving forward, however, that deference may emerge indirectly. The language "valid and enforceable United States patent" is used in section 337, but neither "valid" nor "enforceable" is defined elsewhere in the statute.[87] "Valid" is used in varying contexts throughout the Tariff Act,[88] and "enforceable" has "no common

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81. *See, e.g.*, Hyundai Elecs. Indus. Co. v. Int'l Trade Comm'n, 899 F.2d 1204, 1209–10 (Fed. Cir. 1990) (affirming the ITC's issuance of a limited exclusion order against downstream devices that contained infringing memory devices), *aff'd in part, vacated in part, rev'd in part sub nom.* Int'l Trade Comm'n v. Intel Corp., 946 F.2d 821 (Fed. Cir. 1991).

82. U.S. INT'L TRADE COMM'N, SECTION 337 INVESTIGATIONS: ANSWERS TO FREQUENTLY ASKED QUESTIONS 24 (2009), https://www.usitc.gov/intellectual_property/documents/337_faqs.pdf.

83. *See* ClearCorrect Operating, LLC v. Int'l Trade Comm'n, 810 F.3d 1283, 1290 (Fed. Cir. 2015) (granting *Chevron* deference to the ITC's interpretations of section 337 by acknowledging that the ITC has authority to resolve the ambiguity in section 337).

84. § 1337(a)(1)(A).

85. *See, e.g.*, Kumar, *supra* note 80, at 1554 n.27 ("In the 2009 fiscal year, for example, seventy-nine of the eighty-five active section 337 investigations included a patent infringement claim.").

86. *Id.* at 1562. Nor does the ITC appear to receive such deference implicitly. *See* David L. Schwartz, *Courting Specialization: An Empirical Study of Claim Construction Comparing Patent Litigation Before Federal District Courts and the International Trade Commission*, 50 WM. & MARY L. REV. 1699, 1719–20 (2009) ("The reversal rates for the ITC appear roughly in line with the reversal rates for patent-busy district courts.").

87. § 1337(a).

88. *See, e.g.*, § 1337(a)(1)(B)(i), (a)(1)(C) (using the term "valid" in reference to patents, copyrights, and trademarks interchangeably).

definition" in patent law.[89] Unlike the sections of the Tariff Act governing copyright and trademark issues—which directly reference both the Copyright and Trademark Acts[90]—the Tariff Act does not directly reference the Patent Act. This ambiguity in the text—and lack of tethering to the Patent Act, which the ITC does not administer[91]—opens the door for *Chevron* deference to the ITC's determinations of what constitutes patent validity and enforceability in its formal section 337 adjudications.[92]

The longstanding administrative authority and deference afforded to the ITC, in addition to its potential for deference on matters of patent validity and enforceability, suggests minimizing the role for antitrust law where patents are involved under the *Credit Suisse* framework. This is bolstered further by the PTO's more direct administrative role over the Patent Act, including its recently enhanced regulatory powers and authority.[93] A third key player in the patent realm, the Federal Circuit, makes the need for outside interference of antitrust law even more suspect.

C. The Court of Appeals for the Federal Circuit: Court as Agency

The Federal Circuit is the odd duck of Article III courts. It is the only federal court of appeals with jurisdiction solely defined by subject matter rather than geography.[94] Moreover, it is unique in that it exercises near-exclusive dominion over its subject matter; most cases that end up before the Federal Circuit could not have properly ended up before any other intermediate court of appeals.[95] Similarly,

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89. Kumar, *supra* note 80, at 1577 ("Although the Federal Circuit has found a patent to be unenforceable in certain circumstances, such as in cases of inequitable conduct, there is no common definition for the term." (footnote omitted)).

90. *See* § 1337 (a)(1)(B)(i) ("[C]opyright registered under title 17 . . . ."); § 1337 (a)(1)(C) ("[T]rademark registered under the Trademark Act of 1946 . . . .").

91. Corning Glass Works v. Int'l Trade Comm'n, 799 F.2d 1559, 1565 n.5 (Fed. Cir. 1986) ("[T]he [ITC] is not charged with administration of the patent statute . . . .").

92. Kumar, *supra* note 80, at 1568–75. As noted *supra* note 67, under *Mead*, where an agency engages in formal adjudication, interpretations of the statute that the agency "administers" are afforded *Chevron* deference. United States v. Mead Corp., 533 U.S. 218, 229–30 (2001). *See generally* Cass R. Sunstein, Chevron *Step Zero*, 92 VA. L. REV. 187, 190–91 (2006).

93. *See supra* text accompanying note 77.

94. *Compare* 28 U.S.C. § 1295 (2012) (defining the Federal Circuit's jurisdiction in terms of subject matter), *with* 28 U.S.C. § 41 (defining the regional circuits' geographic jurisdictions).

95. § 1295(a) (detailing the Federal Circuit's exclusive jurisdiction); *see also* Hon. Diane P. Wood, Chief Judge, U.S. Court of Appeals for the Seventh Circuit, Keynote

it is the only federal court of appeals other than the Supreme Court with national jurisdiction, taking appeals from all ninety-four federal district courts.[96] This idiosyncratic position that the Federal Circuit occupies—national and exclusive control of, among other things, patent appeals—has enabled it to perform a likewise idiosyncratic role: court as agency. By engaging in quasi-agency functions, the Federal Circuit further contributes to the preemption of antitrust law under the analysis of *Credit Suisse*.

These quirks of the Federal Circuit are a feature, not a bug; unlike the regional circuits, the Federal Circuit was the product of specific, articulated policy goals. In the late 1970s, a presidential policy review concluded that "disuniform patent law" had become an "impediment to continued American dominance of the technology industry."[97] That disuniformity spurred "widespread" patent forum shopping as litigants vied to have their cases heard in circuits considered significantly more or less friendly to patent rights.[98] Meanwhile, the federal courts of appeals were faced with "exploding caseloads,"[99] a burden that nearly quadrupled from 1960 to 1973.[100] Professor Daniel Meador envisioned a singular solution to these twin problems:

Address at the Chicago-Kent Supreme Court IP Review: Is It Time to Abolish the Federal Circuit's Exclusive Jurisdiction in Patent Cases? (Sept. 26, 2013), *in* 13 CHI.-KENT J. INTELL. PROP. 1, 1 (2013), http://chicagounbound.uchicago.edu/cgi/viewcontent.cgi?article=11396&context=journal_articles (stating that the Federal Circuit has "exclusive jurisdiction over three types of appeals in patent cases: (1) appeals from district courts in cases 'arising under' the patent; (2) appeals from decisions of the [PTO's] Board of Patent Appeals and Interferences; and (3) appeals from investigations of the [ITC] into the importation of goods that allegedly infringe a U.S. patent"). *But see* Christianson v. Colt Indus. Operating Corp., 486 U.S. 800, 808–09 (1988) (holding that cases involving only patent law *defenses* do not fall under the Federal Circuit's exclusive jurisdiction).

96. Elizabeth I. Winston, *Differentiating the Federal Circuit*, 76 MO. L. REV. 813, 815–18 (2011).

97. Paul R. Gugliuzza, *Rethinking Federal Circuit Jurisdiction*, 100 GEO. L.J. 1437, 1454 (2012) (citing COMM'N ON REVISION OF THE FED. COURT APPELLATE SYS., STRUCTURE AND INTERNAL PROCEDURES: RECOMMENDATIONS FOR CHANGE, 67 F.R.D. 195, 369–71 (1975)).

98. COMM'N ON REVISION, *supra* note 97, at 220; *see also* J. Jonas Anderson, *Court Competition for Patent Cases*, 163 U. PA. L. REV. 631, 647 (2015) ("Patent holders tended to prefer to file their cases in a district court within the Fifth, Sixth, or Seventh Circuit . . . . Defendants usually preferred to litigate in the Eighth or Ninth Circuit . . . .").

99. Gugliuzza, *supra* note 97, at 1454–55.

100. RICHARD A. POSNER, THE FEDERAL COURTS: CHALLENGE AND REFORM 72–73 tbl.3.6 (1996).

the creation of a national patent appeals court.[101] His vision and efforts as head of the Office for Improvements in the Administration of Justice[102] would eventually lead to the Federal Courts Improvement Act of 1982 ("FCIA"),[103] creating the Federal Circuit:

> Directing patent appeals to the new court will have the beneficial effect of removing these unusually complex, technically difficult, and time-consuming cases from the dockets of the regional courts of appeals. . . . [T]he central purpose is to reduce the widespread lack of uniformity and uncertainty of legal doctrine that exist in the administration of patent law.[104]

In practice, the Federal Circuit has taken the intention of its creation—uniformity and expertise in patent law—as well as its unique position in the judiciary, and translated it into two key practices that resemble those of an agency: rulemaking and non-deferential review. First, in terms of rulemaking, the Federal Circuit has behaved similar to an agency by issuing mandatory, bright-line rules via case law. The early history of the Federal Circuit in particular is replete with examples of such bright-line rules. The presumption of entitlement to injunctive relief for infringement[105] and the mandatory "teaching, suggestion, or motivation" test for obviousness[106] offer two familiar examples. While the Supreme Court strongly encouraged this quasi-agency rulemaking role early on,[107] that trend has changed in

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101. Gugliuzza, *supra* note 97, at 1455.

102. Daniel J. Meador, *Origin of the Federal Circuit: A Personal Account*, 41 AM. U. L. REV. 581, 582 & nn.4–7 (1992).

103. Federal Courts Improvement Act of 1982, Pub. L. No. 97-164, 96 Stat. 25; *see, e.g.*, 127 CONG. REC. 27,792 (1981) (statement of Rep. McClory) ("[W]e heard a great deal of testimony concerning the problem of forum-shopping which presently is practiced in many different district courts around the country.").

104. H.R. REP. NO. 97-312, at 22–23 (1981) (reporting on the FCIA).

105. *See* Smith Int'l, Inc. v. Hughes Tool Co., 718 F.2d 1573, 1581 (Fed. Cir. 1983) (asserting that "[a] court should not be reluctant to use its equity powers," and deciding "that where validity and continuing infringement have been clearly established . . . immediate irreparable harm is presumed"), *abrogated by* Robert Bosch LLC v. Pylon Mfg. Corp., 659 F.3d 1142 (Fed. Cir. 2011).

106. *See* ACS Hosp. Sys., Inc. v. Montefiore Hosp., 732 F.2d 1572, 1577 (Fed. Cir. 1984) (citing *In re* Rinehart, 531 F.2d 1048 (C.C.P.A. 1976)) ("Obviousness cannot be established by combining the teachings of the prior art to produce the claimed invention, absent some teaching or suggestion supporting the combination. Under section 103, teachings or references can be combined *only* if there is some suggestion or incentive to do so.").

107. *See, e.g.*, Pfaff v. Wells Elecs., Inc., 525 U.S. 55, 67–68 (1998); Isabelle R. McAndrews, *The On-Sale Bar After* Pfaff v. Wells Electronics*: Toward a Bright-Line Rule*, 81 J. PAT. & TRADEMARK OFF. SOC'Y 155, 160 (1999) ("The U.S. Supreme Court granted certiorari [in *Pfaff*] to develop a 'bright-line rule' regarding what type of

recent years.[108] Despite this pushback, the Federal Circuit retains considerable rulemaking potential,[109] whether through "process-based formalism"[110] or the mechanism of en banc review:

> The number and breadth of questions the Federal Circuit agrees to hear en banc and the means by which it hears them go beyond the limited role of a court—to decide the case before it. Instead of exercising restraint and addressing only what it must, the Federal Circuit raises wide-ranging questions and makes broad pronouncements of law that set or change patent policy.
>
> . . . Despite being an appellate court not subject to the notice and comment requirements [of administrative agencies], the Federal Circuit appears to comply with these requirements when it orders cases to be heard en banc.[111]

Second, the Federal Circuit has engaged in non-deferential, agency-like review of PTO and ITC cases. The low standards of review afforded the PTO and ITC closely resemble "the non-deferential approach taken by the top level of an agency reviewing an administrative law judge more than a federal court reviewing an executive branch agency."[112] This stands in stark contrast to the Federal Circuit's treatment of non-patent agencies, which typically receive considerable deference.[113] By offering very limited deference to the patent agencies

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commercial activity would constitute placing an invention 'on sale' under 35 U.S.C. 102(b).").

108. *See, e.g.*, KSR Int'l Co. v. Teleflex Inc., 550 U.S. 398, 415, 427 (2007) (characterizing the Federal Circuit's "Teaching, Suggestion, Motivation" rule as "too constrained to serve its purpose"); eBay Inc. v. MercExchange, LLC, 547 U.S. 388, 394 (2006) (criticizing the Federal Circuit's "general rule . . . [of] issu[ing] permanent injunctions against patent infringement"); Sapna Kumar, *The Accidental Agency?*, 65 FLA. L. REV. 229, 253 (2013) (summarizing Supreme Court case law demonstrating a backlash against the Federal Circuit's "rigid reliance" on obligatory tests).

109. *See, e.g.*, Kumar, *supra* note 108, at 253 ("The Court has not expressed concern over the Federal Circuit's creating tests to help *clarify ambiguities* in the Patent Act . . . ." (emphasis added)).

110. Timothy R. Holbrook, *Substantive Versus Process-Based Formalism in Claim Construction*, 9 LEWIS & CLARK L. REV. 123, 126–27, 129 (2005). Analyzing the Federal Circuit's jurisprudence, Professor Holbrook contrasts "*[s]ubstantively* formalistic rules," which the Supreme Court is more likely to limit, with "*procedurally* formalistic" rules, which the Supreme Court has generally upheld. *Id.* at 125–26 (emphasis added).

111. Ryan Vacca, *Acting like an Administrative Agency: The Federal Circuit En Banc*, 76 MO. L. REV. 733, 733–34 (2011) (footnotes omitted).

112. Kumar, *supra* note 108, at 258; *see also* Tran, *supra* note 60, at 616 ("[The Federal Circuit] has assumed exclusive responsibility for making substantive interpretations of the Patent Act . . . .").

113. *See, e.g.*, Keener v. United States, 551 F.3d 1358, 1363 (Fed. Cir. 2009) (granting *Chevron* deference to the Treasury's interpretation of the Internal Revenue

below, the Federal Circuit has thus entered a policymaking space, effectively treating the PTO and ITC as the court's alter ego.

Much like the Federal Circuit's practice of creating bright-line rules, its lack of deference to the PTO and ITC has received some pushback, as noted in Sections II.A and II.B. But even if these critiques of the Federal Circuit as a quasi-agency win out, with an aggressive tamping down on rulemaking or non-deferential review, the PTO and ITC's regulatory authority would almost certainly grow to fill the void.[114]

In other words, future changes to the patent regulatory apparatus are likely to be hydraulic shifts in authority between the PTO, ITC, and Federal Circuit, if not outright expansions. And the aggregate amount of regulatory authority afforded these three entities is already quite significant in scope and scale. Taken together, the authority ought to be enough to implicate *Credit Suisse*'s preemption test in at least some types of cases.[115] The following Part takes up the task of determining precisely which types.

Code); Patterson v. Dep't of the Interior, 424 F.3d 1151, 1159 (Fed. Cir. 2005) (granting *Chevron* deference to the Office of Personnel Management); Tunik v. Merit Sys. Prot. Bd., 407 F.3d 1326, 1336 (Fed. Cir. 2005) (granting *Chevron* deference to the Merit Systems Protection Board); Eastman Kodak Co. v. Bell & Howell Document Mgmt. Prods. Co., 994 F.2d 1569, 1571 (Fed. Cir. 1993) (interpreting the Lanham Act to warrant *Chevron* deference for the Trademark Trial and Appeals Board).

114. Indeed, as some scholars have observed, the Federal Circuit's longstanding agency-like intervention can be traced to Congress's failure to instill sufficiently broad and deep regulatory authority in the PTO and ITC to begin with. In other words, a robust regulatory structure governing patents is so fundamentally necessary as to essentially be inevitable. *See, e.g.*, Jonas Anderson, *Congress as a Catalyst of Patent Reform at the Federal Circuit*, 63 AM. U. L. REV. 961, 963, 965–66 (2014) (suggesting that the Federal Circuit has constantly expanded its influence in patents in spite of the growth of, among others, the PTO, and suggesting Congress as the best tool to check that Federal Circuit's expansion); Kumar, *supra* note 108, at 275–78 ("[T]he Federal Circuit filled a void left by Congress when it failed to grant the PTO full substantive rulemaking authority, and the Federal Circuit brought greater clarity and predictability to patent law."); Vacca, *supra* note 111, at 758 ("By drafting a broadly-worded Patent Act, [Congress] delegated its duty to set rules and policies. By not giving the PTO authority to promulgate substantive rules . . . , Congress left it to the courts to flesh out rules and direct patent policy. . . . [T]he only institution that could handle the task was the Federal Circuit.").

