
Joseph Miller
Professor of Law
University of Georgia School of Law, getmejoe@uga.edu

Repository Citation

This Article is brought to you for free and open access by the Faculty Scholarship at Digital Commons @ Georgia Law. It has been accepted for inclusion in Scholarly Works by an authorized administrator of Digital Commons @ Georgia Law. Please share how you have benefited from this access. For more information, please contact tstriepe@uga.edu.
Antitrust lawyers know that at least some patent licenses warrant scrutiny to assess what appear to be anticompetitive effects. The steeply rising rate at which the Patent & Trademark Office issues patents in all sectors of the economy, including pharmaceuticals, biotechnology, and computer technology, makes the necessity for such antitrust scrutiny all the more pressing. Antitrust lawyers also worry, however, that antitrust enforcement in the patent licensing area presents special difficulties—special, because the difficulties appear rooted in a less familiar body of law (patent law) that accepts as routine the very agreements that antitrust enforcement agency lawyers want to scrutinize.

The burdens of this essay are three. First, I squarely confirm the core antitrust agency fear about scrutinizing patent license agreements. Antitrust cases about patent licenses do turn, at bottom, on the answer to the primary patent law question whether the patentee has a valid right to foreclose some particular conduct of another. Second, I suggest that, notwithstanding the central role of substantive patent law to the antitrust analysis, things are not as dire as they may seem. As it turns out, some patent law rules can benefit the antitrust enforcement agencies by aiding their scrutiny of patent license agreements. These benefits may, however, be rather paltry when set against the overall enforcement challenge the agencies face under current law. We need, in my view, to take much

* Assistant Professor, Lewis & Clark Law School. I first prepared this piece as written testimony for the May 14, 2002, session of the Joint Hearings on Competition and Intellectual Property Law and Policy in the Knowledge-Based Economy, conducted by the Federal Trade Commission and the Antitrust Division of the U.S. Department of Justice. It was an honor to participate in the Joint Hearings, and I thank the participants in the May 14 session for their encouragement.

1 See Mark A. Lemley, Rational Ignorance at the Patent Office, 95 Nw. U. L. Rev. 1495, 1497-1500 (2001) (detailing 51% increase in number of utility patents issued annually, and 42% increase in number of utility patent applications filed annually, from 1994 to 1999). Even if the issue rate for U.S. utility patents stabilizes at its 2001 level of about 166,000 per year, that still amounts to about 454 utility patents issued per day.
larger strides toward renewing balanced roles for intellectual property law and antitrust law in structuring competition. Thus, third, I encourage the antitrust enforcement agencies to take a far more active role in articulating and urging the adoption of antitrust-spirited reforms to patent law. After all, "the primary purpose of our patent laws is not the creation of private fortunes for the owners of patents but is 'to promote the progress of science and the useful arts.'" It is troubling, then, that the agencies' valuable perspectives and experiences have so long been missing from contemporary policy debates about patent law reform, to the detriment of the competition law framework of which patent law is but one part.

I. WHY PATENT LICENSE SCRUTINY TURNS ON PATENT LAW RULES

Many patent licenses are, from the antitrust law perspective, entirely wholesome. Perhaps, for example, the license merely clears the way for two firms to compete in the market for a product by giving each one access to the other's complementary patented input. Other patent licenses, by contrast, plainly retard competition in a product or technology market without enhancing efficiency at all. Perhaps, for example, the license places one firm in control over the exploitation of two substitute technol-

2 Motion Picture Patents Co. v. Universal Film Mfg. Co., 243 U.S. 502, 511 (1917) (quoting U.S. CONST. art. I, § 8, cl. 8). See also Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417, 429 (1984) ("The monopoly privileges that Congress may authorize are neither unlimited nor primarily designed to provide a special private benefit. Rather, the limited grant is a means by which an important public purpose may be achieved. It is intended to motivate the creative activity of authors and inventors by the provision of a special reward, and to allow the public access to the products of their genius after the limited period of exclusive control has expired."); Mazer v. Stein, 347 U.S. 201, 219 (1954) ("The economic philosophy behind the clause empowering Congress to grant patents and copyrights is the conviction that encouragement of individual effort by personal gain is the best way to advance public welfare through the talents of authors and inventors in 'Science and useful Arts.' Sacrificial days devoted to such creative activities deserve rewards commensurate with the services rendered."). The very same point has often been made about patent law's companion regime, copyright law. See, e.g., Feist Publ'ns, Inc. v. Rural Tel. Serv. Co., 499 U.S. 340, 349 (1991) ("The primary objective of copyright is not to reward the labor of authors, but 'to promote the Progress of Science and useful Arts.'" (alteration in original) (quoting U.S. CONST. art. I, § 8, cl. 8)); Twentieth Century Music Corp. v. Aiken, 422 U.S. 151, 156 (1975) ("The immediate effect of our copyright law is to secure a fair return for an 'author's' creative labor. But the ultimate aim is, by this incentive, to stimulate artistic creativity for the general public good.").

3 See U.S. Dep't of Justice & Federal Trade Comm'n, Antitrust Guidelines for the Licensing of Intellectual Property § 5.5 (1995) [hereinafter IP Guidelines] ("Cross-licensing... may provide procompetitive benefits by integrating complementary technologies, reducing transaction costs, clearing blocking positions, and avoiding costly infringement litigation." (emphasis added)).
ogies that had previously been independent—leading ultimately to higher product prices.\(^4\)

When the antitrust enforcement authorities confront license agreements that are clearly pro- or anticompetitive, they can readily classify the licenses and respond accordingly. As we can all attest, life far more often presents us with facts in the mushy middle. The patents at issue may cover technologies that are substitutes in some respects but complements in others,\(^5\) or the parties' agreement may contain a "grant-back" clause that makes the balance of pro- and anticompetitive effects far more difficult to assess with confidence, or ... and so on.

Let us focus here on but one scenario from the mushy middle. Consider the situation where an enforcement agency has some independent basis to believe the license agreement warrants scrutiny and the scope of the patent right at issue is unclear to a significant degree.\(^6\) The character of the parties' relationship absent the license under review—is it primarily horizontal, primarily vertical, or a hybrid?—is thus also unclear to a significant degree. How does one resolve this ambiguity about the scope of the underlying patent right and, in turn, the parties' respective competitive positions?

