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Confidentiality in Patent Dispute Resolution: Antitrust Implications

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CONFIDENTIALITY IN PATENT DISPUTE RESOLUTION: ANTITRUST IMPLICATIONS

Mark R. Patterson*

Abstract: Information is crucial to the functioning of the patent system, as it is for other markets. Nevertheless, patent licensing terms are often subject to confidentiality agreements. On the one hand, this is not surprising: sellers and buyers do not normally publicize the details of their transactions. On the other hand, explicit confidentiality agreements are not common in other markets, and they may be particularly problematic for patents.

Several United States Supreme Court cases have condemned agreements that suppress market information, and those cases could be applied to confidentiality agreements in the patent context. Of course, confidentiality may sometimes be pro-competitive, particularly when it involves only private negotiations. In other contexts, however, and notably in arbitration, which is a substitute for open court proceedings, the competitive balance is more problematic. Indeed, U.S. patent law mandates that patent arbitration awards be made public through the Patent and Trademark Office, though this requirement is generally ignored.

Information about licensing terms is particularly important in one of today's most important patent licensing contexts. The standard-setting organizations that define the technologies used in products like smartphones typically require their members to commit to license patented technologies that are adopted in standards on fair, reasonable, and non-discriminatory (FRAND) terms. The non-discriminatory element of this commitment is difficult for potential licensees to enforce without information about the licensing terms to which other licensees have agreed.

This Article describes the value of patent licensing information and discusses the antitrust implications of agreements to keep that information confidential, particularly in the FRAND context and in arbitration. The Article also offers several ways in which parties, standard-setting organizations, and arbitration bodies could seek to avoid the anticompetitive effects of confidentiality.

* Professor of Law, Fordham University School of Law. I am grateful for comments from Aditi Bagchi, Jim Brudney, Thomas Cheng, Giuseppe Colangelo, Jorge Contreras, Howie Erichson, Barry Hawk, Clare Huntington, Andrew Kent, Vera Korzun, Mariateresa Maggiolino, Joel Reidenberg, and Richard Squire; I also thank participants at the Seventh Annual Tri-State IP Workshop at NYU School of Law, particularly Rochelle Dreyfuss, Janet Freilich, Scott Hemphill, and Chris Sprigman, and participants at the 2nd TILEC Conference on "Competition, Standardization, and Innovation" at the Tilburg Law and Economics Center, particularly Panos Delimatsis, Vincenzo Denicolò, John Golden, Erik Hovenkamp, and Urška Petrovič. I am also grateful for excellent research assistance from Thomas K. Griffith and for the valuable assistance of Alison Shea and the staff of the Fordham Law Library.

INTRODUCTION	828
I. CONFIDENTIALITY AND PATENT DISPUTE RESOLUTION	834
A. Confidentiality Agreements in Patent Dispute Resolution.....	835
1. Arbitration.....	835
2. Settlement and Licensing	839
B. Limits on Confidentiality	841
1. Discovery and Admissibility in Court.....	842
2. Disclosure in Arbitration	848
3. Voluntary Disclosure.....	849
C. The Costs of Confidentiality	850
II.PATENT DISPUTES AND SUPPRESSION OF INFORMATION	852
A. The Importance of Patent Information	853
B. Agreements to Suppress Information Under Antitrust Law.....	857
C. Actavis and Information Suppression	860
D. Royalty Information and Competition.....	863
III.ANTITRUST ANALYSIS OF CONFIDENTIAL PATENT DISPUTE RESOLUTION	865
A. Market Power	866
B. Anticompetitive Effects.....	869
C. Procompetitive Effects	875
1. Benefits of Confidential Licensing	875
2. Benefits of Confidential Arbitration	878
IV.MEANS OF AVOIDING COMPETITIVE HARM	878
A. Joint Action by Parties to Dispute Resolution.....	879
B. Action by One Party to Dispute Resolution	881
C. Action by a Disadvantaged Licensee	883
D. Action by a Standard-Setting Organization.....	884
E. Definitions of FRAND by Courts or Agencies	885
F. Action by an Arbitration Body.....	887
CONCLUSION	888

INTRODUCTION

Information is crucial to the functioning of the patent system. The validity and value of granted patents are initially unclear,¹ and it is often