115. To be sure, some scholars have touted the non-regulatory nature of antitrust law as a virtue, rendering the adjudicative process largely immune to interest-group "capture." *See, e.g.*, Stacey L. Dogan & Mark A. Lemley, *Antitrust Law and Regulatory Gaming*, 87 TEX. L. REV. 685, 698–70 (2009). To the extent that patent regulation as discussed in this article stems in large part from the judiciary, however, concerns about preemption leading to increased capture should be mitigated. *See id.* at 699 ("Judges, by contrast, are much less subject to having their purpose diverted or to being captured.").

III. THE EXTENT OF PATENT SUPERVISION

Having outlined the sources of regulatory authority over patents and their general scope, the question posed by *Credit Suisse*'s four-part test may be properly answered: over what kinds of activities is patent "regulatory authority" existing and exercised?[116] This Part creates a rough hierarchy of potentially anticompetitive patent activities and analyzes the degree to which they are already squarely under supervision from patent authorities.

To be clear, this Article does not argue that where patent regulatory authority supervises an activity, it will necessarily reach the same end results as antitrust law. The *Credit Suisse* Court found it sufficient that the SEC had the legal authority to "supervise the activities in question"—and that the SEC actually "exercised" that authority—for the analysis to weigh in favor of preemption.[117] The Court was not concerned with whether the *outcome* of that supervision matched the outcome that applying antitrust scrutiny would provide.[118] On the contrary, it was the "risk that the securities and antitrust laws, if both applicable, would produce *conflicting*" outcomes in terms of "guidance . . . or standards of conduct" that further supported the case for preemption.[119] The risk that simultaneous application of patent and antitrust laws will similarly produce conflicting guidance is analyzed in greater detail in Part IV.

The argument for preemption is at its strongest across two categories of activity: (1) attempts to expand the scope of a patent through licensing arrangements implicating other products or intellectual property and (2) attempts to exploit information asymmetry within the patent system. As explained below, these two categories are already supervised through patent misuse doctrine, recordation requirements, and equitable estoppel doctrine. The argument for preemption is somewhat weaker with respect to the next category of activity: (3) attempts to control downstream use and sale of patented products.[120] Patent exhaustion doctrine offers

116. Credit Suisse Sec. (USA) LLC v. Billing, 551 U.S. 264, 275 (2007).

117. *Id.* at 275–77.

118. *Id.* at 282–85.

119. *Id.* at 275–76 (emphasis added).

120. "Patented products" (or "patented goods") is used throughout the remainder of this Article as shorthand for products that are either themselves patented (for example, a "machine" or "composition of matter") or designed to practice a patented "method." 35 U.S.C. § 101 (2012) (establishing categories of patentable subject matter). *See generally* U.S. PAT. & TRADEMARK OFF., MANUAL OF PATENT

limited supervision of this category such that some antitrust intervention may be warranted. The argument for preemption is at its weakest across the final two categories of activity: (4) collusion with competitors through patent pooling or cross-licensing and (5) mergers with competitors through patent acquisition or transfer. There is little to no alternative supervision of these activities, and antitrust law brings considerable expertise and specialization to bear on these types of cases. In table form:

<table>
<tr><th>Category of Activity</th><th>Level of Preemption</th></tr>
<tr><td>(1) Licensing arrangements implicating other products/intellectual property</td><td rowspan="2">Full preemption: minimal need for antitrust intervention</td></tr>
<tr><td>(2) Attempts to exploit information asymmetry</td></tr>
<tr><td>(3) Attempts to control downstream use/sale of patented products</td><td>Quasi-preemption: some need for antitrust intervention</td></tr>
<tr><td>(4) Colluding with competitors through patent polling/cross-licensing</td><td rowspan="2">No preemption: full need for antitrust intervention</td></tr>
<tr><td>(5) Merging with competitors through patent acquisition/transfer</td></tr>
</table>

Of course, some potentially anticompetitive patent activities may not fit neatly into the taxonomy above. But these categories should at least provide a useful rubric against which courts and policymakers considering potential antitrust intervention may judge other patent activities. Patent activities comparable to those in the latter categories may require at least partial application of the antitrust laws; patent activities comparable to those in the higher categories are likely supervised by patent law to such an extent that *Credit Suisse* analysis would endorse preemption.

A. *Full Preemption*

The *Credit Suisse* arguments in favor of preemption are at their strongest across two general categories of potentially anticompetitive patent activities. The first category is attempts to expand the scope of a patent by using licensing arrangements that implicate other products or intellectual property. The second category is attempts to exploit information asymmetry caused by opacity in the patent system. These categories encompass patent activities that are already supervised by

EXAMINING PROCEDURE § 2106 (9th ed. Rev. 7, Nov. 2015) (explaining the distinctions between the categories in detail).

patent authority to such an extent that the need for antitrust intervention is minimal. Permitting antitrust law and patent law to overlap in these contexts would therefore do more harm than good and would generate conflicting guidance and standards of conduct.[121]

1. Attempts to expand the scope of a patent

A patentee may attempt to expand the scope of their patent through licensing arrangements that implicate other products or intellectual property. For example, as a condition of licensing a patent, a licensor may require a prospective licensee to also purchase licenses on their other patents ("package licensing"),[122] or assign back any subsequent patents, such as improvements that the licensee creates ("grantbacks").[123] A licensor may require licensees to continue paying royalties for some period beyond the expiration of the patent or peg the royalties that licensees pay to products completely unrelated to the licensed patent.[124]

What these scenarios have in common is that they feature patent owners using their patents as leverage, extending the limited scope of their grant of monopoly power to include other goods or intellectual property via licensing arrangements. In other words, they are attempts to broaden the physical or temporal scope of the patent. Noting the potential for this activity to disrupt the marketplace and reduce incentives to innovate, many scholars,[125] practitioners,[126] and

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121. *See infra* Part IV.

122. *See, e.g.*, U.S. DEP'T OF JUSTICE & FED. TRADE COMM'N, ANTITRUST ENFORCEMENT AND INTELLECTUAL PROPERTY RIGHTS: PROMOTING INNOVATION AND COMPETITION 103–07 (2007) [hereinafter PROMOTING INNOVATION], https://www.justice.gov/sites/default/files/atr/legacy/2007/07/11/222655.pdf; Peter Lee, *The Supreme Assimilation of Patent Law*, 114 MICH. L. REV. 1413 (2016); William D. Coston, *The Patent-Antitrust Interface: Are There Any No-No's Today?*, VENABLE LLP (2013), https://www.venable.com/the-patent-antitrust-interface–are-there-any-no-nos-today/; Howard Ullman, *A Modern Look at the 9 Patent Licensing 'No-Nos'*, ORRICK (2013), https://www.orrick.com/Insights/2013/02/A-Modern-Look-At-The-9-Patent-Licensing-NoNos.

123. *See, e.g.*, PROMOTING INNOVATION, *supra* note 122, at 90–93; Coston, *supra* note 122; Ullman, *supra* note 122.

124. *See, e.g.*, PROMOTING INNOVATION, *supra* note 122, at 115–19; Coston, *supra* note 122; Ullman, *supra* note 122.

125. For examples of academics supporting antitrust intervention in the context of package licensing, see generally Michael A. Carrier, *Patent Assertion Entities: Six Actions the Antitrust Agencies Can Take*, 1 CPI ANTITRUST CHRON., Winter 2013, at 1, 2–3, 10–11; Herbert Hovenkamp, *Antitrust and the Movement of Technology*, 19 GEO. MASON L. REV. 1119, 1120–21 (2012). For examples of academics supporting antitrust intervention in the context of patent grantbacks, see Robin Feldman, *The Open Source Biotechnology Movement: Is It Patent Misuse?*, 6 MINN. J.L. SCI. & TECH. 117,

policymakers[127] have proposed antitrust interventions. However, the *Credit Suisse* Court would recognize that regulatory authority within the patent world already exists to supervise this activity in the form of patent misuse doctrine.

Patent misuse is an equitable defense to infringement based on the principle of unclean hands.[128] This principle is "intended to prevent a patent-holder from extending the power of a patent beyond the scope of the patent itself."[129] When an alleged infringer raises the defense of patent misuse, the key question becomes whether "the patentee . . . 'impermissibly broadened the "physical or temporal scope" of the patent grant with anticompetitive effect.'"[130] If so, the patent becomes "unenforceable until the misuse is purged."[131]

Each of the potentially anticompetitive activities listed above—package licensing, grantbacks, and royalty manipulation—have been examined through the lens of patent misuse.[132] The misuse doctrine is a

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153–58 (2004); Willard K. Tom & Joshua A. Newberg, *Antitrust and Intellectual Property: From Separate Spheres to Unified Field*, 66 ANTITRUST L.J. 167, 197 (1997). For examples of academics supporting antitrust intervention for anticompetitive royalty schemes, see Brief of Amicus Curiae Intellectual Property Law Association of Chicago in Support of Neither Party at 6–9, Kimble v. Marvel Entm't, LLC, 135 S. Ct. 2401, 2015 WL 1048416 (2015) (No. 13-720); Leslie Ware & Jaden Warren, *Rule of Reason for Post-Expiration Patent Royalties*, 11 J. INTELL. PROP. L. & PRAC. 37, 40–42 (2016).

126. *See, e.g.*, Alden F. Abbott, *Abuse of Dominance by Patentees: A Pro-Innovation Perspective*, ANTITRUST SOURCE 6–11 (Oct. 2014), http://www.americanbar.org/content/dam/aba/publishing/antitrust_source/oct14_abbott_10_21f.authcheckdam.pdf (advocating for antitrust intervention where patent owners exceed "the legitimate scope of a patent right"); Coston, *supra* note 122; *Intellectual Property & Antitrust Issues: Licensing Restrictions*, PATENTBARISTAS (Sept. 9, 2011, 11:01 AM), http://www.patentbaristas.com/archives/2011/09/09/intellectual-property-antitrust-issues-licensing-restrictions/ (arguing that where package licensing and grantbacks are concerned, patent law and antitrust law must work in tandem, not separately); Ullman, *supra* note 122.

127. *See, e.g.*, PROMOTING INNOVATION, *supra* note 122, at 103–14 (arguing that antitrust law should play a significant role in policing package licensing, grantbacks, and potentially anticompetitive royalty schemes).

128. C.R. Bard, Inc. v. M3 Sys., Inc., 157 F.3d 1340, 1372 (Fed. Cir. 1998) ("The defense of patent misuse arises from the equitable doctrine of unclean hands, and relates generally to the use of patent rights to obtain or to coerce an unfair commercial advantage.").

129. Geoffrey D. Oliver, Princo v. International Trade Commission*: Antitrust Law and the Patent Misuse Doctrine Part Company*, 25 ANTITRUST, Spring 2011, at 62, 62.

130. B. Braun Med., Inc. v. Abbott Labs., 124 F.3d 1419, 1426 (Fed. Cir. 1997) (quoting Windsurfing Int'l, Inc. v. AMF, Inc., 782 F.2d 995, 1001 (Fed. Cir. 1986)).

131. *Id.* at 1427.

132. *See, e.g.*, Kimble v. Marvel Entm't, LLC, 135 S. Ct. 2401, 2406 (2015) (upholding the misuse analysis in *Brulotte v. Thys Co.*, 379 U.S. 29 (1964)); *Brulotte*,

natural fit to supervising these activities, tasked as it is with finding the boundary between the inherently anticompetitive effects of patent grant and enforcement[133] and the anticompetitive effects of patentee overreach.[134] While not all of these activities have been found to constitute patent misuse in all cases, the doctrine of patent misuse is, at a minimum, *applicable* to the activities. Because these activities rely on the power to demand licenses, when patent misuse is found—and the patent hence becomes unenforceable—the patentee loses the power to continue their scheme. As a result, these activities are already supervised through patent law; antitrust intervention is, in a sense, duplicative.

Moreover, this supervision is regulatory in nature: the ITC and the Federal Circuit exercise significant authority over what constitutes patent misuse. Misuse is a defense under the Tariff Act,[135] so that the regulatory authority the ITC exercises over matters of patent validity and enforceability[136] would include determining the proper scope of misuse. Similarly, because the Federal Circuit exercises exclusive appellate jurisdiction over infringement cases,[137] defenses to infringement, such as misuse, would be included in its de facto rulemaking authority.[138] Between the ITC and the Federal Circuit, then, it appears that patent misuse offers the legal authority to oversee activities such as package licensing, grantbacks, and royalty manipulation.[139] The existence of this authority and its pattern of usage thus weighs in favor of preemption under *Credit Suisse*'s analysis.[140]

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379 U.S. at 30 (examining post-expiration royalties as potential patent misuse); Powertech Tech., Inc. v. Tessera, Inc., 660 F.3d 1301, 1307 (Fed. Cir. 2011) (examining royalty payments pegged to sales of unrelated products as potential patent misuse); U.S. Philips Corp. v. Int'l Trade Comm'n, 424 F.3d 1179, 1182 (Fed. Cir. 2005) (examining package licensing as potential patent misuse); Duplan Corp. v. Deering Milliken, Inc., 444 F. Supp. 648, 757 (D.S.C. 1977) (examining grantbacks as potential patent misuse), *aff'd in part, rev'd in part*, 594 F.2d 979 (4th Cir. 1979). *See generally* Christina Bohannan, *IP Misuse as Foreclosure*, 96 IOWA L. REV. 475, 476 (2011) (discussing judicial application of misuse to package licensing and grantbacks).

133. *See supra* text accompanying notes 1–3.

134. *See* Oliver, *supra* note 129, at 63.

135. 19 U.S.C. § 1337(c) (2012) ("[E]quitable defenses may be presented in all cases."); *see also* Princo Corp. v. Int'l Trade Comm'n, 616 F.3d 1318, 1345–46 (Fed. Cir. 2010) (en banc) (Dyk, J., dissenting) (discussing the ITC's rejection of a misuse claim).

136. *See supra* Section II.B (discussing the ITC's regulatory authority).

137. *See supra* notes 94–96.

138. *See supra* Section II.C (discussing the Federal Circuit's quasi-agency functions).

139. *See* Credit Suisse Sec. (USA) LLC v. Billing, 551 U.S. 264, 275 (2007).

140. *Id.* at 277.

2. *Attempts to exploit information asymmetry*

A patentee may also attempt to exploit information asymmetry caused by opacity in the patent system. For example, standard-setting organizations ("SSOs") are voluntary industry groups that exist to develop and promote industry standards to improve interoperability of their products—such as the 3G standard that many cell phone manufacturers have adopted, allowing their different phones to all communicate with any 3G-conforming cell towers.[141] In the process of weighing the costs and benefits of using different technologies in their standard, SSOs will ask members to disclose any relevant patents the members may have.[142] Those with relevant patents may be asked to agree to certain royalty arrangements, such as royalty caps, in exchange for their inclusion in the standard.[143] But a member might instead conceal its relevant patents, wait until the SSO has unwittingly adopted an infringing standard—"and investments have been made to commit to the new technology"—and then demand exorbitant royalties, a practice known as "hold-up."[144]

For another example, retributional and reputational concerns typically act to constrain patentees' enforcement activity. In terms of retribution, rival companies likely "each possess patents that implicate one another's products," so "they enter into cross licenses

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141. *See, e.g.*, Broadcom Corp. v. Qualcomm Inc., 501 F.3d 297, 304 (3d Cir. 2007) (addressing the 3G standard created by an SSO and the competing standards). *See generally* Kai-Uwe Kühn et al., *Standard Setting Organizations Can Help Solve the Standard Essential Patents Licensing Problem*, 3 CPI ANTITRUST CHRON., Winter 2013, at 1, 2; Anne Layne-Farrar et al., *Pricing Patents for Licensing in Standard-Setting Organizations: Making Sense of FRAND Commitments*, 74 ANTITRUST L.J. 671 (2007).