The question whether the parties' relationship absent the license is horizontal, vertical, or both is, of course, more than sport. The agencies' joint IP Guidelines make the answer to this question a fundamental step in the antitrust inquiry:

As with other property transfers, antitrust analysis of intellectual property licensing arrangements examines whether the relationship among the parties to the arrangement is primarily horizontal or vertical in nature, or whether it has substantial aspects of both. . . .

... For analytical purposes, the Agencies ordinarily will treat a relationship between a licensor and its licensees, or between licensees,
as horizontal when they would have been actual or likely potential competitors in a relevant market in the absence of the license.\footnote{Id. § 3.3; see also id. Examples 5 & 6 (comparing horizontal and vertical relationships among hypothetical farm equipment makers who also own patents on disparate technologies).}

Similarly, every one of the Antitrust Division's four recent "business review letters" regarding proposed patent pools explains that its favorable evaluation turns, at least in part, on the continuing use of an independent patent expert to determine whether the patents in the pool actually cover essential, complementary technologies—a matter of applying substantive patent law analysis.\footnote{Letter from Joel I. Klein, Acting Assistant Attorney General for Antitrust, U.S. Dep't of Justice, to Gerrard R. Beeney, Sullivan & Cromwell (June 26, 1997) ("The continuing role of an independent expert to assess essentiality is an especially effective guarantor that the Portfolio patents are complements, not substitutes."), http://www.usdoj.gov/atr/public/busreview/1170.htm; Letter from Joel I. Klein, Assistant Attorney General for Antitrust, U.S. Dep't of Justice, to Gerrard R. Beeney, Sullivan & Cromwell (Dec. 16, 1998) ("[S]o long as the patent expert applies this [essentiality] criterion scrupulously and independently, it is reasonable to expect that the Portfolio will combine complementary patent rights while not limiting competition between them and other patent rights for purposes of the licensed applications.")}, http://www.usdoj.gov/atr/public/busreview/2121.htm; Letter from Joel I. Klein, Assistant Attorney General for Antitrust, U.S. Dep't of Justice, to Carey R. Ramos, Paul, Weiss, Rifkind, Wharton & Garrison at 10 (June 10, 1999) (same), http://www.usdoj.gov/atr/public/busreview/2485.htm; Letter from Charles A. James, Assistant Attorney General for Antitrust, U.S. Dep't of Justice, to Ky P. Ewing, Vinson & Elkins at 10 (Nov. 12, 2002) ("The arrangements proposed in connection with the Platform, including . . . the provisions for review of [patent] essentiality by competent experts without conflicts of interest and payment of the costs of evaluation through fees assessed on applicants . . . provide reasonable assurance that patents combined in a single PlatformCo for a 3G radio interface technology will not be substitutes for one another.")}, http://www.usdoj.gov/atr/public/busreview/200455.htm.

In short, although one can defer for a time a judgment about precisely how the patent(s) at issue in an agreement would structure competition between the parties absent the agreement, any useful antitrust analysis must eventually bring this matter to ground.\footnote{By "useful," I simply mean "able to support either the confident closing of an investigation or the filing of an antitrust enforcement action."}

How, then, to do so? How can the ambiguity about the scope of the critical patent rights be resolved?

The enforcement agencies' recent Joint Hearings on a variety of questions at the cross-roads of intellectual property and antitrust law\footnote{The Federal Trade Commission's Web site contains a wealth of information about the Joint Hearings. See generally http://www.ftc.gov/opp/intellect/index.htm (gateway page to Joint Hearings materials).} reveal an interesting perspective on this point. For example, the FTC press release for the Joint Hearings session at which I appeared framed the afternoon's discussion like this: "what standards should be used to determine whether the licensed intellectual property right would have fore-
closed the licensee from being an actual or likely potential competitor with the licensor in the absence of the license?"\(^{11}\) To pose the question this way is to suggest (to my ear, at least) that one hopes the answer will be something other than the perfectly obvious one—namely, the patent law rules that determine the scope of the patents in question. Such hopes, however, are vain. Economic theory honed by experience continues to teach us which outward signs indicate that a particular license agreement warrants intense antitrust scrutiny,\(^{12}\) but only patent law rules can finally tell us whether, e.g., a licensor's patent could truly have been used to oust a licensee from the market for that particular product or process (indicating a genuinely vertical relationship).

I know that this answer—that patent law standards are central to assessing the asserted foreclosure of the licensee absent the license—may dishearten some who soldier in the trenches of antitrust enforcement. The knowledge comes from having soldiered in those trenches myself, however briefly.\(^{13}\) The feared scenario runs something like this: Parties under investigation, knowing that the agency is not filled with seasoned patent litigators or patent prosecutors, try to shield a suspicious license agreement beneath a thicket of interrelated patents (each of which is dauntingly complex on its own), fairly daring the enforcement agency to embark on a substantive assessment of the true scope of those patent rights. The proponents of the license agreement argue that the agency must be prepared, if it files a challenge to the agreement, to prove as part of its case in chief either that the patents are invalid or that the licensee had commercially viable ways to enter the market without infringing the patents. The parties' favored cudgel here is the

---


\(^{13}\) I was privileged to serve as a trial attorney in the Antitrust Division for about one year, 2000-2001.
statutory presumption of validity that patents enjoy in routine infringement litigation. The agency takes the bait, and the investigation grinds to an inconclusive halt under the weight of the substantive analysis of patent scope. Although the license agreement justifiably arouses suspicion of harm to competition, the agency fails to reach a solid conclusion on the merits, much less challenge the agreement in court.

But there is less cause for despair here than may at first appear. The key is realizing that patent law contains not only substantive doctrines that define the scope of a patent owner's power to exclude others, but also critical procedural rules that go a long way toward determining the patentee's practical ability to foreclose competitors in the real world. For example, patent law puts the burden on the patentee to make a strong showing of the patent's validity before forcing the peremptory removal of a competitor from the market with a preliminary injunction. I discuss some consequences of this patentee burden for antitrust analysis of challenged patent license practices. I also describe another patent law procedural device—the drawing of an adverse inference when an accused infringer refuses to divulge the content of its counsel's opinion about the scope of an asserted patent—that appears to offer help when judging license proponents' arguments about patent scope. In short, although the burden of applying patent law's substantive rules may at first taste bitter, the antitrust enforcement benefits from patent law's procedural rules may prove quite sweet.

II. PATENT LICENSES AS PRELIMINARY INJUNCTIONS AND FAILING-FIRM EXITS

Assume we are scrutinizing a patent license with one patentee and one licensee concerning one patent. We evaluate the agreement for antitrust purposes by comparing its effects on competition to the results

---

14 See 35 U.S.C. § 282 (“A patent shall be presumed valid. Each claim of a patent (whether in independent, dependent, or multiple dependent form) shall be presumed valid independently of the validity of other claims; dependent or multiple dependent claims shall be presumed valid even though dependent upon an invalid claim.”).