1. This point has been the subject of recent scholarship addressing it from a variety of perspectives. See Mark A. Lemley & Carl Shapiro, *Probabilistic Patents*, 19 J. ECON. PERSP. 76 (2005); Gideon Parchomovsky & R. Polk Wagner, *Patent Portfolios*, 154 U. PA. L. REV. 1, 66 (2005) (“As patent portfolios become more prevalent, it will be increasingly difficult to assess

through litigation of patents that those issues are clarified. When a patentee alleges infringement of its patent, the alleged infringer is free to challenge not just the claim of infringement but also whether the patent should have been granted at all, and the court will then deliver information about the patent's validity. The importance of challenges to patent validity is such that in many circumstances they may not be foreclosed by private agreement.² This is so because the challenges have implications not just for the parties to the agreement but for the public. Hence, the United States Supreme Court said in *Lear, Inc. v. Adkins*³ that if challengers “are muzzled, the public may continually be required to pay tribute to would-be monopolists without need or justification.”⁴

It is not just the validity or infringement of patents, though, but also their value, that is often determined through litigation. When a patentee prevails in an infringement action, the court is frequently called upon to determine a “reasonable royalty.”⁵ Although other parties need not treat a court-determined royalty rate as authoritative, it is likely to be persuasive—it is valuable information on which parties base their negotiations.⁶ Royalty rates are also often determined through purely private licensing agreements, however, and in that case the parties often agree that the information may not be publicly available.⁷ Or, if the parties cannot reach an agreement, they may choose to arbitrate their dispute.⁸ In that case, too, the parties often enter into confidentiality agreements that prohibit disclosure of the royalty and other terms that result.⁹

accurately the stand-alone value of individual patents.”); Mark R. Patterson, *Leveraging Information About Patents: Settlements, Portfolios, and Holdups*, 50 HOUS. L. REV. 483 (2012).

2. See *infra* section II.A.

3. 395 U.S. 653 (1969).

4. *Id.* at 670–71 (overruling *Automatic Radio Mfg. Co. v. Hazeltine Research, Inc.*, 339 U.S. 827, 836 (1950)).

5. See 35 U.S.C. § 284 (2012) (“Upon finding for the claimant the court shall award the claimant damages adequate to compensate for the infringement, but in no event less than a reasonable royalty for the use made of the invention by the infringer, together with interest and costs as fixed by the court.”).

6. See Jonathan S. Masur, *The Use and Misuse of Patent Licenses*, 110 NW. U. L. REV. 115, 120 (2015) (“[A]ny negotiation over royalties will necessarily be based upon the outcome the parties expect should the case go to trial.” (citation omitted)).

7. See *infra* section I.B.

8. In the U.S. arbitration of patent disputes is permitted, even as to issues of validity and infringement. 35 U.S.C. § 294(a). In many other jurisdictions, arbitration of validity is not permitted, see *infra* text accompanying notes 118–19, but even those jurisdictions typically permit arbitration of royalty disputes.

9. See *infra* section I.A.

In contrast to the judicial limits on agreements preventing validity challenges, the courts have not been hostile to confidential royalty arrangements. Nevertheless, the two differ only in degree. Extrapolating from the Supreme Court's statement in *Lear*, even in the royalty context "the public may continually be required to pay [greater] tribute to would-be monopolists without need or justification."¹⁰ The only difference is that the "tribute" in the validity context is all-or-nothing, whereas it is a matter of degree for royalties. In the same way that licensees without knowledge that a patent is invalid may pay for a license to the invention, so may licensees without knowledge of lower royalty rates pay higher ones. In the validity context, the underlying principle comes from patent law, but this Article contends that in the royalty context antitrust law imposes requirements for competition that produce a similar result.

There is no general policy, of course, that all buyers, or licensees, should pay the same price. Different royalty rates are a form of price discrimination, and the effects of price discrimination are not always harmful. Nor, however, are they always beneficial, and the United States Supreme Court has issued decisions in recent years that make price discrimination in intellectual property more difficult.¹¹ Moreover, when information about royalty rates is unavailable, the dispersion of royalty rates is likely to be greater than that in other markets, where information may be more widely available and competition may provide a greater constraint on pricing.

Furthermore, the usual argument for the beneficial effects of price discrimination is that it can allow a seller to maximize profits while still making sales to all buyers willing to pay prices above cost.¹² That is so if the seller can perfectly price-discriminate by matching prices to individual buyers' willingness to pay. Where the buyer is an intermediate seller, though, its willingness to pay will depend in part on

10. *Lear, Inc. v. Adkins*, 395 U.S. 653, 670 (1969).