142. *See, e.g.*, Layne-Farrar et al., *supra* note 141, at 672.

143. Frequently, SSOs will ask patent owners to agree to license their relevant patents on so-called "FRAND" terms: licensing terms that are fair, reasonable, and non-discriminatory. *See* Layne-Farrar et al., *supra* note 141, at 671–72; Koren W. Wong-Ervin, *Methodologies for Calculating FRAND Royalty Rates and Damages*, FTC (Oct. 22, 2014), https://www.ftc.gov/system/files/attachments/key-speeches-presentations/wong-ervin_aba_program_frand_royalty_rates_10-22-14.pdf. This practice, and the tension it has created, is discussed in greater detail *infra* Part V.

144. *See* Kobayashi & Wright, *supra* note 7, at 470; Jorge L. Contreras, *Equity, Antitrust, and the Reemergence of the Patent Unenforceability Remedy*, ANTITRUST SOURCE 2 (Oct. 2011), http://www.americanbar.org/content/dam/aba/publishing/antitrust_source/oct11_contreras_10_24f.authcheckdam.pdf ("[B]efore a standard is locked-in, the industry may choose among various technical alternatives: some may be covered by patents and others may not. Patented technology must compete with unpatented technology on the basis of factors including price and technical quality. After lock-in, however, the cost of switching to a new standard increases dramatically, and patent holders who emerge without warning have significant, and arguably improper, leverage to charge rents to implementers of the standard.").

or (similarly) abstain from suing one another . . . [in] the patent equivalent of . . . mutual assured destruction."[145] In terms of reputation, patentees may face "customers exerting pressure to settle litigation or shareholders skeptical of patent enforcement."[146] Where patentees hope to engage with SSOs, "a reputation as a non-aggressor can increase the likelihood that a firm's technology is included in standards."[147] But by transferring their patents to a shell subsidiary or third party who engages in litigation on their behalf, patentees may avoid those concerns by obfuscating their link to the patent or the litigation, a maneuver known as "privateering."[148]

What these scenarios have in common is that they feature patent owners exploiting information asymmetry, using opacity in patent ownership to gain leverage and even raise the operating costs of their competitors. Noting the anticompetitive potential of these activities, many scholars,[149] practitioners,[150] and policymakers[151] have proposed

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145. *See* Mark S. Popofsky & Michael D. Laufert, *Patent Assertion Entities and Antitrust: Operating Company Patent Transfers*, ANTITRUST SOURCE 4 (Apr. 2013), https://www.ropesgray.com/~/media/Files/articles/2013/04/Antitrust-Attacks-on-Patent-Assertion-Entities.pdf (explaining the deterrence effects of defensive patenting).

146. Carrier, *supra* note 125, at 7.

147. Popofsky & Laufert, *supra* note 145, at 4.

148. *See, e.g.*, Sipe, *supra* note 8, at 192–94, 199; Edith Ramirez, Chairwoman, FTC, Opening Remarks at the Computer & Communications Industry Association and American Antitrust Institute Program, Competition Law & Patent Assertion Entities: What Antitrust Enforcers Can Do 7 (June 20, 2013), https://www.ftc.gov/sites/default/files/documents/public_statements/competition-law-patent-assertion-entities-what-antitrust-enforcers-can-do/130620paespeech.pdf (stating that privateering, through "a lack of transparency," enables assertion without "mutually assured destruction by proxy").

149. For examples of academics supporting antitrust intervention in the context of holdup, see Joseph Farrell et al., *Standard Setting, Patents, and Hold-up*, 74 ANTITRUST L.J. 603 (2007); J. Gregory Sidak, *Patent Holdup and Oligopsonistic Collusion in Standard-Setting Organizations*, 5 J. COMPETITION L. & ECON. 123 (2009); Robert A. Skitol, *Concerted Buyer Power: Its Potential for Addressing the Patent Holdup Problem in Standard Setting*, 72 ANTITRUST L.J. 727 (2005). For examples of academics supporting antitrust intervention in the context of privateering, see Carrier, *supra* note 125, at 2; Popofsky & Laufert, *supra* note 145; Comments of the American Antitrust Institute to the Federal Trade Commission and U.S. Department of Justice on Patent Assertion Entities (Feb. 21, 2013), http://www.justice.gov/atr/public/workshops/pae/comments/paew-0011.pdf; Comments of Phillip Malone, Harvard Law School, Patent Assertion Entities Activities Workshop 155–56 (Dec. 10, 2012), https://www.ftc.gov/sites/default/files/documents/public_events/Patent%20Assertion%20Entity%20Activities%20Workshop%20/pae_transcript.pdf.

150. *See, e.g.*, Eli Dourado, *How Patent Privateers Have Eroded Mutually Assured Destruction in the Computer Industry*, ÜMLAUT (Oct. 2, 2013),

antitrust interventions. However, just as above, the *Credit Suisse* Court would recognize that regulatory authority within the patent world already exists to supervise these activities, this time in the form of patent ownership recordation and equitable estoppel.

Thanks to recordation requirements, the PTO has a wealth of information at its disposal regarding patent ownership. The PTO maintains records on initial patent assignees as well as current assignees.[152] It knows whether patents have been subjected to reexamination and "who requested the reexamination" as well as who has been paying maintenance fees for which patents.[153] The PTO even knows "whether or not the current owner is a large or small entity."[154] While not all of this information is currently accessible to the public,[155] policymakers and industry members are already working to expand availability.[156] Together, this information

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https://theumlaut.com/2013/10/02/patent-privateers/; Comments of Google, Blackberry, Earthlink & Red Hat to the Federal Trade Commission and U.S. Department of Justice on Patent Assertion Entities 16 (Apr. 5, 2013), https://www.justice.gov/sites/default/files/atr/legacy/2013/04/15/paew-0049.pdf.

151. *See, e.g.*, PROMOTING INNOVATION, *supra* note 122 (determining that antitrust law should play a significant role in policing holdup); Erica S. Mintzer & Suzanne Munck, *The Joint U.S. Department of Justice and Federal Trade Commission Workshop on Patent Assertion Entity Activities—"Follow the Money"*, 79 ANTITRUST L.J. 423, 437 (2014) (contending that antitrust law should play a significant role in policing privateering); Julie Brill, Commissioner, FTC, Introductory Remarks at the Innovation Policy Summit, The Need for Patent Litigation Reform (Jan. 8, 2014), https://www.ftc.gov/system/files/documents/public_statements/191751/140108patentlitigation.pdf (remarking on the FTC's extensive review of antitrust intervention in patent law).

152. Colleen V. Chien, *The Who Owns What Problem in Patent Law* 6 (Santa Clara Univ. Legal Studies, Research Paper No. 03-12, 2012), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1995664.

153. *Id.* at 6–7.

154. *Id.*

155. *Id.*; *see also* Sipe, *supra* note 8, at 203 (observing the difficulties in determining patent ownership).

156. For examples of such proposals, see Patent Transparency and Improvements Act of 2013, S. 1720, 113th Cong. (2013) (requiring anyone filing a patent infringement suit to disclose all parties with a financial interest in the outcome or "any other kind of interest that could be substantially affected by the outcome of the proceeding"); *Fact Sheet: White House Task Force on High-Tech Patent Issues*, WHITE HOUSE OFF. PRESS SECRETARY (June 4, 2013), https://www.whitehouse.gov/the-press-office/2013/06/04/fact-sheet-white-house-task-force-high-tech-patent-issues (recommending that Congress require disclosure of the "Real Party-in-Interest" on patents and directing the PTO to begin its rulemaking process to improve transparency); *Defend Innovation*, ELECTRONIC FRONTIER FOUND., https://defendinnovation.org/proposal/improve-notice-function.html (last visited

"point[s] the recipient of a privateer's demand letter in the direction of" its true instigator and provides SSOs with the tools to mitigate the surprise of hold-up.[157]

Hold-up activity is also supervised by the equitable estoppel doctrine. Equitable estoppel is a defense to patent infringement,[158] requiring

> misleading conduct, which may include not only statements and actions but silence and inaction, leading another to reasonably infer that rights will not be asserted against it; (2) reliance upon this conduct; and (3) due to this reliance, material prejudice if the delayed assertion of such rights is permitted.[159]

Equitable estoppel is "founded on principles of fraud," intended to prevent one party from taking "unfair advantage of another."[160] Having induced the other party to rely on certain behavior from you, you are estopped from behaving otherwise and taking advantage of that reliance.

In this sense, equitable estoppel appears tailor-made to police hold-up, and it has in fact already been recognized by the courts as a valid defense in hold-up cases.[161] As one federal court applying equitable estoppel against hold-up explained,

> Ten years before this suit was filed, plaintiff concluded that the proposed Thrift or MINTS standard infringed his patent. It was well known to plaintiff and throughout the industry that the same provisions the plaintiff is relying on for infringement were being contemplated as national and international standards. Moreover, . . . plaintiff sat on an American National Standard

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Nov. 30, 2016) ("All patent owners should be required to keep their disclosures up to date throughout the life of the patent, or else the patent will be unenforceable. For example, patent owners should be required to update ownership and litigation records in a timely fashion.").

157. Sipe, *supra* note 8, at 205.

158. A.C. Aukerman Co. v. R.L. Chaides Constr. Co., 960 F.2d 1020, 1028 (Fed. Cir. 1992).

159. Mabus v. Gen. Dynamics C4 Sys., Inc., 633 F.3d 1356, 1359 (Fed. Cir. 2011) (quoting Lincoln Logs Ltd. v. Lincoln Pre-Cut Log Homes, Inc., 971 F.2d 732, 734 (Fed. Cir. 1992)).

160. *Equitable Estoppel*, BLACK'S LAW DICTIONARY (10th ed. 2014).

161. *See, e.g.*, Rambus Inc. v. Infineon Techs. AG, 318 F.3d 1081, 1084 (Fed. Cir. 2003) (limiting patent enforceability for breach of affirmative duty to disclose pending patent applications to an SSO); Wang Labs., Inc. v. Mitsubishi Elecs. Am., Inc., 103 F.3d 1571, 1580 (Fed. Cir. 1997) (distinguishing equitable estoppel from an implied license but noting the applicability of both to the SSO hold-up context); Stambler v. Diebold Inc., 11 U.S.P.Q.2d 1709, 1714 (E.D.N.Y. 1988) (holding that the plaintiff's "intentionally misleading silence" barred plaintiff's patent infringement claim under equitable estoppel), *aff'd*, 878 F.2d 1445 (Fed. Cir. 1989).

> Institute standards committee . . . . Plaintiff subsequently left the committee without notifying it of the alleged infringement of his patent. Under these circumstances, plaintiff had a duty to speak out . . . and his silence was affirmatively misleading. Plaintiff could not remain silent while an entire industry implemented the proposed standard and then when the standards were adopted assert that his patent covered what manufacturers believed to be an open and available standard.[162]

Certainly, where a patentee was a member of an SSO and failed to disclose ownership of potentially relevant patents when *asked*, the doctrine applies.[163] And the latter two prongs—reliance and material prejudice—would be relatively easy to prove in nearly any standard-setting context.[164]

Together then, recordation requirements and equitable estoppel evince supervisory authority under the patent laws for activities that abuse opacity in ownership. The former is administered directly by the PTO, and the latter—as a defense to infringement like misuse—is another regulatory tool wielded by the ITC and Federal Circuit.[165]

As with the discussion of patent misuse above,[166] this Article concedes that patent recordation and equitable estoppel will not necessarily provide the same outcomes in privateering and hold-up cases as a full-throated application of antitrust law. Rather, independent of outcome, *Credit Suisse*'s preemption analysis would recognize the existence and applicability of these alternative regulatory solutions to opacity problems as weighing in favor of preemption. The risks associated with permitting both regulatory apparatuses to overlap, explored in detail in Part IV, are simply too great.

B. Quasi-Preemption: Attempts to Control Downstream Use and Sale

The *Credit Suisse* arguments in favor of preemption are somewhat weaker where attempts to control downstream product markets are concerned; supervision and intervention from patent authority is incomplete, and antitrust law has a more natural role to play. The partial regulation from patent authority does, however, support

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162. *Stambler*, 11 U.S.P.Q.2d at 1714–15.

163. Robert P. Merges & Jeffrey M. Kuhn, *An Estoppel Doctrine for Patented Standards*, 97 CAL. L. REV. 1, 11, 23 (2009) (noting that equitable estoppel in the hold-up context may require "an affirmative communication between two parties," such as a patentee submitting an incomplete list of relevant patents).

164. *See, e.g.*, Sipe, *supra* note 8, at 212–13.

165. *See supra* Sections II.B–C.

166. *See supra* Sections II.A.1–2.

relaxing the higher levels of scrutiny that antitrust law currently applies to downstream product controls whenever patents are involved.

The previous Section focused largely on patent licensing arrangements. But a patentee may also attempt to exert control over the downstream product market, dictating how its patented products are used or sold. For example, a patentee may require that purchasers of its patented goods refrain from combining them with any competitor's goods.[167] If the patentee outsources production to a licensed manufacturer, it may limit the manufacturer to making the product within certain specifications and potential uses or limit the manufacturer to selling the product to a certain customer base.[168] A patentee may even try to forbid sales of its patented product below a certain price.[169]

What these scenarios have in common is that they feature patent owners attempting to directly control aspects of the downstream product market—the customers, prices, and uses. In other words, they are attempts to exert control not over who may practice the patent but, rather, what happens to any patented products. As with the scenarios given in the previous Section, scholars[170] and policymakers[171] have proposed full-throated antitrust interventions to curtail attempts by patentees to exert downstream market control. The *Credit Suisse* Court, however, would recognize that regulatory authority within the patent world already exercises partial supervision in the form of patent exhaustion doctrine.

Patent exhaustion, like patent misuse, is a defense to infringement.[172] It dictates "that the initial authorized sale of a patented item terminates all patent rights to that item."[173] As a result, once a patented item is "lawfully made and sold, there is no

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167. Coston, *supra* note 122; Ullman, *supra* note 122.

168. Coston, *supra* note 122; Ullman, *supra* note 122.

169. *See, e.g.*, Coston, *supra* note 122; Ullman, *supra* note 122.

170. For examples of academics supporting antitrust intervention where a patentee attempts to control downstream product customers, prices, and uses, see Molly Shaffer Van Houweling, *The New Servitudes*, 96 GEO. L.J. 885, 922 (2008); Ashley Doty, Note, Leegin v. PSKS*: New Standard, New Challenges*, 23 BERKELEY TECH. L.J. 655, 683 (2008); Herbert J. Hovenkamp, *Resale Price Maintenance: Consignment Agreements, Copyrighted or Patented Products and the First Sale Doctrine* (Univ. Iowa Legal Studies, Research Paper No. 10-42, 2010), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1671943.

171. *See, e.g.*, U.S. DEP'T JUST. & FED. TRADE COMM'N, ANTITRUST GUIDELINES FOR THE LICENSING OF INTELLECTUAL PROPERTY 25–31 (1995), http://www.justice.gov/sites/default/files/atr/legacy/2006/04/27/0558.pdf.

172. Keurig, Inc. v. Sturm Foods, Inc., 732 F.3d 1370, 1373 (Fed. Cir. 2013).

173. *Id.* at 1373 (quoting Quanta Comput., Inc. v. LG Elecs., Inc., 553 U.S. 617, 625 (2008)).

restriction on [its] *use* to be implied for the benefit of the patentee."[174] An infringement claim based on downstream use or sale will therefore be dismissed as a matter of law.[175]

Each of the potentially anticompetitive activities listed above—controlling uses, pricing, and customer bases—has been examined through the lens of patent exhaustion.[176] Just as with patent misuse, however, the doctrine is not quite coterminous with antitrust law.[177] And because exhaustion is a defense to infringement, the same sources of regulatory authority offer supervision.[178] The result thus far has been findings of exhaustion in most cases where a patentee attempts to exercise control over the downstream product market.[179]

However, unlike with patent misuse, the applicability of exhaustion may not support full preemption of antitrust law. Because these activities center on the patented goods themselves—rather than licensing arrangements—a defense to patent infringement will not itself destroy the anticompetitive scheme; the patentee may still

174. *Quanta*, 553 U.S. at 630 (alteration in original) (quoting Adams v. Burke, 84 U.S. 453, 457 (1873)).