15 Professor Shapiro, in his provocative paper exploring the merits of a “simple antitrust rule” that “a patent settlement cannot lead to lower expected consumer surplus than would have arisen from ongoing litigation,” supra note 12, at 10, poses questions that highlight the central role that procedural rules play in defining patent value:

A number of different rules can materially affect the value of the patent grant. Under what conditions can a patent holder obtain a preliminary injunction blocking another firm from producing products that allegedly infringe the patent? How long does patent litigation take, and what is the state of competition during the interim period while patent validity and infringement are being resolved in court?

Id. at 4 (footnote omitted).
that would obtain in various "but-for" worlds. The most salient "but-for" world is the one that would exist if the parties had continued with their prior courses of conduct but without the license.

The clearest case for antitrust concern is one in which the license transforms a competitive relationship into a coordinated one. Perhaps the parties were actually competing in a product or service market, or in a market for licenses to their respective technologies. Perhaps they were not yet competing on present sales, but the second party was taking concrete steps—incurring real costs—to enter the market in the near term. As a factual matter, they were competitors. This state of pre-license, de facto competition, at least in instances where the rival-turned-licensee knew of the patent's arguable applicability and had been competing anyway, is strong evidence that the rival viewed the risk of patent infringement liability as more than offset by the gains to be had in the market in question.

Now take the license option out of the equation. Competition continues. In this "but-for" world without the license agreement, the patentee may yet wish to eliminate its rival as an independent actor in the market. Taking the unavailability of the license agreement as given, we know that the patentee has only two options that rely on enforcement of the patent right. The patentee can sue on the patent and oust its competitor either (1) temporarily, by successfully moving for a preliminary injunction that bars the competitor's activity until the suit is fully resolved; or (2) permanently, by securing a permanent injunction after a favorable full trial on the merits of all disputed infringement and validity issues (including through any appeal).

It is worth pausing for a moment to clarify precisely what such a patent suit entails for the patentee. The suit must assert one or more specific patents against particular conduct. A patent, which includes a more or less lengthy written description that sets forth the protected invention in its technological context, ends with a series of numbered paragraphs called "claims." Each of these numbered paragraphs marks out the

---

17 Even stronger evidence on the point would be the rival's decision to indemnify other parties against patent infringement liability claims made by this patentee on this patent. Depending upon the technology, such indemnification may be needed to induce customers to deal with the rival rather than with the patentee.
18 A temporary foreclosure of competition may, of course, become permanent if a successful preliminary injunction motion is followed by the patentee's victory in the full trial on the merits.
periphery of a territory from which the patentee can exclude others.\textsuperscript{19} Indeed, this power to exclude is the essence of the patent right.\textsuperscript{20} For example, U.S. Patent No. 5,443,036, entitled “Method of Exercising a Cat”—which I use as a teaching tool in my Intellectual Property Law Survey course—contains the following independent claim:

1. A method of inducing aerobic exercise in an unrestrained cat comprising the steps of:

   (a) directing an intense coherent beam of invisible light produced by a hand-held laser apparatus to produce a bright highly-focused pattern of light at the intersection of the beam and an opaque surface, said pattern being of visual interest to a cat; and

   (b) selectively redirecting said beam out of the cat’s immediate reach to induce said cat to run and chase said beam and pattern of light around an exercise area.\textsuperscript{21}

One does not infringe this patent claim unless one engages in both steps in all their detail. The patent claim provides the patentee with a cause of action against persons practicing this method without the patentee’s permission.

Importantly, it is not up to the accused infringer to prove that its activity falls outside the patentee’s control. Rather, at trial, the patentee bears the burden of proving that such infringement has in fact occurred: “To establish infringement, every limitation set forth in a patent claim must be found in an accused product or process exactly or by a substantial equivalent. The patentee bears the burden of proving infringement by a preponderance of the evidence.”\textsuperscript{22} In short, firms are generally free to compete in a market unless the patentee can prove its specific right to exclude that particular conduct in court.\textsuperscript{23}

\textsuperscript{19} See 35 U.S.C. § 112, ¶ 2 (“The specification shall conclude with one or more claims particularly pointing out and distinctly claiming the subject matter which the applicant regards as his invention.”).

\textsuperscript{20} See 35 U.S.C. § 271(a) (“Except as otherwise provided in this title, whoever without authority makes, uses, offers to sell, or sells any patented invention, within the United States or imports into the United States any patented invention during the term of the patent therefor, infringes the patent.”). See also Bloomer v. McQuewan, 55 U.S. (14 How.) 539, 549 (1852) (“The franchise which the patent grants, consists altogether in the right to exclude every one from making, using, or vending the thing patented, without the permission of the patentee. This is all that he obtains by the patent.”).


\textsuperscript{22} Laitram Corp. v. Rexnord, Inc., 939 F.2d 1533, 1535 (Fed. Cir. 1991) (citation omitted). Citations for the point are legion.

\textsuperscript{23} The patentee’s fundamental and unshifting burden to prove infringement, a long-settled feature of patent law, has proved troublesome for at least some antitrust enforce-
When we compare the actual, patent license-containing world (lacking any trial where the patentee is put to its proof) with a "but-for," license-free world (where the patentee has no power to exclude a competitor unless it can carry its burden of proving infringement before a neutral and independent adjudicator), at least two things relevant to our inquiry become apparent. First, by eliminating its competitor as an independent actor in the market without going to the trouble of successfully prosecuting a full trial on the merits in which it has proved to a neutral and independent authority that the competitor has actually infringed the patent, the patentee who licenses its competitor obtains the functional equivalent of a preliminary injunction barring the competitor's conduct. The competitor is brought under the patentee's control without a trial, and on terms agreeable to the patentee.

Second, to the extent that the parties defend the license from antitrust scrutiny by maintaining that it has not foreclosed any lawful competition, they rely on a patent-based "failing firm" defense. "There has been no harm to competition," the license proponents argue, "because the patentee's valid and infringed patent would sooner or later have forced the competitor to exit the market anyway." This defense of the license maps readily onto the failing firm defense to a merger, according to which, "[w]here the likely alternative to a merger is the elimination of the firm and its assets from the market, the merger will not violate" the antitrust laws.24

The central project here is to consider how best to determine whether the patent at the center of the agreement we are scrutinizing would have foreclosed the licensee from being an actual or likely competitor of the licensor in the absence of the license. The foregoing aspects of the license agreement—that it is functionally a preliminary injunction against the licensee, and that it assumes the truth of a failing firm theory—suggest two corresponding principles that the antitrust agencies

---

24 1 ABA SECTION OF ANTITRUST LAW, ANTITRUST LAW DEVELOPMENTS 337 (4th ed. 1997) [hereinafter DEVELOPMENTS].
should use to shape their investigations of patent licenses, as well as any resulting court challenge to a patent license. First, a patentee should be no better off when defending the presumptive scope of its licensed patent rights to an antitrust agency than it would be if it were attempting to obtain a preliminary injunction against the competitor. Second, an antitrust agency should be no worse off when assessing the erstwhile competitor's good faith basis for sacrificing its independence to the patentee than it would be if it were challenging a merger that the parties defend on failing firm grounds. I consider the practical payoff of each principle in turn.

A. WHEN PROVING VALIDITY IS THE PATENTEE'S BURDEN

My first suggested principle is that a patentee should be no better off when defending the presumptive scope of its licensed patent rights to an antitrust agency than it would be if it were attempting to obtain a preliminary injunction against the competitor. What does this mean in practice?

The proponents of a dubious patent license agreement may urge that, because the patent enjoys a statutory presumption of validity under 35 U.S.C. § 282, the agency cannot challenge a license agreement as anticompetitive without proving by clear and convincing evidence that the patent is invalid. By doing so, the license proponents ignore the question of infringement altogether. A patentee has no right to exclude from the market persons who are not infringing, i.e., not practicing the claimed invention in all its detail. As a result, a patent cannot justify the change from competition in fact between rivals to coordination under a license between now-friendly firms until the patentee carries its usual burden of showing that the licensee's conduct actually meets every limitation of at least one claim in the patent. The patentee's usual burden in this regard does not vanish merely because it walks through the door of an antitrust enforcement agency. To the contrary, a patentee and licensee should be able and eager to demonstrate to antitrust authorities, to the same level of detail they employ in routine patent infringement litigation, that the licensee's conduct falls within the scope of at least one patent claim owned by the licensor.

I know from personal experience that this is a popular argument among lawyers who appear before the enforcement agencies. Many readers of this Journal no doubt have similar experience.

Trial courts use well-established procedures to focus patent litigation parties on the precise scope and applicability of the asserted patent claims. For example, in the U.S. District Court for the Northern District of California, local rules expressly require a patentee to provide to the accused infringer, not later than 10 days after the Initial Case Management Conference, the following: "A chart identifying specifically where each
License proponents who bark insistently about the presumption of validity, in addition to ignoring the question of infringement, demonstrate a home truth familiar to experienced patent litigators—namely, the presumption of validity is invoked somewhat more often than it is understood. The presumption of validity is neither a by-product of Patent Office infallibility nor an impregnable substantive shield against serious validity challenges. It is, instead, simply "a procedural device."\footnote{Nutrition 21 v. United States, 930 F.2d 867, 869 (Fed. Cir. 1991) (vacating preliminary injunction in patentee's favor).} In a patent infringement trial on the merits, the accused infringer that would invalidate a patent must come forward with supporting evidence, and it (rather than the patentee) bears the risk of non-persuasion to a "clear and convincing evidence" standard. In a preliminary injunction proceeding, by stark contrast, the presumption of validity effectively plays no role at all.

When a patentee moves for a preliminary injunction in a routine patent infringement suit, it bears the burden of clearing the same four-part hurdle that faces essentially all preliminary injunction plaintiffs. Specifically, the patentee's request for a preliminary injunction will be denied unless it can show "(1) a reasonable likelihood of success on the merits; (2) irreparable harm if an injunction is not granted; (3) a balance of hardships tipping in its favor; and (4) the injunction's favorable impact on the public interest."\footnote{Amazon.com, Inc. v. barnesandnoble.com, inc., 239 F.3d 1343, 1350 (Fed. Cir. 2001) (reversing grant of preliminary injunction in Amazon's favor in a suit on its "one-click" patent).} Importantly, the patentee's burden to show a likelihood of success on the merits extends both to questions of infringement and validity. The patent thus is not presumed valid but must be shown to be so.

For example, in the recent case overturning a preliminary injunction that had been granted to Amazon in its patent case against Barnes & Noble concerning "one click" ordering on the Web, the Federal Circuit explained that

\begin{quote}
Amazon must show that, in light of the presumptions and burdens that will inhere at trial on the merits, (1) Amazon will likely prove that BN
\end{quote}

\begin{itemize}
\item \text{element of each asserted [patent] claim is found within each Accused Instrumentality . . . .}\footnote{N.D. CAL. PATENT L.R. 3-1 (c). This local rule calling for claim charts is important because the Northern District of California ranked second among all U.S. district courts in the number of patent cases it resolved in the 1995–1999 period. See Kimberly A. Moore, \textit{Forum Shopping in Patent Cases: Does Geographic Choice Affect Innovation?}, 79 N.C. L. Rev. 889, 903–04 (2001) (presenting results of comprehensive empirical study of district court patent litigation). In my view, the antitrust enforcement agencies should consider using a similar approach to obtain detailed claim charts from the parties to a patent license.}\end{itemize}
infringes the '411 patent, and (2) Amazon's infringement claim will likely withstand BN's challenges to the validity and enforceability of the '411 patent. If BN raises a substantial question concerning either infringement or validity, i.e., asserts an infringement or invalidity defense that the patentee cannot prove "lacks substantial merit," the preliminary injunction should not issue.29

Nor is the Amazon case unusual in this respect.30 In short, the patentee cannot peremptorily eliminate a competitor's marketplace independence with a preliminary injunction unless it "present[s] a clear case supporting the validity of the patent in suit."31

The consequences for the proponents of a dubious patent license agreement in an antitrust investigation are straightforward. Just as the patentee that wants a preliminary injunction must present a clear, detailed case supporting the validity and the infringement of the patent when substantial questions are raised on these points, so too must the proponents of what is functionally a preliminary injunction in the patentee's favor—the license agreement—present a clear, detailed case supporting the validity and the infringement of the patent when an antitrust enforcement agency raises a substantial reason to doubt either proposition. Professor Shapiro is thus quite correct to observe, in his recent analysis of the appropriate antitrust limits to impose on patent license agreements, that "the patent holder is not 'entitled' to negotiate a monopoly outcome, just because the patent holder asserts that its patent is valid and infringed by a particular rival."32