175. *Keurig*, 732 F.3d at 1372–73.

176. *See, e.g.*, *Quanta*, 553 U.S. at 630 (applying exhaustion doctrine to an attempt by Intel to force purchasers of its patented microprocessors to only combine them with other Intel computer components); Ethyl Gasoline Corp. v. United States, 309 U.S. 436, 451 (1940) (applying exhaustion doctrine to an attempt by Ethyl Gasoline to forbid retailers from selling its patented gasoline mixture below certain prices); Gen. Talking Pictures Corp. v. W. Elec. Co., 304 U.S. 175, 181 (1938) (applying exhaustion doctrine to an attempt by Western Electric to forbid retailers from selling its patented vacuum tubes specifically to commercial movie theaters); Mallinckrodt, Inc. v. Medipart, Inc., 976 F.2d 700, 701, 703 (Fed. Cir. 1992) (applying exhaustion doctrine to an attempt by Mallinckrodt to forbid purchasers of its patented aerosol device from refurbishing or refilling the devices for additional uses).

177. The Federal Circuit did at one point treat patent exhaustion as coterminous with antitrust violations. *See Mallinckrodt*, 976 F.2d at 701. That approach was subsequently rejected by the Supreme Court. *See Quanta*, 553 U.S. at 618; *see also* Samuel F. Ernst, *Of Printer Cartridges and Patent Exhaustion: The En Banc Federal Circuit Is Poised to Clarify* Quanta, PATENTLYO (Apr. 21, 2015), http://patentlyo.com/patent/2015/04/cartridges-exhaustion-clarify.html ("Significantly, the Supreme Court makes no mention of market power, the 'rule of reason,' or any other antitrust policy as the basis for its decision in *Quanta*. Patent exhaustion is not merely a reiteration of antitrust law.").

178. *See supra* notes 135–39 and accompanying text.

179. The notable exception to this practice has been courts permitting restrictions that apply to the *initial* sale of a patented product; for example, a patentee dictating the price or market in which a licensed manufacturer may sell. *See, e.g.*, Samuel F. Ernst, *Patent Exhaustion for the Exhausted Defendant: Should Parties Be Able to Contract Around Exhaustion in Settling Patent Litigation?*, 2014 U. ILL. J.L. TECH. & POL'Y 445, 454 (citing *Gen. Talking Pictures*, 304 U.S. at 181).

attempt to enforce its control over downstream use and sale via other legal mechanisms—contract law, for example.[180]

Rather than full preemption, this Article advocates a middle-tier, measured approach with regard to attempts to regulate the downstream product market. The current trend in antitrust courts is to generally treat downstream controls on patented goods as more "inherently suspicious" than unpatented goods.[181] But because exhaustion effectively dissolves the patent angle of these activities,[182] antitrust courts should instead proceed as if they are dealing with unpatented products when engaging in their analysis. This will prevent many of the dangers of doctrinal overlap: antitrust courts will not need to consider—or adjudicate—patent issues in their analysis.[183] This middle-tier approach to antitrust intervention stands in contrast to the analysis for attempts at merger and collusion, outlined below, where the patents at issue are in full force and infringement suits themselves threaten competition as a result.

C. No Preemption: Attempts to Collude and Merge

The *Credit Suisse* arguments in favor of preemption are at their weakest where patents are essentially used as instruments of collusion or merger. Supervision and intervention from patent authority are essentially absent, and antitrust law is operating within its foundational competency. For example, two competitors may

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180. *See, e.g.*, Leegin Creative Leather Prods., Inc. v. PSKS, Inc., 551 U.S. 877, 885 (2007) (examining an attempt to control downstream resale prices with contract law); *In re* Fair Allocation Sys., Inc., 126 F.T.C. 626, 635–36 (1998) (examining an attempt to control downstream market territory and quantities with contract law). *See generally* Kenneth G. Elzinga & David E. Mills, *The Economics of Resale Price Maintenance*, *in* 3 ABA SECTION OF ANTITRUST LAW, ISSUES IN COMPETITION LAW AND POLICY 1841, 1841 (2008) (examining the impact and efficacy of contractual limits on downstream price and nonprice attributes).

181. Herbert Hovenkamp, *Post-Sale Restraints and Competitive Harm: The First Sale Doctrine in Perspective*, 66 N.Y.U. ANN. SURV. AM. L. 487, 492 (2011) (citing *Quanta* as an example of the higher scrutiny applied to downstream controls when patents are concerned).

182. While the patentee may retain indirect control over certain aspects of the downstream product market—for example, what price manufacturers may charge for the initial sale—they have lost the unique patent advantage against downstream users and retailers: infringement. *See id.* at 492 (noting that the reason "presence of an IP right make[s] a difference" in analyzing effects on competition is because "infringement actions have different advantages and pose different problems" than mere "contract actions").

183. The likelihood of antitrust courts to make mistakes and generate inefficiency while analyzing patent issues is examined in detail *infra* Part IV.

attempt to pool their patents in a third-party holding company, and use it to sue all of their other competitors for infringement, effectively cartelizing the market.[184] One company may also attempt to acquire its competitor's patent portfolio, effectively engaging in a merger and concentrating market share.[185]

The middle-tier approach outlined above[186] would not be effective for actions that concentrate market share. Because these actions concern the market for intellectual property rights—either pooling or acquisition thereof—the existence of the patents cannot be ignored. On the other hand, antitrust courts analyzing these activities would have to engage in relatively little adjudication of actual patent issues.[187] Instead, they would be drawing upon the core

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184. *See* WILLIAM M. LANDES & RICHARD A. POSNER, THE ECONOMIC STRUCTURE OF INTELLECTUAL PROPERTY LAW 383 (2003) (arguing that competitors' attempts to pool or cross-license patents should be subject to strict antitrust analysis); ROBERT C. MARSHALL & LESLIE M. MARX, THE ECONOMICS OF COLLUSION: CARTELS AND BIDDING RINGS 151 (2012) (discussing the effects of cartels on other members of the market); Joel I. Klein, Acting Assistant Attorney Gen., U.S. Dep't of Justice Antitrust Div., Cross-Licensing and Antitrust Law (May 2, 1997), http://www.justice.gov/atr/speech/cross-licensing-and-antitrust-law.

185. *See* Fiona M. Scott Morton, Deputy Assistant Attorney Gen. for Econ. Analysis, U.S. Dep't of Justice Antitrust Div., Patent Portfolio Acquisitions: An Economic Analysis 6–10 (Sept. 21, 2012), http://www.justice.gov/atr/file/518966/download; Fiona M. Scott Morton & Carl Shapiro, *Strategic Patent Acquisitions*, 79 ANTITRUST L.J. 463, 484–85 (2014).

186. *See supra* Section III.B.

187. For example, where two competitors cross-license and then agree (implicitly or explicitly) to sue all other competitors out of the market, the court does not need to engage in a lengthy analysis of the patents at issue or take up claim construction in order to determine market power; predatory collusion between competitors is per se an antitrust violation. *See, e.g.*, United States v. Singer Mfg. Co., 374 U.S. 174, 196–97 (1963). *See generally* Mark A. Lemley & Christopher R. Leslie, *Categorical Analysis in Antitrust Jurisprudence*, 93 IOWA L. REV. 1207, 1213–15 (2008). Where portfolio acquisitions are concerned, some interpretation of the patents may be required. But in many cases, an analysis of the downstream market itself—that is, the market for the products practicing the competitors' patents—would be sufficient and would avoid much of the need to delve into the patents themselves. *See, e.g.*, United States v. Line Material Co., 333 U.S. 287, 287 (1948); FTC v. Lundbeck, Inc., 650 F.3d 1236, 1242 (8th Cir. 2011); *Statement of the Department of Justice's Antitrust Division on Its Decision to Close Its Investigations of Google Inc.'s Acquisition of Motorola Mobility Holdings Inc. and the Acquisitions of Certain Patents by Apple Inc., Microsoft Corp. and Research in Motion Ltd.*, U.S. DEP'T JUST. OFF. PUB. AFF. (Feb. 13, 2012), http://www.justice.gov/opa/pr/statement-department-justice-s-antitrust-division-its-decision-close-its-investigations ("The division concluded that each of the [portfolio] transactions was unlikely to substantially lessen competition *for wireless devices*." (emphasis added)).

foundational competencies of antitrust law: policing collusion and regulating mergers.[188]

Moreover, these core competencies are unique to antitrust. None of the tools of patent regulation mentioned above—misuse, recordation, estoppel, or exhaustion—have been applied to curtail collusive behavior or regulate portfolio mergers. Therefore, even bearing in mind the considerable limitations and flaws of antitrust law—uncertainty, inefficiency, and imprecision, among others[189]—the argument for preemption is at its weakest in this sphere. The key questions in *Credit Suisse*'s analysis would not be satisfied because patent law offers no true alternative supervision. Limiting antitrust law intervention in the patent sphere to where it is strictly necessary—as it is here—offers a solution to minimize the potential for conflicting guidance and error due to overlap.

Actavis is instructive on this point. In the reverse payment scheme used in *Actavis*, a patent owner pays a potential competitor to delay bringing its competing product to market.[190] This is "effectively . . . a cartel."[191] In this scenario, the patent owner and the potential

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188. The Clayton Act, for example, was specifically designed to prohibit companies "whose *primary* purpose is to hold stocks of other companies" to form a collusive trust. *See* DAVID DALE MARTIN, MERGERS AND THE CLAYTON ACT 31 (1959). In terms of regulating mergers, the specialization and institutional competence of the Department of Justice (DOJ) Antitrust Division and the Federal Trade Commission (FTC) is substantial, to say the least. *See, e.g.*, ANTITRUST MODERNIZATION COMM'N, REPORT AND RECOMMENDATIONS 47 (2007), http://govinfo.library.unt.edu/amc/report_recommendation/amc_final_report.pdf (determining that the expanded merger review process used since the 1970s "has led to the development of substantial expertise within" the DOJ and FTC); Lawrence M. Frankel, *The Flawed Institutional Design of U.S. Merger Review: Stacking the Deck Against Enforcement*, 2008 UTAH L. REV. 159, 174 (noting that the DOJ and FTC have "substantial expertise[,] including lawyers and economists who have spent virtually their entire careers analyzing mergers"); Nick Cibula, Note, *It's Always a Good Time for a Beer, but What About the Hops?*, 18 DRAKE J. AGRIC. L. 157, 176 (2013) (arguing that the DOJ and FTC have "expansive expertise to determine antitrust concerns" such as "merger[s] and acquisitions"); *see also* Sipe, *supra* note 8, at 222 (describing collusion and merger concerns as the "foundations of antitrust law").

189. *See supra* text accompanying notes 8–15.

190. FTC v. Actavis, Inc., 133 S. Ct. 2223, 2227 (2013) (providing an example of a reverse-payment scheme); *see also supra* text accompanying notes 41–42.

191. *In re* Cipro Cases I & II, 348 P.3d 845, 854 (Cal. 2015) (applying *Actavis* and holding that reverse-payment settlement agreements are not immune from antitrust scrutiny); *see also* Michael A. Carrier, *Unsettling Drug Patent Settlements: A Framework for Presumptive Illegality*, 108 MICH. L. REV. 37, 39–40 (2009) (comparing reverse payments to collusive market division via "eliminate[ed] competition between rivals"); Herbert Hovenkamp, *Anticompetitive Patent Settlements and the Supreme Court's*

competitor are colluding to restrict output to charge higher prices to consumers and splitting the profits between them. In that sense, the patent regulatory tools discussed above offer no solution. There is no overreaching licensing arrangement, for example, that patent misuse could snuff out. Instead, antitrust law offers its core strengths and competencies, and largely without needing to adjudicate patent-specific issues at all. Indeed, as the *Actavis* Court found compelling in its decision, in reverse payment antitrust cases "it is normally not necessary to litigate patent validity," as the antitrust question turns on the collusive conduct itself.[192] *Credit Suisse*-style concerns are therefore at their lowest ebb.

To the extent the hierarchy outlined in this Part remains incomplete, it should nevertheless provide a useful rubric moving forward. Anticompetitive activities—involving patents or otherwise—defy entirely neat categorization. New forms of anticompetitive behavior emerge with every novel addition to commerce and commercial structure. Moreover, a single scheme may implicate multiple overlapping categories of activity. But generally speaking, the above analysis reveals that anticompetitive activities relying on leveraging patents through licensing arrangements or information asymmetry are likely supervised through patent misuse doctrine, recordation requirements, and equitable estoppel doctrine. Courts and policymakers should be skeptical of antitrust intervention against these kinds of activities and should strongly consider the possibility of preemption. In the alternative, anticompetitive activities relying on downstream control of patented products are only partially supervised via patent exhaustion doctrine. Preemption may be viable, but at least some antitrust intervention is likely warranted. Finally, anticompetitive activities relying on patents as instruments of collusion or merger have little to no supervision from patent authorities. Despite skepticism of—and costs associated with—antitrust law, courts and policymakers should not hesitate to apply full-throated antitrust intervention to these kinds of activities.

Actavis *Decision*, 15 MINN. J.L. SCI. & TECH. 3, 8–9 (2014) (explaining the similarities in effect between a two-person cartel and a monopoly held by one person).

192. *Actavis*, 133 S. Ct. at 2236. *But see* Joshua B. Fischman, *The Circular Logic of* Actavis, 66 AM. U. L. REV. 123–24 (2016) (arguing that the Court inappropriately equivocated patent validity with the terms of a reverse-payment settlement).

IV. RISK OF CONFLICT

The previous two Parts examined the existing sources of regulatory authority in the patent context—the PTO, the ITC, and the Federal Circuit—to create a hierarchy of potentially anticompetitive patent activities, categorizing them based on the degree to which they are already under patent-specific supervision. Where that alternative supervision exists, as the *Credit Suisse* Court recognized, the benefits of overlapping antitrust intervention are marginal. Of equal—if not greater—concern, however, are the *costs* of overlapping antitrust intervention.

The bulk of the Court's analysis in *Credit Suisse* was dedicated to calculating those costs in the securities context. Due to the "fine, complex, detailed line" separating activity the SEC permits and activity the SEC forbids, the "contradictory inferences" that might arise from identical behavior, the "need for securities-related expertise" in adjudication, the "risk of inconsistent court results," and the danger of permitting plaintiffs to "dress what is essentially a securities complaint in antitrust clothing," the *Credit Suisse* Court determined that "antitrust courts are likely to make unusually serious mistakes" where they intervene with securities law.[193] As a result, the Court stated, permitting antitrust law and securities law to overlap would likely "produce conflicting guidance, requirements, duties, privileges, or standards of conduct."[194] This Part extends that analysis to the patent context where the costs are equally substantial. Each of the above concerns is just as pressing in the patent sphere—if not moreso.

A. *The Fine Lines of Patent Law*

In *Credit Suisse*, the Court characterized the line separating permissible and impermissible securities activity as "fine, complex, [and] detailed."[195] Accordingly, allowing antitrust and securities law to apply simultaneously would be particularly likely to produce conflicting guidance and requirements. The Court illustrated this dilemma:

> It will often be difficult for someone who is not familiar with accepted syndicate practices to determine with confidence whether an underwriter has insisted that an investor buy more shares in the immediate aftermarket (forbidden), or has simply allocated more shares to an investor willing to purchase additional shares of that

193. Credit Suisse Sec. (USA) LLC v. Billing, 551 U.S. 264, 279, 280–82, 284, 281–82 (2007).
194. *Id.* at 275–76.
195. *Id.* at 279, 282.

> issue in the long run (permitted). And who but a securities expert could say whether the present SEC rules set forth a virtually permanent line, unlikely to change in ways that would permit the sorts of . . . conduct that it now seems to forbid?[196]

Patent law is similarly replete with fine doctrinal lines separating the permissible and the forbidden. To provide just a few key examples, the frameworks governing patent misuse, exhaustion, inequitable conduct, and contributory infringement are highly complex and continue to develop and evolve.