29 Id. at 1350-51 (citations omitted).
30 See Oakley, Inc. v. Sunglass Hut Int'l, 316 F.3d 1331, 1339 (Fed. Cir. 2003) (affirming grant of preliminary injunction for patentee) ("In the context of a preliminary injunction, while 'the burden of proving invalidity is with the party attacking validity,' the party seeking the injunction 'retain[s] the burden of showing a reasonable likelihood that the attack on its patent's validity would fail.'" (alteration in original) (citation omitted)); Purdue Pharma L.P. v. Boehringer Ingelheim GmbH, 237 F.3d 1359, 1365 (Fed. Cir. 2001) (affirming grant of preliminary injunction for patentee) ("[T]o support its preliminary injunction, [patentee] Purdue bore the burden of establishing a likelihood of success on these issues and thus must have shown that [accused infringer] Roxane likely will not prove that the patent is invalid."); Nutrition 21, 930 F.2d at 869 ("[A]t the preliminary injunction stage, because of the extraordinary nature of the relief, the patentee carries the burden of showing likelihood of success on the merits with respect to the patent's validity, enforceability, and infringement."); New England Braiding Co. v. A.W. Chesterton Co., 970 F.2d 878, 882 (Fed. Cir. 1992) (affirming denial of patentee's preliminary injunction motion) ("[T]he presumption [of validity] does not relieve a patentee who moves for a preliminary injunction from carrying the normal burden of demonstrating that it will likely succeed on all disputed liability issues at trial, even when the issue concerns the patent's validity.").
31 Amazon.com, 239 F.3d at 1359.
32 Shapiro, supra note 12, at 10.
B. WHEN PROTECTING PATENT COUNSEL'S OPINION WARRANTS AN ADVERSE INFERENCE

My second suggested principle is that an antitrust agency should be no worse off when assessing the erstwhile competitor's good faith basis for sacrificing its independence to the patentee than it would be if it were challenging a merger defended on failing firm grounds. What does this mean in practice?

The theory that animates the failing firm defense, articulated in the first Supreme Court case that recognized it, is that it "does not substantially lessen competition or restrain commerce within the intention of the Clayton Act" to permit a merger when confronted with "the case of a corporation in failing circumstances, the recovery of which to a normal condition was, to say the least, in gravest doubt, selling its capital to the only available purchaser in order to avoid what its officers fairly concluded was a more disastrous fate."33

If the proponents of a challenged merger wish to rely on a failing firm theory, they must plead and prove it as an affirmative defense. In other words, the burden is entirely on the merger proponents to prove the requisite elements of the defense.54 As a general matter, then, it seems plain that the proponents of a challenged patent license agreement, to the extent that they wish to rely on the merits of the patentee's underlying claim to have been able to use its patent to foreclose the licensee's independent marketplace conduct, should bear the burden of establishing their underlying claim as an affirmative defense to any antitrust challenge to the license agreement (as well as the risk of failing to do so). And this burden allocation does not exhaust the value of the failing firm construct to antitrust enforcement in the patent license context.

More specifically, the requisite elements of the failing firm defense are that "the company to be acquired is in imminent danger of failure," the failing firm has "no realistic prospect for a successful reorganization," and "there is no viable alternative purchaser that poses less anticompetitive risk."55 The third element, moreover, has been operationalized in

33 Int'l Shoe Co. v. FTC, 280 U.S. 291, 301, 302-03 (1930). See also Dr Pepper/Seven-Up Cos. v. FTC, 991 F.2d 859, 864 (D.C. Cir. 1993) (remanding for further consideration of failing firm theory) ("[T]he purpose of the Clayton Act is not served by prohibiting companies from purchasing failing competitors when there are no other alternatives.").

34 See United States v. Gen. Dynamics Corp., 415 U.S. 486, 507 (1974); Olin Corp. v. FTC, 986 F.2d 1295, 1305 (9th Cir. 1993); Dr Pepper/Seven-Up Cos., 991 F.2d at 864-65.

35 1 DEVELOPMENTS, supra note 24, at 389. See also Merger Guidelines, supra note 16, § 5.1 (setting forth essentially the same elements).
a quite practical and—for purposes of scrutinizing patent license arrangements—suggestive way. Rejecting an absolutist approach, which would saddle the merger proponents with the difficult (if not impossible) task of proving the lack of any viable alternative purchaser anywhere, the courts have merely required proof of a good faith (albeit unsuccessful) effort on the near-failing target’s part to locate an alternative buyer, a merger that would pose a lesser threat to competition.36

How does the failing firm defense advance the antitrust analysis of a patent license agreement? Map the failing firm scenario onto the dubious patent license proponents, treating the patentee as the acquiring firm and the licensee as the target firm. The analog for proof of a good faith effort on the target’s part to locate an alternative buyer is proof of a good faith basis for the licensee’s belief that it was certainly infringing a valid patent and thus had no viable alternative to sacrificing its independence to the patentee. The licensee’s beliefs on this score are, of course, almost certain to have been shaped in substantial part by the legal advice that its patent counsel has rendered about the scope and validity of the licensed patent and the nature of the licensee’s conduct. As a result, requiring the licensee to offer proof justifying a good faith belief that it had no alternative but to enter the license effectively forces the licensee to choose between asserting or waiving its evidentiary privilege in the substance of legal advice from its patent counsel. This choice, however unpleasant for the licensee, will not be unfamiliar.

To a patent lawyer, proof of the sort called for here sounds a great deal like the inverse of the proof typically relied upon to rebut an allegation that one’s patent infringement was willful, i.e., undertaken without due care for the known patent rights of another. When infringement is alleged to be willful, the accused infringer can defeat the charge with a competent (usually written) legal opinion from its patent counsel that provides a good faith basis for believing that the patent at issue “was not infringed or was invalid or unenforceable and would be so held if litigated.”37 Rebutting a willfulness charge thus also typically puts a party

36 See General Dynamics Corp., 415 U.S. at 507 (“A company invoking the [failing firm] defense has the burden of showing . . . that it tried and failed to merge with a company other than the acquiring one.” (footnote omitted)); Dr Pepper/Seven-Up Cos., 991 F.2d at 865 (“[T]he proponent of the acquisition must demonstrate that it has made a reasonable, good faith attempt to locate an alternative buyer.”). See also Merger Guidelines, supra note 16, § 5.1 (“[T]he allegedly failing firm . . . has made unsuccessful good-faith efforts to elicit reasonable alternative offers of acquisition of the assets of the failing firm that would both keep its tangible and intangible assets in the relevant market and pose a less severe danger to competition than does the proposed merger.” (footnote omitted)).

to the choice of asserting or waiving its evidentiary privilege in the substance of legal advice from its patent counsel.

Not surprisingly, the patent law's standard procedural response to an accused infringer's refusal to proffer the substance of its patent counsel's opinion is quite instructive here. The court hearing a patent infringement case cannot force the accused infringer to waive its privilege in a noninfringement/invalidity opinion from its patent counsel. Nor, however, should the court assume that the opinion provided a good faith basis for the infringer's continuing infringement. Indeed, quite the opposite is true. As the Federal Circuit has explained,

Where the infringer fails to introduce an exculpatory opinion of counsel at trial, a court must be free to infer that either no opinion was obtained or, if an opinion were obtained, it was contrary to the infringer's desire to initiate or continue its use of the patentee's invention.

The refusal to share the opinion justifies an adverse inference about its substance.

A similar adverse inference seems equally appropriate in the context of antitrust agency review of a dubious patent license agreement. If the proponents of the patent license agreement wish to rely on the merits of the patentee's underlying claim to have been able to use its patent to foreclose the licensee's independent marketplace conduct, the licensee should be able and eager to offer proof sufficient to justify its purported good faith belief that it was certainly infringing a valid patent and thus had no viable alternative but to sacrifice its independence to the patentee. A competent opinion letter from patent counsel would constitute such proof. When a licensee in this situation fails to provide an opinion from patent counsel detailing the licensee's infringement of a valid patent, the willfulness allegation because, by definition, "[w]illfulness is shown when, upon consideration of the totality of the circumstances, clear and convincing evidence establishes that the infringer acted in disregard of the patent, that the infringer had no reasonable basis for believing it had a right to engage in the infringing acts." Electro Med. Sys., S.A. v. Cooper Life Scis., Inc., 34 F.3d 1048, 1056 (Fed. Cir. 1994).

See L.A. Gear, Inc. v. Thom McAn Shoe Co., 988 F.2d 1117, 1126 (Fed. Cir. 1993) (reversing district court's finding that infringement was not willful) ("Although a party to litigation may indeed withhold disclosure of the advice given by its counsel, as a privileged communication, it will not be presumed that such withheld advice was favorable to the party's position.").

39 Fromson v. W. Litho Plate & Supply Co., 853 F.2d 1568, 1572-73 (Fed. Cir. 1988). See also L.A. Gear, 988 F.2d at 1126 ("We have held that the assertion of privilege with respect to infringement and validity opinions of counsel may support the drawing of adverse inferences."); HARMON, supra note 37, at 814 ("An accused infringer has the right to assert the attorney-client privilege. And when it refuses to produce an exculpatory opinion of counsel in response to a charge of willful infringement, an inference may be drawn that either no opinion was obtained or, if one was obtained, it was unfavorable.").
antitrust enforcement agency—and any tribunal hearing a subsequent antitrust challenge to the agreement—must be free to infer from this failure either that no such opinion was obtained or, if an opinion was obtained, that it did not justify the licensee's conclusion that it had no viable alternative but to sacrifice its independence to the patentee.

III. WHY ANTITRUST AGENCIES SHOULD FORMULATE PATENT LAW REFORMS

The bad news is that the substantive scope and validity of the patent(s) underlying a license are central to determining the lawfulness of the license's effects on competition. The good news is that this bad news does not make antitrust scrutiny of patent licenses fruitless. At the very least, patent law's procedural rules may offer some benefits to the antitrust enforcement agencies as they scrutinize troubling patent licenses.

Notwithstanding the foregoing discussion of some benefits that patent law's procedural rules may offer, one could in fairness complain that I am re-arranging some deck chairs on a badly listing ship. Can we right ourselves more solidly in the waves of more and more patents from increasingly varied technological domains? Not, I think, until the antitrust enforcement agencies take a far more active role in shaping patent law in the United States.

Joel Klein, during his tenure as the Assistant Attorney General for the Antitrust Division, described the basic danger that may lurk at the heart of any patent license agreement—namely, that the patentee and its erstwhile challenger have cut a deal to delay rightful competition, aligning their anticompetitive interests against the public's interests. This danger results from the basic legal rule, with us since the Supreme Court's decision in \textit{Blonder-Tongue Laboratories, Inc. v. University of Illinois Foundation}, that a patent held invalid as to one is invalid as to all.\textsuperscript{40} As Professor John Thomas has explained, under \textit{Blonder-Tongue Laboratories} "[p]atents are declared invalid for all purposes, not vis-à-vis a particular individual. A prevailing opponent of a patent therefore cannot prevent others," including other competitors of the patentee and itself, "from practicing the invention claimed in the invalidated patent."\textsuperscript{41} One drawback of this regime, from an antitrust perspective, is "that a potential [patent] opponent cannot appropriate the benefits of a successful charge

\textsuperscript{40} 402 U.S. 313 (1971).

of patent invalidity to itself," as a result of which there are "fewer patent challenges than are socially optimal." 42

Another drawback of the Blonder-Tongue Laboratories regime is that the putative attacker’s potential inability to recoup the costs of its assault on a patent makes a license from the patentee that fences out mutual competitors far more attractive. As Joel Klein put it, “our principal concern is whether the patents or their owners are using the [license] arrangement to blunt competition that would otherwise take place—a rather-switch-than-fight strategy, if you will.” 43 In other words, “settlements are often based on considerations that lead parties to give up rights that they might well vindicate if they went to the mat. And when intellectual property rights are at stake, the consequences of those compromises can align the settlers’ interests against the interests of consumers.” 44 In the face of this danger, which all patents on commercially significant technologies potentially present, the antitrust enforcement agencies can best promote both static and dynamic efficiency not merely by challenging individual anticompetitive license agreements, but also by identifying and supporting reforms to patent law that reduce every patentee’s ability to use the promise of a cut of monopoly rents to tame a fierce rival into a placid licensee.