As explained in Part III, patent misuse and exhaustion are equitable defenses to infringement.[197] The former applies where a patentee "impermissibly broadened the 'physical or temporal scope' of the patent grant with anticompetitive effect."[198] The patent then becomes "unenforceable until the misuse is purged."[199] The latter applies where a patented item has been "lawfully made and sold," after which "there is no restriction on [its] use to be implied for the benefit of the patentee."[200] An infringement claim based on downstream use or sale will therefore be dismissed as a matter of law.[201] The Federal Circuit, reviewing these defenses,[202] is forced to thus grapple with complex, "murk[y]" questions.[203] In terms of patent misuse: What is outside the scope of any given patent grant? Has this particular patent been "leveraged" as part of the alleged anticompetitive scheme? How should courts analyze and resolve *portfolio*—rather than individual patent—misuse?[204] In terms of exhaustion: Does the article sold sufficiently embody the "essential features" of the patent?[205] To what extent can parties contract

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196. *Id.* at 280.
197. *See supra* notes 128–31, 172–75 and accompanying text.
198. B. Braun Med., Inc. v. Abbott Labs., 124 F.3d 1419, 1426 (Fed. Cir. 1997) (quoting Windsurfing Int'l, Inc. v. AMF, Inc., 782 F.2d 995, 1001–02 (Fed. Cir. 1986)).
199. *Id.* at 1427.
200. Quanta Comput., Inc. v. LG Elecs., Inc., 553 U.S. 617, 629–30 (2008) (alteration in original) (quoting Adams v. Burke, 84 U.S. 453, 457 (1873)).
201. Keurig, Inc. v. Sturm Foods, Inc., 732 F.3d 1370, 1372–73 (Fed. Cir. 2013).
202. *See supra* notes 94–96 (discussing the Federal Circuit's exclusive jurisdiction).
203. Oliver, *supra* note 129, at 67; *see also* John W. Osborne, *A Coherent View of Patent Exhaustion: A Standard Based on Patentable Distinctiveness*, 20 SANTA CLARA COMPUTER & HIGH TECH. L.J. 643, 646 (2004) (describing the "general statement" of patent exhaustion doctrine as "deceptively simple," but acknowledging that courts' application of the doctrine "has not been simple, straightforward, or consistent").
204. Princo Corp. v. Int'l Trade Comm'n, 616 F.3d 1318, 1331 (Fed. Cir. 2010) (en banc).
205. Osborne, *supra* note 203, at 646.

around exhaustion?[206] As a result, there is already "foreseeable polymorphism" in the doctrines of patent misuse and exhaustion, and "unforeseeable strains of potential misbehaviors" are likely to emerge.[207] Allowing generalist antitrust courts to intervene would only produce greater uncertainty and, ultimately, conflicting and inconsistent results.

Inequitable conduct is another equitable defense to patent infringement.[208] To successfully assert a claim of inequitable conduct, the accused infringer must show that the patentee failed to disclose information, such as prior art, in its patent application.[209] The patentee must also have "specific intent to deceive the PTO," such that the "PTO would not have granted the patent but for [the] failure to disclose."[210] The remedy, as expressed by the Federal Circuit, is the "'atomic bomb' of patent law": "inequitable conduct regarding any single claim renders the entire patent unenforceable."[211] The result is a fine line to adjudicate. Because the Federal Circuit has determined that "intent and materiality are separate elements . . . that . . . should not be put on a sliding scale with one another," the crucial—and highly technical—question of whether or not the patentee's alleged deception was the "but for" cause of the PTO's grant must be addressed fully in every case.[212] Again, inconsistency and uncertainty would mar this already complex doctrine if antitrust courts were left to adjudicate these claims.

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206. *See, e.g.*, Yuichi Watanabe, *The Doctrine of Patent Exhaustion: The Impact of* Quanta Computer, Inc. v. LG Elecs., Inc., 14 VA. J.L. & TECH. 273, 285–87 & nn.80–99 (2009). To wit, sufficiently egregious attempts to contract around exhaustion may themselves trigger misuse. *See* USM Corp. v. SPS Techs., Inc., 694 F.2d 505, 510–12 (7th Cir. 1982).

207. Richard Li-dar Wang, *Deviated, Unsound, and Self-Retreating: A Critical Assessment of the* Princo v. ITC *En Banc Decision*, 16 MARQ. INTELL. PROP. L. REV. 51, 72–73 (2012).

208. *See* Therasense, Inc. v. Becton, Dickinson & Co., 649 F.3d 1276, 1285 (Fed. Cir. 2011) (en banc) (describing the use of inequitable conduct to "bar[] enforcement of a patent" and "dismiss patent cases involving egregious misconduct").

209. *Id.* at 1290.

210. *Id.* at 1290, 1296.

211. *Id.* at 1288 (quoting Aventis Pharma S.A. v. Amphastar Pharm., Inc., 525 F.3d 1334, 1349 (Fed. Cir. 2008) (Rader, J., dissenting)).

212. James J. Schneider, Comment, Therasense*-less: How the Federal Circuit Let Policy Overtake Precedent in* Therasense, Inc. v. Becton, Dickinson & Co., 53 B.C. L. REV. ELECTRONIC SUPPLEMENT 223, 229 (2012) (citing *Therasense*, 649 F.3d at 1290), http://bclawreview.org/files/2012/04/18_schneider.pdf.

As opposed to direct infringement, contributory infringement covers situations where a party does not sell the patented article or practice the patented process, but instead

> offers to sell or sells . . . a material or apparatus for use in practicing a patented process, constituting a material part of the invention, knowing the same to be especially made or especially adapted for use in an infringement of such patent, and not a staple article or commodity of commerce suitable for substantial noninfringing use . . . .[213]

For a plaintiff's claim of contributory infringement to succeed, the plaintiff must demonstrate that the defendant "knew that the combination for which its components were especially made was both patented and infringing," and that the "components have 'no substantial noninfringing uses.'"[214] In practice, contributory infringement claims can be incredibly complex, not only in technical terms—understanding how components may be used together or separately in infringing or noninfringing ways—but doctrinally as well. For example, there is a delicate line between raising a successful contributory infringement claim and impermissibly trying to extend the scope of one's patent over unpatented devices—potentially triggering misuse.[215] With the risk of a finding of unenforceability on one side and the possibility of rampant third-party infringement on the other, the costs of antitrust courts generating conflicting guidance or contributing to uncertainty in this doctrine would be quite high.

Altogether, the degree of complexity associated with patent doctrines, such as misuse, exhaustion, inequitable conduct, and contributory infringement, weigh in favor of preemption under *Credit Suisse*'s analysis. If permitted instead to overlap, there is a significant risk that patent law and antitrust law would produce conflicting guidance and requirements. Just as generalist antitrust courts would struggle to distinguish permissible and forbidden securities

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213. 35 U.S.C. § 271(c) (2012).

214. Lucent Techs., Inc. v. Gateway, Inc., 580 F.3d 1301, 1320 (Fed. Cir. 2009) (quoting Cross Med. Prods., Inc. v. Medtronic Sofamor Danek, Inc., 424 F.3d 1293, 1312 (Fed. Cir. 2005)).

215. *See, e.g.*, Dawson Chem. Co. v. Rohm & Haas Co., 448 U.S. 176, 201 (1980) (determining that the owner of a process patent can only use contributory infringement to block the sale of unpatented "nonstaple goods" without triggering misuse). *See generally* A. Samuel Oddi, *Contributory Infringement/Patent Misuse: Metaphysics and Metamorphosis*, 44 U. PITT. L. REV. 73, 75 (1982) (exploring the historical and ongoing tension between the two doctrines of contributory infringement and patent misuse; in particular, the complexity of the post-*Dawson* staple-nonstaple dichotomy).

arrangements—and fail to accurately forecast potential changes in securities law[216]—they would struggle with the equally delicate and fine lines of patent doctrine.

B. The Danger of Contradictory Inferences

The *Credit Suisse* Court also pointed out the danger that contradictory inferences may be drawn from "overlapping evidence" showing both "unlawful antitrust activity and . . . lawful securities marketing activity," which would further increase the odds of conflicting guidance and requirements from antitrust law and securities law.[217] The Court provided the following example:

> [E]vidence tending to show unlawful antitrust activity and evidence tending to show lawful securities marketing activity may overlap, or prove identical. Consider, for instance, a conversation between an underwriter and an investor about how long an investor intends to hold the new shares (and at what price), say, a conversation that elicits comments concerning both the investor's short and longer term plans. That exchange . . . might help to establish an effort to collect an unlawfully high commission . . . through the sales of less popular stocks. Or it might prove only that the underwriter allocates more popular shares to investors who will help stabilize the aftermarket share price.[218]

This same concern—overlapping and similar, yet not coterminous standards—holds equally true for antitrust law and patent law. The examples given in the previous Section are illustrative on this point as well: misuse, exhaustion, inequitable conduct, and contributory infringement.[219]

Although anticompetitive effect is a necessary component of a successful claim of patent misuse,[220] making the principles of antitrust

216. Credit Suisse Sec. (USA) LLC v. Billing, 551 U.S. 264, 282 (2007).
217. *Id.* at 281–82.
218. *Id.* at 281.
219. *See generally* Deborah A. Garza, Deputy Assistant Attorney Gen., U.S. Dep't of Justice Antitrust Div., Remarks Before the Intellectual Property Owners Association, Antitrust and Competition Law, Standards Setting and Pharmaceutical Issues Committees Conference, The Increasing Role of Antitrust Principles in Defining Patent Rights (June 9, 2008), http://www.justice.gov/atr/speech/remarks-increasing-role-antitrust-principles-defining-patent-rights ("And several aspects of patent law—such as misuse, patent exhaustion doctrine, and the standards used to determine whether an invention is patentable and whether to enjoin infringement—are designed . . . to preserve and protect competition.").
220. *See* Princo Corp. v. Int'l Trade Comm'n, 616 F.3d 1318, 1334 (Fed. Cir. 2010) (en banc) (rejecting a misuse claim in part due to the alleged infringer's failure to demonstrate anticompetitive effects).

law relevant, antitrust law and patent misuse are not coterminous.[221] Anticompetitive conduct that constitutes patent misuse may not rise to the level of an antitrust violation[222] and vice versa.[223] Though patent exhaustion is also intended to safeguard competition, it too is disjointed from antitrust liability.[224] Similarly, while inequitable conduct has overlapping concerns with antitrust law,[225] the two are not synchronized in terms of liability.[226] With contributory infringement, there is considerable crossover—but also conflict—with antitrust tying doctrine.[227] Specifically, a patent owner may use

221. The coterminous approach to antitrust and misuse was, in fact, specifically rejected by Congress the last time misuse doctrine was revisited via legislation. *See* S. REP. NO. 100-492, at 17–18 (1988). *See generally* Joel R. Bennett, *Patent Misuse: Must an Alleged Infringer Prove an Antitrust Violation?*, 17 AIPLA Q.J. 1, 2 (1989); Kenneth J. Burchfiel, *Patent Misuse and Antitrust Reform: "Blessed Be the Tie?"*, 4 HARV. J.L. & TECH. 1, 2 n.9 (1991).

222. *See, e.g.*, Zenith Radio Corp. v. Hazeltine Research, Inc., 395 U.S. 100, 140 (1969) (determining that even if the lower court found misuse, "it does not necessarily follow that the misuse embodies the ingredients of a violation of either [section] 1 or [section] 2 of the Sherman Act").

223. *See, e.g.*, *Princo*, 616 F.3d at 1329 ("While proof of an antitrust violation shows that the [patentee] has committed wrongful conduct having anticompetitive effects, that does not establish misuse of the patent in suit unless the conduct in question restricts the use of that patent and does so in one of the specific ways that have been held to be outside the otherwise broad scope of the patent grant.").

224. *See* Garza, *supra* note 219; *supra* note 177.

225. *See, e.g.*, Christopher R. Leslie, *Antitrust, Inequitable Conduct, and the Intent to Deceive the Patent Office*, 1 U.C. IRVINE L. REV. 323, 325 (2011) ("Invalid patents undermine both the patent system and the competitive marketplace. They raise entry costs and delay market entry, deter customers and business partners from contracting with new entrants . . . and hurt innovation."); Christopher R. Leslie, *The Anticompetitive Effects of Unenforced Invalid Patents*, 91 MINN. L. REV. 101, 103 (2006) ("Even supporters of strong patent protection have generally not quarreled with antitrust law's treatment of patents procured through fraud.").

226. *See, e.g.*, Walker Process Equip., Inc. v. Food Mach. & Chem. Corp., 382 U.S. 172, 173, 177–78 (1965) (explaining that if "the exclusionary power of the illegal patent claim," for example, is proved, "the maintenance and enforcement of a patent obtained by fraud on the Patent Office may be the basis of an action under [section] 2 of the Sherman Act," but it is not so automatically); *see also* Nobelpharma AB v. Implant Innovations, Inc., 141 F.3d 1059, 1069 (Fed. Cir. 1998) ("Consistent with the Supreme Court's analysis in *Walker Process* . . . we have distinguished 'inequitable conduct' from *Walker Process* fraud, noting that inequitable conduct is a broader, more inclusive concept than the common law fraud needed to support a *Walker Process* counterclaim.").

227. Tying is the more generic antitrust term for schemes like package licensing, wherein a purchaser is forced to purchase certain items together rather than individually. *See* Joshua D. Wright, *Antitrust Analysis of Tying Arrangements and Exclusive Dealing*, *in* ANTITRUST LAW AND ECONOMICS 183–85 (Keith N. Hylton ed., 2010). More precisely, it is an antitrust violation to use "market power" in one good

claims of contributory infringement to force purchases of unpatented goods upon consumers of patented products in a manner that may or may not rise to the level of an antitrust violation.[228] Moreover, antitrust principles even come into play at the remedies stage for successful contributory infringement claims.[229]

C. The Need for Patent-Related Expertise

Another of the key reasons given in *Credit Suisse* as to why overlapping antitrust and securities law would produce conflict was the "need for securities-related expertise" in adjudication.[230] Specifically, the Court noted that the SEC has the "expertise to draw that line" between what should and should not be permissible under securities law.[231] This same reasoning applies with equal, if not greater, force in the realm of patent law. Patent law requires not only an understanding of patented technologies themselves—ranging from the particular biochemistry of pharmaceuticals to the pure number theory underpinning high-level cryptography—but also an

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to force consumers to purchase an additional "tied" good, thereby "foreclos[ing] a substantial volume of commerce." United States v. Microsoft Corp., 253 F.3d 34, 84–85 (D.C. Cir. 2001) (per curiam) (examining Microsoft's practice of forcing consumers to purchase its Internet browser by bundling it into Microsoft's operating system software).

228. Charles W. Adams, *A Brief History of Indirect Liability for Patent Infringement*, 22 SANTA CLARA COMPUTER & HIGH TECH. L.J. 369, 370 (2006). Professor Adams argues that it was the early abuses of contributory infringement that led to the creation of the Clayton Act (and its prohibition of certain tying arrangements) in the first place. *Id.* But, as with antitrust claims based on inequitable conduct under *Walker Process*, exclusionary market power must be shown to make out an antitrust violation and may not be present in every case of abusive contributory infringement claims. *See, e.g.*, Ill. Tool Works Inc. v. Indep. Ink, Inc., 547 U.S. 28, 31 (2006) (noting that "the mere fact that a tying product is patented does not support such a presumption" of market power).

229. Instead of an injunction, the court may engage in compulsory licensing, forcing the patentee to accept a given royalty from the infringer and permitting the infringer to legally practice the patent. JAMES PACKARD LOVE, KNOWLEDGE ECOLOGY INT'L, RECENT EXAMPLES OF THE USE OF COMPULSORY LICENSES ON PATENTS 3–6 (2007), http://www.keionline.org/misc-docs/recent_cls_8mar07.pdf. These "compulsory licenses are generally authorized" where an injunction would be "anti-competitive"—even if the patentee has not committed an antitrust violation—or where there is otherwise significant "public need." Colleen Chien, *Cheap Drugs at What Price to Innovation: Does the Compulsory Licensing of Pharmaceuticals Hurt Innovation?*, 18 BERKELEY TECH. L.J. 853, 859 (2003); *see also* Kenneth J. Nunnenkamp, *Compulsory Licensing of Critical Patents Under CERCLA?*, 9 J. NAT. RESOURCES & ENVTL. L. 397, 408 & n.45 (1994).