The antitrust agencies need not, and should not, start the process of formulating reforms from scratch. Indeed, as the copious Joint Hearings testimony and varied writings of current patent law professors amply demonstrate, a number of concrete and valuable reform proposals have already been made. To mention but a few that seem especially appealing from an antitrust perspective:

42 Id. at 334.


44 Id. Others have made the same observation. See, e.g., Robert J. Hoerner, Antitrust Pitfalls in Patent Litigation Settlement Agreements, 8 Fed. Cir. B.J. 113, 114 (1998) (“When an alleged infringer decides that it is in his interest to settle a patent infringement litigation against him, his entire business outlook changes. Where before he wanted the patent held invalid, he now may want the patent held valid so that the patent owner can assert it against his competitors. Where before he wanted the patent given a narrow scope, he now may want the patent to be given a broad scope so that it can reach the products of his competitors. . . . And, he will want to do what he can to commit the patent owner to suing, and not licensing, his competition if they are arguably infringing.”); Shapiro, supra note 12, at 7 (“Settlements can deprive consumers not only of competition between the settling parties, but from other firms as well if an invalid patent is never actually challenged.”).
• the statutory presumption of validity should be substantially weakened, if not eliminated outright;\textsuperscript{45}

• the fee-shifting rules should be changed to provide that a plaintiff patentee must pay the attorney fees of a successful accused infringer that prevails on grounds that demonstrate that the infringement claim should never have been brought in the first place;\textsuperscript{46}

• a bounty system could be created at the patent application stage, encouraging parties that know about prior art that would defeat a pending patent application to submit that prior art to the Patent Office.\textsuperscript{47}

The presumption of validity should be changed because, even when correctly used as a merely procedural device, it rests on the painfully naïve (or willfully blind) assumption of ideally exhaustive Patent Office review for patentability. Consequently, the presumption too vigorously guards against erroneous invalidation of theoretically valid, but realistically under-examined, patents. There is also merit in adopting a fee-shifting rule to cover the reasonable attorney fees of a defendant who demonstrates that the patentee should have avoided imposing an invalid patent on the public. Such a fee-shifting mechanism would encourage an accused infringer with a meritorious case to stay in the fight longer (i.e., it would help the accused infringer to better resist the patentee’s efforts to realign the infringer’s interests with its own), as well as force

\textsuperscript{45} See Toward a Better Informed Patent System: FTC/DOJ Hearings on Competition and Intellectual Property Law in the Knowledge-Based Economy 6 (Apr. 10, 2002) (presentation of Jay P. Kesan, Univ. of Ill. Coll. of Law) [hereinafter Kesan, Better Informed] ("Eliminate [the] presumption of validity—[it] gives away a valuable residual right and currently [we] get very little in return."), http://www.ftc.gov/opp/intellect/020410jaykesan.pdf; Jay P. Kesan, Carrots and Sticks to Create a Better Patent System, 17 BERKELEY TECH. L.J. 763, 769 (2002) [hereinafter Kesan, Carrots and Sticks] (proposing, inter alia, that "we eliminate the presumption of validity for any patent that issues under the current [prior art] disclosure rules"); Lemley, supra note 1, at 1528–29 ("At a bare minimum, the presumption of validity should be pared back so that it covers only prior art references and arguments actually considered by the examiner.").

\textsuperscript{46} See Kesan, Better Informed, supra note 45, at 9 ("One-way, pro-defendant fee shifting if patents revoked or invalidated based on prior art categories that could have been reasonably discovered by the patentee."); Kesan, Carrots and Sticks, supra note 45, at 795–97 (proposing fee-shifting rule in detail); Lemley, supra note 1, at 1530–31 ("[A]ccused infringers normally won’t get attorney’s fees unless they can prove that the suit was filed in bad faith. It may make sense to add some balance to the fee awards [on analogy to copyright law] ... and therefore help shift some of the burden of determining validity away from accused infringers."); Mark A. Lemley, Reconceiving Patents in the Age of Venture Capital, 4 J. SMALL & EMERGING BUS. L. 137, 146 (2000) (suggesting "a partial fee-shifting idea: grant fees to patent defendants who prevail in circumstances that show that the case should never have been filed").

\textsuperscript{47} See Thomas, supra note 41, at 342–50 (describing in detail a proposed application-stage bounty system).
patent applicants further to internalize the full cost of vetting their innovations for genuine patentability.\textsuperscript{48}

The foregoing proposals merit serious consideration by the antitrust enforcement agencies. At the same time, I am skeptical that either a fee-shifting rule to benefit successful accused infringers or a bounty system at the patent application stage goes far enough in driving a wedge between patentees and the rivals that they seek to oust or tame. An attorney fee award, although it encourages an accused infringer with a meritorious case to stay in the fight, is not enough to overcome the collective action problem confronting patent challengers under current law. Indeed, it is not enough even to make the accused infringer whole, for the simple reason that attorney fee awards do nothing to compensate a firm for the lost productivity of employees who were diverted from the firm’s forward-looking work by the backward-looking distraction of litigation. Professor Thomas’s application-stage bounty proposal does attempt, quite rightly, to overcome the collective action problem that deadens an infringer’s incentive to challenge an invalid patent—the very same collective action problem that is the linchpin of a patentee’s plan to co-opt its rival with a cut of the monopoly rent.\textsuperscript{49} At the same time, by operating at the pre-issuance application stage, rather than the post-issuance litigation stage, the bounty he proposes has an effect diffused across the full range of patent applications—from plainly meritless applications on inventions of little commercial significance to seemingly ironclad applications on key new technologies.\textsuperscript{50} Thus, my own tentative view is that a bounty mechanism is desirable, but that it should operate at the litigation stage.\textsuperscript{51}

A litigation-stage bounty mechanism would both discourage shoddy prior art searches by patent applicants and encourage persistence on the part of accused infringers with strong evidence of invalidity. Specifically, an accused infringer who succeeds in negating a patent claim on grounds

---

\textsuperscript{48} The other main component driving such internalization is the level set for patent application filing fees and patent maintenance fees, which are the sole funding source for Patent Office operations.

\textsuperscript{49} See supra notes 40–44 and accompanying text.

\textsuperscript{50} As Professor Lemley has observed, “if the [Thomas] bounties encourage prior art submitters to pick ‘low-hanging fruit’ by submitting art to invalidate obviously worthless patents, they may increase the cost of the system with little corresponding benefit.” Lemley, supra note 1, at 1526 n.112. Rather than simply hope “that the [Thomas] bounties would elicit prior art submissions primarily about patents that are likely candidates for future litigation,” id. at 1525 n.112, I would structure the bounty mechanism so that it applies only to the subset of patents that are actually litigated and thus of demonstrated commercial significance.