230. Credit Suisse Sec. (USA) LLC v. Billing, 551 U.S. 264, 281–82 (2007).

231. *Id.* at 285.

understanding of potential economic effects on innovation, implementation, use, and downstream or substitute markets. Professor Wasserman summarizes the view among academics: "There is near-universal agreement that the institution charged with creating sound patent policy needs access both to economic and to technological data, as well as sufficient expertise to analyze and interpret this information."[232]

The sources of regulatory authority outlined in Part II—the PTO, the ITC, and the Federal Circuit—are well-stocked with this exact expertise. The PTO has classic information-gathering mechanisms at its disposal including hearings,[233] research studies,[234] and cross-contact with other agencies.[235] This is in addition to the considerable expertise cultivated among scientifically-trained patent examiners,[236] the Administrative Patent Judges on the Patent Trial and Appeal Board,[237] and the staff within the newly created Office of the Chief Economist.[238] In short, "the PTO possesses superior pathways to acquire technological

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232. Wasserman, *supra* note 65, at 2008; *see also* Michael J. Burstein, *Rules for Patents*, 52 WM. & MARY L. REV. 1747, 1777–78 (2011) ("Patent policy in particular requires the application of technological and economic analysis . . . ."); Rai, *supra* note 56, at 1262 ("[E]xpertise in both economics and technology is a highly desirable attribute for any institution creating patent policy.").

233. *See, e.g.*, *Transcripts of the Public Hearings on Biotechnology*, U.S. PAT. & TRADEMARK OFF. (Oct. 17, 1994, 9:00 AM), https://www.uspto.gov/web/offices/com/hearings/biotech/biotrans.html.

234. *See, e.g.*, U.S. PATENT & TRADEMARK OFFICE, INTERNATIONAL PATENT PROTECTIONS FOR SMALL BUSINESSES 1–3 (2012), http://www.uspto.gov/sites/default/files/aia_implementation/20120113-ippr_report.pdf.

235. *See, e.g.*, Rai, *supra* note 56, at 1255–57 (noting the dialogue between the National Institutes of Health and the PTO regarding DNA patent policy).

236. As of 2014, the PTO had employed more than 9300 patent examiners to process over 618,000 patent applications. U.S. PATENT & TRADEMARK OFFICE, PERFORMANCE AND ACCOUNTABILITY REPORT: FISCAL YEAR 2014, at 11, 143 (2014) [hereinafter PERFORMANCE AND ACCOUNTABILITY], https://www.uspto.gov/about/stratplan/ar/USPTOFY2014PAR.pdf.

237. From late 2014 to mid-2015, between 214 and 235 judges on the PTAB adjudicated over 9900 examination appeals. NATHAN K. KELLEY & SCOTT R. BOALICK, U.S. PATENT & TRADEMARK OFFICE, PATENT TRIAL AND APPEAL BOARD UPDATE, 7, 34 (2015), http://www.uspto.gov/sites/default/files/documents/20150820_PPAC_PTAB_Update.pdf; PERFORMANCE AND ACCOUNTABILITY, *supra* note 236, at 55. The PTAB also heard 1310 AIA petitions, including post-grant and inter partes reviews. U.S. PATENT & TRADEMARK OFFICE, PATENT TRIAL AND APPEAL BOARD STATISTICS 4 (2015), http://www.uspto.gov/sites/default/files/documents/2015-04-30%20PTAB.pdf.

238. *Office of Chief Economist*, U.S. PAT. & TRADEMARK OFF., https://www.uspto.gov/about-us/organizational-offices/office-policy-and-international-affairs/office-chief-economist (last visited Nov. 30, 2016).

and economic data, as well as the expertise to evaluate and analyze this information to craft substantive patent law standards."[239]

The ITC, given its statutory requirement to adjudicate patent infringement claims,[240] has not only a "high level of expertise in patent law" but also "deep knowledge of the narrow range of technologies that are repeatedly the subject of section 337 investigations,"[241] such as telecommunications, computers, and medical technology.[242] Furthermore, the ITC has developed considerable economic expertise, given its need to consider "antitrust and equitable principles, and the public policy of promoting 'free competition'" in its decision making.[243] Altogether, the depth and breadth of the ITC's expertise has been recognized by an array of scholars,[244] and even the Chief Judge of the Federal Circuit.[245]

The Federal Circuit's own expertise in patent law is considerable. The court's jurisdiction includes all appeals arising under the Patent Act[246] in addition to appeals of patent decisions from the PTO[247] and

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239. Wasserman, *supra* note 65, at 2018.

240. *See* 19 U.S.C. § 1337(a)(1)(B)(i) (2012); *see also supra* text accompanying notes 78–85. In 2014, the ITC had ninety-three active section 337 investigations involving determinations of patent infringement. U.S. INT'L TRADE COMM'N, FY 2014 AT A GLANCE: INTELLECTUAL PROPERTY IMPORT INVESTIGATIONS 1 (2015), https://www.usitc.gov/press_room/documents/yir_op2_2015.pdf.

241. Kumar, *supra* note 80, at 1586.

242. INTELLECTUAL PROPERTY IMPORT INVESTIGATIONS, *supra* note 240, at 1 (providing statistics on the different products involved in section 337 investigations).

243. S. REP. NO. 93-1298, at 196 (1974) (discussing the ITC's role in investigating complaints, as envisioned by the Tariff Act); *see also* Kumar, *supra* note 80, at 1563 (stating that the scope of the ITC's determinations "encompasses, at minimum, issues involving patents, international trade, and antitrust law").

244. *See, e.g.*, Maria Raia Hamilton, *Process Patents and the Limits of the International Trade Commission's Jurisdiction: Finding the Line in the Sand*, 50 IDEA 161, 183 n.121 (2010) (indicating that ITC judges mostly hear patent disputes, so they are considered to have "greater technical expertise" than Article III judges); Kumar, *supra* note 80, at 1555; Michael Meehan, *Increasing Certainty and Harnessing Private Information in the U.S. Patent System: A Proposal for Reform*, 2010 STAN. TECH. L. REV. 1, ¶ 106; Kali N. Murray, *The Cooperation of Many Minds: Domestic Patent Reform in a Heterogeneous Regime*, 48 IDEA 289, 333 (2008); Schwartz, *supra* note 86, at 1702; Herbert C. Shelley et al., *The Standard of Review Applied by the United States Court of Appeals for the Federal Circuit in International Trade and Customs Cases*, 45 AM. U. L. REV. 1749, 1801 (1996).

245. *See* Interview by Douglas Lichtman with Paul R. Michel, Chief Judge, U.S. Court of Appeals for the Fed. Circuit (Jan. 5, 2009), http://www.ipcolloquium.com/Programs/Players/4.html (describing the Administrative Law Judges within the ITC as "specialist" judges and—"loosely"—"expert patent judges").

246. 28 U.S.C. § 1295(a) (2012); *see supra* notes 94–96.

247. § 1295(a)(4)(A).

the ITC.[248] This broad jurisdictional grant has led many to label the Federal Circuit as the unique "expert court" among the otherwise "generalist" regional federal appellate courts.[249] In addition, the Federal Circuit's exclusive position—both in terms of patent appeals and in reviewing the ITC and PTO—provides a natural bottleneck for expertise to converge and cross-pollinate.

As the Court recognized in *Credit Suisse*, "antitrust courts are likely to make unusually serious mistakes" in areas of law where expertise is necessary.[250] In addition, allowing generalist antitrust courts to encroach upon and shape patent law would effectively squander the considerable collective expertise of the PTO, the ITC, and the Federal Circuit. This expertise mismatch strongly suggests the need for a minimally overlapping role for antitrust law and patent law, if not preemption entirely under *Credit Suisse*.

D. The Risk of Inconsistency

The *Credit Suisse* Court additionally noted the risk that antitrust courts, "with different nonexpert judges and different nonexpert juries" will find it difficult to "reach consistent results" as a reason why antitrust law and securities law, if simultaneously applicable, would be likely to produce conflicting guidance and requirements.[251] This risk looms large in the patent context as well. As outlined above, the need for expertise in adjudicating patent disputes is substantial;[252] as a result, nonexpert judges dealing with cases involving patents are apt to produce inconsistent results. But there is also uncertainty and inconsistency built into the applicable antitrust doctrine itself: in antitrust cases involving patents, courts have increasingly abandoned predictable rules and eliminated useful presumptions that might otherwise create consistency.

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248. § 1295(a)(5)–(6).

249. *See, e.g.*, Paul R. Gugliuzza, *The Federal Circuit as a Federal Court*, 54 WM. & MARY L. REV. 1791, 1839 (2013); Kumar, *supra* note 80, at 1549, 1589; Banks Miller & Brett Curry, *Experts Judging Experts: The Role of Expertise in Reviewing Agency Decision Making*, 38 LAW & SOC. INQUIRY 55, 56, 60 (2013); Amy R. Motomura, *Federal Circuit Deference: Two Regimes in Conflict*, 119 PA. ST. L. REV. 925, 952 (2015); Joan E. Schaffner, *Federal Circuit "Choice of Law":* Erie *Through the Looking Glass*, 81 IOWA L. REV. 1173, 1176, 1179, 1218 (1996) (arguing that the Federal Circuit should have broader authority to assert independent judgment on "all substantive law issues which compromise a 'patent related case'" due to the court's expertise).

250. Credit Suisse Sec. (USA) LLC v. Billing, 551 U.S. 264, 282 (2007).

251. *Id.* at 281.

252. *See supra* Section IV.C.

Over the past few decades, the Supreme Court has eliminated a number of specialized antitrust rules and analytical carve-outs created for patents in favor of bringing patents into the general antitrust fold.[253] The Court has largely accomplished this task by folding patent cases into the relatively unpredictable rule of reason.[254] The rule of reason is a holistic test to determine whether certain conduct constitutes an illegal restraint of trade, eschewing clear standards in favor of flexibility and totality:

> [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, the purpose or end sought to be attained, are all relevant facts. This is not because a good intention will save an otherwise objectionable regulation or the reverse; but because knowledge of intent may help the court to interpret facts and to predict consequences.[255]

The trend towards an all-encompassing rule of reason approach to antitrust has produced costly,[256] fact-intensive litigation with highly uncertain outcomes.[257] As Professor Robin Feldman summarized, "[T]here is nothing messier than the rule of reason . . . [whose]

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253. *See* Robin Feldman, *Ending Patent Exceptionalism and Structuring the Rule of Reason: The Supreme Court Opens the Door for Both*, 15 MINN. J.L. SCI. & TECH. 61, 62–63 (2014) (asserting that the Supreme Court's decision in *Actavis* created an opportunity to structure the rule of reason in order to mitigate patent exceptionalism); Lee, *supra* note 122, at 1416.

254. Feldman, *supra* note 253, at 73–74; Shubha Ghosh, *Convergence?*, 15 MINN. J.L. SCI. & TECH. 95, 113 (2014) ("More engagement with the policies underlying competition would be desirable. Instead, those thinking about antitrust engage with models of markets that may provide some guidance but lead invariably to the rule of reason."); Lee, *supra* note 122, at 1445 (noting that the Supreme Court's move toward the rule of reason is apparent in "tying arrangements and reverse patent settlements").

255. Bd. of Trade v. United States, 246 U.S. 231, 238 (1918).

256. Frank H. Easterbrook, *The Limits of Antitrust*, 63 TEX. L. REV. 1, 12–13 (1984) ("Litigation costs are the product of vague rules combined with high stakes, and nowhere is that combination more deadly than in antitrust litigation under the Rule of Reason."); Ghosh, *supra* note 254, at 102 (arguing that the "litigation costs" under the rule of reason are so high that it effectively "serve[s] to immunize patent owners from suit").

257. *See* Alan Devlin & Michael Jacobs, *Joint-Venture Analysis After* American Needle, 7 J. COMPETITION L. & ECON. 543, 546 (2011) ("Full-blown rule-of-reason analysis subjects defendants to considerable expense and uncertainty."); *see also* Andrew I. Gavil, *Moving Beyond Caricature and Characterization: The Modern Rule of Reason in Practice*, 85 S. CAL. L. REV. 733, 738 n.28 (2012) ("The proposition that rule of reason litigation can be uncertain and costly . . . does not appear to be controversial.").

analysis is so complex that it is a burden on litigants and the judicial system."[258] Perhaps ironically, some of the most strident criticism of the all-encompassing rule of reason has come from the Supreme Court itself.[259] To the extent that bringing antitrust cases involving patents into the general, all-purpose rule of reason eliminates otherwise bright-line rules and presumptions, it inevitably generates uncertainty in its own right.[260] More importantly for the purposes of this Article, the rule of reason forces antitrust courts in practice to analyze more and more patent law issues—analysis for which antitrust courts are ill-equipped.[261]

For example, the existence of "market power"[262] is a necessary predicate to certain antitrust violations, such as tying.[263] In *Illinois Tool Works Inc. v. Independent Ink, Inc.*,[264] the Supreme Court eliminated the presumption that a patent confers "market power" over the products covered by the patent; in doing so, the Court

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258. Feldman, *supra* note 253, at 63.

259. *See, e.g.*, Jefferson Par. Hosp. Dist. No. 2 v. Hyde, 466 U.S. 2, 34 (1984) (O'Connor, J., concurring) (noting that the "costs of a rule-of-reason approach" necessarily include "elaborate inquir[ies] into the economic effects of" the particular suspect conduct), *abrogated by* Ill. Tool Works Inc. v. Indep. Ink, Inc., 547 U.S. 28 (2006); Cont'l T.V., Inc. v. GTE Sylvania Inc., 433 U.S. 36, 50 n.16 (1977) ("[P]er se rules tend to provide guidance to the business community and to minimize the burdens on litigants and the judicial system of the more complex rule-of-reason trials . . . ."); N. Pac. Ry. Co. v. United States, 356 U.S. 1, 5 (1958) (noting that rule of reason analysis requires "incredibly complicated and prolonged economic investigation into the entire history of the industry involved, as well as related industries, in an effort to determine at large whether a particular restraint has been unreasonable—an inquiry so often wholly fruitless when undertaken"); United States v. Trenton Potteries Co., 273 U.S. 392, 397 (1927) (noting that rule of reason analysis frequently requires "minute inquiry [into] whether a particular price is reasonable or unreasonable").

260. *See* David Olson & Stefania Fusco, *Rules Versus Standards: Competing Notions of Inconsistency Robustness in Patent Law*, 64 ALA. L. REV. 647, 664 (2013) (discussing how the loss of presumptions and bright-line rules governing patents removes "predictability" and "allows more inconsistency to persist in the system").

261. *But see* Mark S. Levy, Comment, *Big Pharma Monopoly: Why Consumers Keep Landing on "Park Place" and How the Game Is Rigged*, 66 AM. U. L. REV. 247, 283–85 (2016) (advocating for courts to apply the rule of reason in patent-related pharmaceutical cases, such as REMS manipulation and product hopping).

262. Market power is generally defined as "the ability to raise prices above those that would be charged in a competitive market." NCAA v. Bd. of Regents, 468 U.S. 85, 109 n.38 (1984).

263. *See supra* note 227 (defining "tying" and explaining its implications for consumers and commerce). *See generally* WILLIAM BREIT, THE ANTITRUST CASEBOOK: MILESTONES IN ECONOMIC REGULATION 218–20 (3d ed. 2008) (discussing examples of tying arrangements analyzed by the Court and outlining the doctrine's evolution).

264. 547 U.S. 28 (2006).

moved tying cases to a rule of reason analysis.[265] Legal academics and economists had long criticized that presumption as inaccurate in many cases.[266] But the marginal gain in accuracy[267] has come at the loss of consistency and predictability[268] and an increase in the need for antitrust courts to delve into patent interpretation. The question of whether market power exists over a certain product forces courts to consider potential substitutes for that product;[269] so when patents are involved, the courts must—at least implicitly—determine the precise scope of the patent: What hypothetical substitute products or uses would not be infringing?[270] This act of "translating the words of the [patent] into a meaningful technological context [is] one of the most difficult problems in patent law."[271] And yet, in these antitrust cases, it would be the inconsistent regional circuits, rather than the Federal Circuit, reviewing patent interpretations.[272]

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265. *See id.* at 31. Before *Illinois Tool Works*, "requisite economic power [was] presumed when the tying product [was] patented." United States v. Loew's Inc., 371 U.S. 38, 45 (1962) (citing Int'l Salt Co. v. United States, 332 U.S. 392 (1947), *abrogated by Ill. Tool Works*, 547 U.S. 28), *abrogated by Ill. Tool Works*, 547 U.S. 28.