\textsuperscript{51} I am currently working on a paper that constructs such a litigation-stage bounty proposal. Joseph Scott Miller, Patent Law: Its Cause and Cure (in progress).
that show that the patentee could reasonably have avoided prompting the issuance of an invalid or unenforceable patent in the first place (in practice, proof of invalidating printed prior art that the patentee would have found with a diligent prior art search, or did find and should have disclosed) would receive a bounty equal to a share of the profits the patentee had earned that were attributable to the invalid patent. The patentee would be required to disgorge those profits to the accused infringer as the bounty. This bounty would be available only to the first accused infringer(s) that obtain a final, unappealable judgment that the patent is invalid or unenforceable. Other parties that were, or would have been, accused infringers receive the benefit of unencumbered entry into the newly opened market, but only the successful patent attacker receives the bounty bonus.

My proposal, which would apply to all issued patents, is akin to the six-month semi-exclusivity bounty for drug patents, which is provided to the first ANDA filer under the Hatch-Waxman regime for promoting entry by generic drug makers. According to Alfred Engelberg, who served as the Generic Pharmaceutical Association’s patent counsel during the formulation and passage of the Hatch-Waxman regime in 1984, the semi-exclusivity “provision was requested by the generic drug manufacturers to insure that the successful challenger of a patent would have an opportunity to recoup its litigation costs before other generic manufacturers could take advantage of the elimination of the patent as a barrier to competition.” In other words, the Hatch-Waxman rules recognize and attempt to address precisely the collective action problem described by Professor Thomas, but with a litigation-stage bounty.

The Hatch-Waxman regime is admittedly an unpopular one at the moment, especially among antitrust lawyers. But its semi-exclusivity rule has been an excellent laboratory for patent law reform more generally, both for the good and the bad that it shows. Hatch-Waxman has led to

---

52 Just how large a share of the patentee's profits should be disgorged is unclear to me at present. For the sake of simplicity, one might opt to force disgorgement of 100%. Other candidate formulations may emerge.

53 See 21 U.S.C. § 355(j)(5)(B)(iv) (providing first ANDA filer with 6 months of semi-exclusivity); see also Alfred B. Engelberg, Special Patent Provisions for Pharmaceuticals: Have They Outlived Their Usefulness?, 39 IDEA 389, 403-04 (1999) (describing the first ANDA filer's semi-exclusivity as both “a 'bounty' provision” and “a significant incentive to challenge patents”).

54 Engelberg, supra note 53, at 403-04; see also id. at 423 (“The entire purpose of the 180-day exclusivity provision, at the time it was drafted, was to insure that one generic competitor would not get a free ride on the litigation effort of another generic competitor until the party who had borne the cost and risk of litigation had a fair opportunity to recover its litigation costs.”).

55 See Thomas, supra note 41, at 333-34.
a great deal of abuse by allowing some generic drug makers to trap other
generic drug makers behind an insuperable entry barrier, induced to
do so by large cash payments from the threatened brand-name drug
maker. But it has also demonstrated the boon to competition from
providing market participants with a benefit for taking down invalid
patents that they can appropriate to themselves, thus correcting the
under-supply of patent challenges. Importantly, the Federal Trade Com-
misson's recently completed, comprehensive study of the harm to com-
petition posed by some features of Hatch-Waxman concludes that "the
data suggest that, in and of itself, the 180-day exclusivity provision gener-
ally has not created a bottleneck to prevent FDA approval of subsequent
eligible generic applicants." There is thus reason to hope that, if the
errant features of the statute can be altered, thus depriving brand-name
drug makers of the opportunity to game the system by using one generic's
semi-exclusivity to block entry by others, the 180-day bounty can play
its intended role in encouraging someone to be the first successful
patent challenger.

IV. CONCLUSION

To grapple effectively with the competitive effects of a patent license
agreement under ambiguous conditions, antitrust authorities must, in
the end, address questions of patent law. Patent law dictates what a given
patentee can, and cannot, exclude another from doing. Patent law thus
plays a central role in defining the competitive relationship among paten-
tee and licensee firms. The joint IP Guidelines, in hewing to this path,
did not break new ground so much as they followed common sense.

Patent law, of course, contains both procedural and substantive rules.
As a result, antitrust authorities can and should take full account of
patent law's procedural doctrines when investigating the competitive
effects of patent licenses. These procedural doctrines, when deployed
in the antitrust enforcement context, can draw out key information from
the patent license parties and thus aid and focus an agency's investigation.
The two principles derived here—(a) that a patentee should be no better
off when defending the presumptive scope of its licensed patent rights
to an antitrust agency than it would be if it were attempting to obtain
a preliminary injunction against a competitor, and (b) that an antitrust
agency should be no worse off when assessing the erstwhile competitor's

56 See Engelberg, supra note 53, at 416–17, 423–25 (describing numerous problems
caused by the structure of the semi-exclusivity provision).
57 FEDERAL TRADE COMM'N, GENERIC DRUG ENTRY PRIOR TO PATENT EXPIRATION: AN
FTC STUDY viii (2002).
good-faith basis for sacrificing its independence to the patentee than it would be if it were challenging a merger that the parties defend on failing firm grounds—illustrate the power of taking account of such procedural doctrines. No doubt there are other patent law procedural rules that can further sharpen one’s antitrust analysis of particular patent licenses.

Antitrust policy makers should do more, however, than take full account of patent law rules, both substantive and procedural. They should also fully join the debates about just what shape those patent law rules should take. One area in which antitrust insights may be especially fruitful is the cluster of patent law doctrines that structure the market for challenges to the validity of patents on commercially significant technologies—chief among them the rule of *Blonder-Tongue Laboratories*, according to which all market players share the benefit of one firm’s successful challenge to a patent’s validity. Current law makes it too easy for a patentee to co-opt a rival, depriving the public of the benefits of competition that would ensue were an invalid patent exposed and market entry facilitated. A new litigation-stage bounty for the first successful patent challenger could help correct a framework that appears designed to undersupply definitive patent challenges.

My litigation-centered, profits-disgorgement bounty proposal may at first appear a bit harsh. As I have said, my own view on the matter is still developing. But my final goal in this essay has not been to demonstrate that a specific reform proposal is right in all its particulars and fully worthy of the antitrust enforcement agencies’ support. Rather, it has been to show that, notwithstanding the boost they may draw from patent law’s procedural rules, the antitrust enforcement agencies cannot fully discharge their mission to foster competition without pressing for changes to U.S. patent law that aim to break the power patentees now have to co-opt their rivals, cutting short the validity and noninfringement challenges that threaten to knock down wrongful entry barriers.

---