266. *See, e.g.*, HERBERT HOVENKAMP, MARK D. JANIS & MARK A. LEMLEY, IP AND ANTITRUST: AN ANALYSIS OF ANTITRUST PRINCIPLES APPLIED TO INTELLECTUAL PROPERTY LAW § 4.2(a) (Supp. 2005) (arguing that intellectual property rights grant power to exclude but do not necessarily confer market power); Burchfiel, *supra* note 221, at 57, 77–79 (1991) (commenting that the presumption is anecdotal and not supported by facts); LANDES & POSNER, *supra* note 184, at 374.

267. *See* Dennis J. Abdelnour, Note, Illinois Tool Works*: Allocating the Burden of Proving Market Power in Patent Tying Cases*, 5 NW. J. TECH. & INTELL. PROP. 365, 380–84 (2007) (discussing classes of patents that would rightfully have a presumption of market power).

268. *See supra* notes 254–60; *see also* David O. Taylor, *Formalism and Antiformalism in Patent Law Adjudication: Rules and Standards*, 46 CONN. L. REV. 415, 423, 495 (2013) (arguing that patent law has an exceptional need for certainty and bright-line rules relative to other doctrines).

269. *See, e.g.*, Jefferson Par. Hosp. Dist. No. 2 v. Hyde, 466 U.S. 2, 37–38 n.7 (1984) (plurality opinion); Thomas G. Krattenmaker et al., *Monopoly Power and Market Power in Antitrust Law*, 76 GEO. L.J. 241, 256–57 n.75 (1987).

270. In the case of a package license analyzed as a tying scheme, the court's need to delve into patent analysis is doubled: Which patent licenses are substitutes for other patent licenses? The question surely cannot be answered without first interpreting the patents in the package, delving into claim construction, and then doing the same for the arguable substitute patents.

271. Lee Petherbridge, *The Claim Construction Effect*, 15 MICH. TELECOMM. & TECH. L. REV. 215, 218 (2008).

272. Where the plaintiff brings a non-patent law cause of action, such as an antitrust tying claim, appellate jurisdiction is generally with the regional courts rather than the Federal Circuit even if patents are factually involved. *See* Holmes Grp., Inc. v. Vornado Air Circulation Sys., Inc., 535 U.S. 826, 830, 834 (2002).

In short, the *Credit Suisse* Court recognized the "risk that antitrust courts, with different nonexpert judges and different nonexpert juries, will produce inconsistent results" in areas of law where significant expertise is required, such as patent law.[273] This threat of inconsistency has only been heightened by the trend to eliminate specialized antitrust rules and analytical carve-outs for patents that might otherwise prevent nonexpert courts from having to deal with patent intricacies. The end result is a high probability of conflicting guidance and requirements where patent law and antitrust law are simultaneously applicable, counseling in favor of preemption.

E. The Potential for Forum-Shopping

Finally, the *Credit Suisse* Court noted that if antitrust law and securities law are simultaneously applicable, there is a danger of "permitting plaintiffs to dress what is essentially a securities complaint in antitrust clothing," thereby avoiding securities-specific procedures.[274] Circumventing these specialized procedures, the Court argued, would further contribute to conflicting guidance and requirements.[275] Patent law features not only specialized procedures but an entirely separate court of appeals.[276] As discussed above, bringing patents into the general antitrust fold has the end result of requiring generalist courts to analyze patent issues.[277] Because the issues in antitrust cases involving patents evade unified Federal Circuit review, the *Credit Suisse* Court would be highly concerned about potential conflict.

Exacerbating the problem, this jurisdictional side-stepping can also happen in reverse: litigants may avoid the otherwise controlling regional circuit by dressing up their antitrust claims with tacked-on patent claims, thereby ending up before the Federal Circuit on appeal. Before 1998, this would not have been a problem because "the general jurisprudence of the Federal Circuit had been to apply its own substantive law to patent issues and the appropriate regional circuit law to non-patent issues," including antitrust issues.[278] But

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273. Credit Suisse Sec. (USA) LLC v. Billing, 551 U.S. 264, 281 (2007).
274. *Id.* at 284.
275. *Id.* at 281–82.
276. *See supra* notes 94–96.
277. *See supra* Section IV.D.
278. Claudette Espanol, Comment, *The Federal Circuit: Jurisdictional Expansion into Antitrust Issues Relating to Patent Enforcement*, 2 SETON HALL CIR. REV. 307, 315 (2005) (citing Nobelpharma AB v. Implant Innovations, Inc., 141 F.3d 1059 (Fed. Cir. 1998)). For an example of the Federal Circuit's pre-*Nobelpharma* approach, see *Atari,*

over the past two decades, the Federal Circuit has created its own body of antitrust law that is distinct and separate from the bodies of antitrust law for each of the regional circuits.[279] This puts district courts in a considerable bind when antitrust and patent claims overlap: Should they apply the Federal Circuit's antitrust law or the law of their regional circuit?[280] To the extent that different districts—across different types of cases—vary in their answer to that question,[281] the overlap between patent and antitrust law will continue to generate inconsistency and conflict.

Taken together, these concerns paint a relatively bleak picture where patent law and antitrust law overlap. The fine, precise doctrinal lines within patent law are likely to be warped. Similar economic and competitive considerations—but not identical standards—make contradictory inferences inevitable. Generalist courts are forced to adjudicate patent issues over which they lack the requisite expertise. Across courts, results are virtually certain to be inconsistent—a phenomenon only made worse by the potential for forum-shopping. In short, the risk that the patent and antitrust laws, "if both applicable, would produce conflicting guidance, requirements, duties, privileges, or standards of conduct" is at least as great as the risk associated with the securities-antitrust overlap.[282] Looking at the longstanding, fundamental tension between patent law and antitrust law—and the considerable ink spilled by academics

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Inc. v. JS & A Grp., Inc., 747 F.2d 1422, 1439 (Fed. Cir. 1984) (applying the law of the "involved circuit" to all issues over which the Federal Circuit did not have exclusive jurisdiction), *overruled by Nobelpharma*, 141 F.3d at 1068.

279. Espanol, *supra* note 278, at 318 (noting that the Federal Circuit applies its own body of antitrust law, not regional circuit precedent, to "antitrust claims premised on the bringing of a patent infringement suit").

280. *See id.* at 325 ("[T]here may be conflicting authority on the same issues, depending on where an appeal will be brought . . . . A district court must adhere to Federal Circuit precedent in interpreting and applying patent law. At the same time, a district court is also required to respect the authority of its regional circuit court when interpreting non-patent specific issues."); James B. Kobak, Jr., *The Federal Circuit as a Competition Law Court*, 83 J. PAT. & TRADEMARK OFF. SOC'Y 527, 530–32 (2001).

281. For example, in *Spotless Enterprises, Inc. v. Carlisle Plastics, Inc.*, the Eastern District of New York followed the Second Circuit, rather than the Federal Circuit, in holding that bad faith was not required as part of a patent-based unfair competition claim. 56 F. Supp. 2d 274, 286–87 (E.D.N.Y. 1999) (explicitly rejecting *Hunter Douglas, Inc. v. Harmonic Design, Inc.*, 153 F.3d 1318, 1336 (Fed. Cir. 1998)). Other districts instead followed the Federal Circuit's holding that bad faith was required. *See, e.g.*, Moore N. Am., Inc. v. Poser Bus. Forms, Inc., No. CIV.A.97-712-SLR, 2000 WL 1480992, at *6 (D. Del. Sept. 29, 2000).

282. Credit Suisse Sec. (USA) LLC v. Billing, 551 U.S. 264, 275–76 (2007).

and policymakers in unsuccessful attempts to resolve that tension—the conclusion that the risk is in fact far greater becomes inescapable.

V. THE UNIQUE NATURE OF PATENT-ANTITRUST INTERPLAY

The preemption arguments in Parts II, III, and IV proceeded by attempting to apply the *Credit Suisse* framework as narrowly as possible. While the analysis in *Credit Suisse* elevates what might be more appropriately termed policy arguments into doctrinal ones, the attempt thus far has been to resist introducing policy arguments that have no direct parallel or referent in *Credit Suisse*. Having made the narrow case, this Part broadens the analysis, introducing additional arguments in favor of patent law preempting antitrust law for which *Credit Suisse* appears to at least pave the way, if not provide full endorsement.

Specifically, the following subsections explore four arguments in favor of preemption relying on the unique interplay between patent law and antitrust law; arguments that were therefore necessarily absent from the securities-antitrust analysis of *Credit Suisse*. First, patent terms provide a built-in time limit on any particular anticompetitive scheme. Second, the anticompetitive effects of schemes requiring patentable innovation are offset, at least in part, by increased incentives to innovate. Third, the patent-antitrust overlap threatens not only to distort patent doctrine, as explored in Part IV, but also antitrust doctrine. Fourth, at least some anticompetitive problems in the patent sphere are themselves the result of antitrust intervention. These four arguments support the notion that the benefits of antitrust intervention are particularly low—and the costs particularly high—where patents are concerned. Consistent with the logic of *Credit Suisse*, these arguments offer additional support for strongly considering preemption.

A. Patent Expiration and Unwinding Schemes

The preemption analysis undertaken by the *Credit Suisse* Court, following on *Trinko* and *NYNEX*, was essentially based on cost-benefit analysis: the costs of antitrust intervention are generally quite high,[283] and the existence of an alternative supervisory regime undercuts most potential benefits.[284] In *Credit Suisse*, the supervision and tools of the SEC made the need for antitrust intervention "unusually small" in the securities context.[285] In the patent context, there are similar

283. *See supra* notes 8–15 and accompanying text.
284. *See supra* notes 19–35 and accompanying text.
285. *Credit Suisse*, 551 U.S. at 283.

alternative sources of supervision, as outlined in Part II. But even where these sources are lacking, anticompetitive patent schemes—unlike anticompetitive securities schemes—have a built-in expiration date that further reduces the benefits of antitrust intervention: the end of the patent term.

For applications filed on or after June 8, 1995, the patent term is twenty years from filing,[286] provided that maintenance fees are properly paid.[287] Once the patent term expires, the patent is no longer enforceable, and competitors are free to practice its claims.[288] Therefore, even absent any supervision or intervention, most of the types of patent schemes analyzed in Part III will eventually self-destruct. Attempts to peg royalty rates to the sales of an unrelated product, for example, necessarily unwind when royalties are no longer due.

This stands in stark comparison to most anticompetitive schemes, which *gain* strength as market power is consolidated over time and threaten to continue in perpetuity absent intervention.[289] This threat of anticompetitive equilibrium is in part what justifies the costly application of antitrust law in the first place.[290] Where an anticompetitive scheme is inherently unstable or short-lived, on the other hand, the benefits of antitrust intervention are minimized.[291] As

286. 35 U.S.C. § 154(a)(2)(2012).
287. *Id.* § 41(b)(1).
288. *Id.* § 154(a)(2).
289. A firm that uses predatory pricing to consolidate market share, for example, may then use its dominant position to capitalize on barriers to entry, such as economies of scale, network effects, or vertical integration, making its predation even harder to overcome. *See, e.g.*, ARTHUR O'SULLIVAN & STEVEN M. SHEFFRIN, ECONOMICS: PRINCIPLES IN ACTION 153 (2003); R. Preston McAfee et al., *What Is a Barrier to Entry?*, 94 AM. ECON. REV. 461, 461 (2004).
290. *See Credit Suisse*, 551 U.S. at 284.
291. Antitrust scholars have made an analogous point in the cartel context. Cartels, groups of competitors that all agree to charge some supracompetitive price, are considered inherently unstable. Every member in the group has an incentive to charge less than the agreed-upon price and thereby capture the entire market as the cheapest seller. *See* ADI AYAL, FAIRNESS IN ANTITRUST: PROTECTING THE STRONG FROM THE WEAK 52 (2014) ("Since cheating is undeniably lucrative, a cartel is inherently unstable, and thus will defeat itself over time."); RICHARD A. POSNER, ANTITRUST LAW 67 (2d ed. 2001) ("[C]artel[s] [are] rife with inducements and temptations to cheating, as is confirmed by the history of actual cartels, which are usually quite unstable even when not forced underground by antitrust enforcement."). As a result, scholars argue, the benefits of antitrust intervention against cartels are minimal and do not generally justify the associated costs. *See, e.g.*, DOMINICK T. ARMENTANO, ANTITRUST: THE CASE FOR REPEAL 90 (2d ed. 1999); ROBERT H. BORK, THE ANTITRUST PARADOX: A POLICY AT WAR WITH ITSELF 196 (1978).

a result, the cost-benefit analysis for antitrust intervention where patents are concerned leans even more heavily in favor of preemption.

B. Monopolist Profits and Incentives to Innovate

To return to the outset of this Article, antitrust law's primary goal is to "proscribe unreasonable restraints of competition" and thereby ensure efficient competitive market operation.[292] "[T]he core reason" that antitrust scholars oppose monopolies and price fixing is because of the associated "deadweight loss."[293] That is, the monopolist or price fixer does not merely transfer wealth out of the pockets of consumers into its own; it prevents otherwise mutually beneficial transactions from occurring, "injur[ing] both the excluded consumers and the economy more broadly as inefficient substitution takes place."[294] That deadweight loss effect, however, is minimized where anticompetitive patent behavior is at issue due to increased incentives to innovate.

When patentable innovation occurs, the entire economy benefits. "[N]ew products and processes," as well as "improvements in . . . productivity," permit more mutually beneficial transactions to occur and grow the economy in a process essentially opposite that of deadweight loss.[295] Incentives to innovate therefore affect economic growth. The potential to enact an anticompetitive patent scheme may form such an incentive.

Anticompetitive schemes are generally quite profitable, and a potential innovator deciding whether to invest additional time and money into research and development would take the possibility of such profits into account. Even if an anticompetitive patent scheme causes some deadweight loss, the extent that the economy grows—either directly by the patent used in the scheme or indirectly by increased incentives to innovate—may offset any deadweight losses in

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292. SCM Corp. v. Xerox Corp., 645 F.2d 1195, 1203 (2d Cir. 1981).

293. Christopher R. Leslie, *Antitrust Damages and Deadweight Loss*, *in* THE ECONOMICS OF ANTITRUST INJURY AND FIRM-SPECIFIC DAMAGES 45, 45 (Kevin S. Marshall ed., 2008).

294. *Id.* For background information on the mechanics of deadweight loss, see generally N. GREGORY MANKIW, PRINCIPLES OF ECONOMICS 163–70 (2014).

295. ABBY JOSEPH COHEN, GOLDMAN SACHS, INNOVATION AND ECONOMIC GROWTH 4 (2012), http://www.goldmansachs.com/our-thinking/archive/archive-pdfs/gsr.pdf (connecting innovation to improved living standards). *See generally* DAVID WARSH, KNOWLEDGE AND THE WEALTH OF NATIONS: A STORY OF ECONOMIC DISCOVERY xv–xvii (2006); David Ahlstrom, *Innovation and Growth: How Business Contributes to Society*, 24 ACAD. MGMT. PERSP. 11, 11 (2010).

the long run.[296] This is, of course, the same logic underpinning the patent system in the first place: temporarily monopolistic practices are tolerated in exchange for incentivizing innovation.[297]

Naturally, this line of reasoning has its limits. The returns from incentivizing even the most groundbreaking innovation can eventually be swallowed by sufficiently egregious patent schemes. While a typical anticompetitive scheme does little more than line the pockets of the perpetrator, an anticompetitive scheme that first requires patentable innovation offers at least some returns to society as a whole. And to the extent that patent-related anticompetitive schemes are more likely to provide at least some offsetting long-term economic benefits compared to non-patent schemes, the costs of antitrust intervention will be less justified on the margins where patents are involved.

C. Doctrinal Distortions in Antitrust

The analysis in Part IV examines the extent that conflicting guidance and requirements are likely to emerge if antitrust law and patent law are permitted to overlap. That analysis focused primarily on the damage that overlap would do to patent law: from disrupting the "fine, complex, detailed line[s]" of patent doctrines to improperly interpreting patents due to a lack of requisite "expertise."[298] But as antitrust law increasingly attempts to supervise patent activity, antitrust law itself is at risk of warping as well.

For example, antitrust courts have attempted in recent years to police patent trolls: entities that acquire and enforce patents without

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296. This is particularly likely to be true because the anticompetitive scheme eventually expires but the new technology will continue to be available in perpetuity. *See supra* notes 286–91 and accompanying text.

297. *See, e.g.*, Jeremy Bentham, *Manual of Political Economy*, *in* 1 JEREMY BENTHAM'S ECONOMIC WRITINGS 263 (Werner Stark ed., 1952) ("A patent considered as a recompense for the encrease [sic] given to the general stock of wealth by an invention, as a recompense for industry and genius and ingenuity, is proportionate and essentially just. No other mode of recompense can merit either one of the other epithet."); JOHN STUART MILL, PRINCIPLES OF POLITICAL ECONOMY 932–33 (2d ed. 1929) ("[I]n general an exclusive privilege, of temporary duration is preferable; because it leaves nothing to any one's discretion; because the reward conferred by it depends on the invention's being found useful, and the greater the usefulness, the greater the reward; and because it is paid by the very persons to whom the service is rendered, the consumers of the commodity."); ADAM SMITH, THE WEALTH OF NATIONS 712 (1937) (arguing that the provision of temporary monopoly is "the easiest and most natural way in which the state can [provide] recompense . . . for hazarding a dangerous and expensive experiment, of which the public is afterwards to reap the benefit").

298. Credit Suisse Sec. (USA) LLC v. Billing, 551 U.S. 264, 279, 282 (2007).

actually practicing them.[299] The troll business model—acquiring licensing fees from entities that actually do create goods and services—has led many academics and policymakers to characterize them as a pure anticompetitive nuisance worthy of antitrust intervention.[300] But there are "clear doctrinal . . . roadblocks to leveraging antitrust law" to police much of patent troll behavior, ranging from "quasi-constitutional" protections to textual limitations.[301]

In terms of constitutional protections, the Supreme Court has established that the First Amendment's protection of the right to petition grants presumptive immunity from liability under the antitrust laws for "attempts to influence the passage or enforcement of laws," such as patent infringement suits.[302] This immunity applies even when a suit is brought with anticompetitive intent:

> Joint efforts to influence public officials do not violate the antitrust laws *even though intended to eliminate competition.* Such conduct is not illegal, either standing alone or as part of a broader scheme itself violative of the Sherman Act. The jury should have been so instructed and, given the obviously telling nature of this evidence, we cannot hold this lapse to be mere harmless error.[303]

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299. BRIAN T. YEH, CONG. RESEARCH SERV., AN OVERVIEW OF THE "PATENT TROLLS" DEBATE 4 (2013), http://www.fas.org/sgp/crs/misc/R42668.pdf.

300. *See* Carrier, *supra* note 125, at 11–12; Collin A. Rose, Note, *A Match Made for Court: Patent Assertion Entities and the Federal Trade Commission*, 48 COLUM. J.L. & SOC. PROBS. 95, 139 (2014); Bert Foer & Sandeep Vaheesan, *Patent Trolls in the Cross Hairs*, AM. ANTITRUST INST. (Jan. 16, 2014), http://www.antitrustinstitute.org/content/patent-trolls-cross-hairs (arguing that the Department of Justice and the FTC should bypass Congress and take action pursuant to their existing authority); Gene Sperling, *Taking on Patent Trolls to Protect American Innovation*, WHITE HOUSE BLOG (June 4, 2013, 1:55 PM), https://www.whitehouse.gov/blog/2013/06/04/taking-patent-trolls-protect-american-innovation (arguing that patent trolls are responsible for "an explosion of abusive patent litigation designed not to reward innovation . . . but to threaten companies in order to extract settlements based on questionable claims"); EXEC. OFFICE OF THE PRESIDENT, PATENT ASSERTION AND U.S. INNOVATION 12 (2013), https://www.whitehouse.gov/sites/default/files/docs/patent_report.pdf.

301. Sipe, *supra* note 8, at 191, 223.

302. E. R.R. Presidents Conference v. Noerr Motor Freight, Inc., 365 U.S. 127, 135 (1961). For examples of the application of this immunity doctrine specifically to patent trolls, see *In re Innovatio IP Ventures, LLC Patent Litig.*, 921 F. Supp. 2d 903, 922 (N.D. Ill. 2013); Steven Seidenberg, *Patent Trolls Are Getting First Amendment Protection for Their Demand Letters*, ABA J. (May 1, 2014, 9:00 AM), http://www.abajournal.com/magazine/article/patent_trolls_are_getting_first_amendment_protection_for_demand_letters.

303. United Mine Workers of Am. v. Pennington, 381 U.S. 657, 670 (1965) (emphasis added).

The only exception to this immunity is where a lawsuit is a "sham," determined by a two-prong test: (1) the suit "must be objectively baseless," such that "no reasonable litigant could realistically expect success on the merits," and (2) the suit must be brought with the "subjective motivation" to interfere with a competitor through "governmental *process*—as opposed to the *outcome* of that process."[304]

However, neither prong is likely to be met in many troll cases. With regard to the first prong, the patent quality of troll portfolios is generally at least as high as portfolios owned by non-trolls,[305] and patents owned by trolls tend to fare no better or worse on average in reexamination proceedings.[306] With regards to the second prong, troll plaintiffs genuinely hope to succeed on the merits. Trolls, by definition, do not participate in the actual product market—and hence are not in competition with the product sellers—so merely hurting producers through nuisance litigation does them no good. A successful infringement suit, on the other hand, grants them damages. As a result, for antitrust law to reach patent trolls, arguably the most important carve-out from antitrust liability[307] would need to be eroded.

In terms of textual limitations, in the types of patent troll cases where immunity does not apply, commentators have frequently suggested using section 5 of the Federal Trade Commission Act as the doctrinal hook for antitrust enforcement.[308] The scope of section 5—prohibiting any "unfair or deceptive acts or practices in or affecting

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304. Prof'l Real Estate Inv'rs, Inc. v. Columbia Pictures Indus., Inc., 508 U.S. 49, 60–61 (1993).

305. *See* Timo Fischer & Joachim Henkel, *Patent Trolls on Markets for Technology—An Empirical Analysis of NPEs' Patent Acquisitions*, 41 RES. POL'Y 1519, 1519 (2012); *see also* Michael Risch, *Patent Troll Myths*, 42 SETON HALL L. REV. 457, 458, 481 (2012).

306. *See* Steve Moore, *A Fractured Fairytale Part 3: More Patent Troll Myths*, IP WATCHDOG (July 31, 2013), http://www.ipwatchdog.com/2013/07/31/a-factured-fairytale-part-3-more-patent-troll-myths/id=43755.

307. *See, e.g.*, M. Sean Royall & Seth M.M. Stodder, *From* Burlington Northern *to* Baltimore Scrap, 15 ANTITRUST, Summer 2001, at 47, 51 (2001) ("There is a clear public interest in ensuring that meritorious claims are brought before the courts, irrespective of the subjective motivations of the claimants or their supporters . . . many important cases concerning vital public interests . . . might [otherwise] never be brought into court and resolved.").

308. 15 U.S.C. § 45 (2012); *see* Thibault Schrepel, *Patent Privateering: Patents as Weapons*, U. CIN. L. REV. (Feb. 19, 2015), http://uclawreview.org/2015/02/19/patent-privateering-patents-as-weapons (explaining the absence of a legal claim against the mere existence of a patent troll); Carrier, *supra* note 125, at 11–12 (suggesting section 5 as a vehicle for the FTC to address patent trolling); Popofsky & Laufert, *supra* note 145, at 12; Comments of Google et al., *supra* note 150, at 3–4; Comments of Philip Malone, *Patent Assertion Entities Activities Workshop*, *supra* note 149, at 156, 162.

commerce"[309]—is quite broad. This breadth makes it a seemingly natural tool against a novel threat like patent trolls, who do not appear to implicate other antitrust laws.[310] But the use of section 5 as a catch-all to expand antitrust law's reach has significant drawbacks. Critics rightly point out the "apparent absence of limiting principles" in both section 5's language[311] and interpretation,[312] and the commensurate risk of uncertainty and rent-seeking generated by its application in novel contexts.[313] Attempts to police patent trolls only exacerbate this increasingly atextual approach to antitrust enforcement.

Hence, if antitrust law is to play a role in policing patent troll activity, it would first have to "distort" antitrust law in order to do so,[314] whether by overriding key doctrinal carve-outs or by permitting atextual expansion. Either way, the existing risk of false antitrust positives and chilling effects associated with antitrust intervention is increased significantly. In comparison, patent law may already have the tools to curtail troll behavior.[315] Where, as in the context of patent trolls, antitrust law must be stretched or distorted in order to reach patent activity, the benefits of preemption as an alternative are therefore substantial.

D. Antitrust Solutions Causing Antitrust Problems

Paradoxically, antitrust involvement in the patent sphere itself occasionally generates anticompetitive problems. A key example of

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309. 15 U.S.C. § 45(a)(1).

310. *See, e.g.*, Sipe, *supra* note 8, at 191, 194 (examining some of the shortcomings of applying the Sherman Act to troll activity).

311. William E. Kovacic & Marc Winerman, *Competition Policy and the Application of Section 5 of the Federal Trade Commission Act*, 76 ANTITRUST L.J. 929, 942 (2010).

312. James Cooper, *The Limits of Section 5's Scope Beyond the Sherman Act*, TRUTH ON THE MARKET (Aug. 1, 2013), http://truthonthemarket.com/tag/sherman-act/ (asserting that FTC Commissioners essentially define illegal action under section 5). *But see Statement of Enforcement Principles Regarding "Unfair Methods of Competition" Under Section 5 of the FTC Act*, FTC (Aug. 13, 2015), https://www.ftc.gov/system/files/documents/public_statements/735201/150813section5enforcement.pdf (outlining broad principles "intended to provide a framework" for the exercise of section 5 authority, such as "the promotion of consumer welfare").

313. James Campbell Cooper, *The Perils of Excessive Discretion: The Elusive Meaning of Unfairness in Section 5 of the FTC Act*, 3 J. ANTITRUST ENFORCEMENT 87, 91, 117–18 (2015); Joshua D. Wright, *Revisiting Antitrust Institutions: The Case for Guidelines to Recalibrate the Federal Trade Commission's Section 5 Unfair Methods of Competition Authority*, 2013 CONCURRENCES, at 1, 2 (articulating the concern that a lack of continuity in FTC Commissioners will result in inconsistent agency action).

314. Sipe, *supra* note 8, at 203.

315. *See supra* Part III.

this occurrence comes from the standard-setting context. As noted in Section III.A, SSOs are concerned with the potential for a patent owner to charge an exorbitant royalty rate after its technology has been incorporated into a standard and implementers are thereby effectively "locked-in."[316] As a result, before incorporating a known patented technology into a standard, SSOs will frequently require patent owners to agree in advance to license its technology on certain favorable terms.[317]

However, SSOs are constrained in their ability to engage in such *ex ante* negotiations due to antitrust interference. An SSO requiring all standard-implicating patent owners to license at a given rate may be characterized as a price-fixing cartel—a serious Sherman Act violation.[318] As a result, SSOs use "licensing obligations [that] are left intentionally vague to avert price-fixing liability."[319] Typically, these obligations take the form of nebulous "FRAND" terms: the patentee is asked to agree to license on "fair, reasonable, and non-discriminatory terms."[320]

This intentional ambiguity unfortunately comes at the cost of enforceability:

> Despite the appeal of FRAND commitments, a consistent, practical, and readily enforceable definition of FRAND has proven difficult to achieve. Virtually no [SSO] defines what this elusive phrase means, and many [SSOs] affirmatively disclaim any role in establishing, interpreting, or adjudicating the reasonableness of FRAND licensing terms. In fact, some [SSOs] go so far as to prohibit discussions of

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316. *See supra* note 141 and accompanying text.

317. *See supra* notes 141–44 and accompanying text.

318. *See, e.g.*, Mark A. Lemley, *Standardizing Government Standard-Setting Policy for Electronic Commerce*, 14 BERKELEY TECH. L.J. 745, 753 (1999) ("The Antitrust Division of the Department of Justice has even taken action against the European Telecommunications Standards Institute for compelling members to relinquish [infringement claims] in the standards it promulgates."); Patrick D. Curran, Comment, *Standard-Setting Organizations: Patents, Price Fixing, and Per Se Legality*, 70 U. CHI. L. REV. 983, 1000–01 (2003) (arguing that an SSO should be concerned about the possibility of being found liable under several antitrust theories); *see also* U.S. DEP'T OF JUSTICE & FED. TRADE COMM'N, ANTITRUST GUIDELINES FOR THE LICENSING OF INTELLECTUAL PROPERTY § 5.1, at 24 (1995) ("[H]orizontal restraints [arising from joint patent ventures] often will be evaluated under the rule of reason. In some circumstances, however, that analysis may be truncated . . . some restraints may merit per se treatment, including price fixing . . . .").

319. Curran, *supra* note 318, at 983.

320. Layne-Farrar et al., *supra* note 141, at 671 (expressing concern that FRAND requirements are not sufficiently established).

> royalties and other licensing terms at [SSO] meetings, making the development of any consensus view unlikely.[321]

As a result, there has been considerable litigation between patentees and SSOs over the meaning of their FRAND obligations—leaving courts to the thankless task of determining, for example, what a "reasonable" price for a given patent license is.[322] Scholars and policymakers have already proposed antitrust intervention as a solution to these attempts to "exploit the ambiguities" of FRAND commitments.[323] But these proposals consistently fail to observe the role that antitrust played in creating and perpetuating these ambiguities in the first place.

In other words, antitrust law has created an anticompetitive problem in the patent sphere, and the existence of that anticompetitive problem is now being used as a justification for greater antitrust intervention. In cases such as this, preemption offers an out. Antitrust intervention, on the other hand, merely ensures its own necessity.

CONCLUSION

Supreme Court precedent suggests that preemption may offer an elegant resolution to the escalating tension between patent law and antitrust law. The PTO, the ITC, and the Federal Circuit already exercise considerable regulatory authority over the patent sphere—in particular over patent schemes involving licensing leverage or informational asymmetry. Permitting antitrust law to overlap with this patent authority is likely to do more harm than good due to the complex doctrinal lines governing patent conduct, the contradictory inferences that patent law and antitrust law necessitate, the high degree of expertise necessary to adjudicate patent issues, and the considerable risk of forum-shopping. The Supreme Court has already found this combination—alternative supervision and risk of conflict—sufficiently compelling to preempt antitrust law in the

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321. Jorge L. Contreras, *Fixing FRAND: A Pseudo-Pool Approach to Standards-Based Patent Licensing*, 79 ANTITRUST L.J. 47, 51–52 (2013) (footnote omitted).

322. *Id.* at 95–97 (indexing the major FRAND disputes from 1995–2012).

323. Renata Hesse, Deputy Assistant Attorney Gen., U.S. Dep't of Justice Antitrust Div., Remarks for the ITU-T Patent Roundtable, Six "Small" Proposals for SSOs Before Lunch 11 (Oct. 10, 2012), https://www.justice.gov/atr/file/518951/download; George S. Cary et al., *The Case for Antitrust Law to Police the Patent Holdup Problem in Standard Setting*, 77 ANTITRUST L.J. 913 (2011); Christopher B. Hockett & Rosanna G. Lipscomb, *Best FRANDs Forever? Standard-Setting Antitrust Enforcement in the United States and the European Union*, 23 ANTITRUST, Summer 2009, at 19, 19–22.

securities sphere. But the case for patent law preempting antitrust law is even stronger due to the unique nature of patents and the interplay—and tension—that patent law alone has with antitrust law. The inherent time limit on anticompetitive patent schemes, the economic effects of increased incentives to innovate, the risks of warping antitrust doctrine to cover patent activity, and the self-defeating effects that antitrust intervention has had thus far all suggest that where patents are concerned, the benefits of antitrust intervention are even lower—and the costs much higher.