11. These decisions have reaffirmed exhaustion/first sale doctrines in both patent law and copyright law. *Impression Prods., Inc. v. Lexmark Int'l, Inc.*, ___ U.S. ___, 137 S. Ct. 1523 (2017) (patent law); *Kirtsaeng v. John Wiley & Sons, Inc.*, 568 U.S. 519 (2013) (copyright). In *Kirtsaeng*, the Court emphasized that "the Constitution's language nowhere suggests that [copyright's] limited exclusive right should include a right to divide markets or a concomitant right to charge different purchasers different prices for the same book, say to increase or to maximize gain." *Id.* at 552.

12. See F.M. SCHERER & DAVID ROSS, *INDUSTRIAL MARKET STRUCTURE AND ECONOMIC PERFORMANCE* 495 (1990) ("First- or second-degree discrimination usually leads to larger outputs than under simple monopoly, and from there to lower dead-weight losses and improved allocative efficiency."). Under first-degree price discrimination, each product is sold at a price matching the consumer's willingness to pay; second-degree price discrimination is discrimination on the basis of quantity purchased.

how much competing buyers are paying for the same good. Consider, for example, a smartphone manufacturer deciding how much it is willing to pay for a patent license that would allow it to include a particular feature on its phones. If manufacturer A pays \$X/phone for the feature, manufacturer B may not be willing to pay more than \$X, because that will place it at a cost disadvantage with respect to phones with that feature. Perhaps it would be better off seeking to compete on other features instead.¹³ But if manufacturer B does not know how much A is paying, it will not be able to make this assessment. Its willingness to pay, then, will be distorted, and price discrimination will be imperfect. Imperfect price discrimination, in contrast to perfect discrimination, is not so likely to be beneficial.¹⁴ Therefore, the unavailability of comparative price information—in this context, comparative royalty information—eliminates much, if not all, of the force of this argument for price discrimination.

Furthermore, one of the most important patent licensing contexts today is FRAND licensing, which requires that license terms be fair, reasonable, and—crucially—non-discriminatory. Many of the technologies used in important products like cellphones and WiFi transmission require that different products work together, a process facilitated by the many technical standards promulgated by standard-setting organizations (SSOs), which are generally made up of representatives from the industry. When the standards include patented technologies, licenses to the relevant patents are needed to comply with the standard, leading them to be referred to as standard-essential patents (SEPs). As a result, the SSOs typically require members participating in the standard-setting process to commit to FRAND licensing for any SEPs the members own. These circumstances describe much patenting practice today, including the so-called “smartphone patent wars.”¹⁵

The element of FRAND most relevant here is that which requires that licenses be “non-discriminatory.” Although there is some dispute about

13. The relationships between the availability of price information, price discrimination, and the willingness of buyers to participate in markets is explored in Saul Levmore & Frank Fagan, *The End of Bargaining in the Digital Age*, CORNELL L. REV. (forthcoming), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3062794 [<https://perma.cc/6KB8-DUE8>].

14. SCHERER & ROSS, *supra* note 12, at 495 (noting that output can be reduced if a seller’s “ability to segregate marginal customers by reservation prices is quite imperfect”).

15. See Kurt Eichenwald, *The Great Smartphone War*, VANITY FAIR (May 3, 2014), <http://www.vanityfair.com/news/business/2014/06/apple-samsung-smartphone-patent-war> [<http://perma.cc/Y4YM-8CBA>]; Richard Waters & Jessica Dye, *Apple and Nokia Reboot Patent Wars*, FIN. TIMES (Dec. 21, 2016), <https://www.ft.com/content/04959354-c7b0-11e6-9043-7e34c07b46ef> [<http://perma.cc/F68Q-CGGH>].

what exactly that means, different license terms are at least problematic.¹⁶ For that reason, confidentiality that makes it difficult for participants in these markets to determine the license terms that have been granted to others is also problematic.¹⁷ As described above, license terms typically are public only when disputes are litigated. When parties resolve disputes through other means, such as arbitration or through private licensing negotiations, the results are usually confidential, making it difficult for parties to assess whether offer terms are in fact non-discriminatory. As the European Commission wrote in its November 2017 communication on SEPs and FRAND licensing, “[r]ecourse to ADR [alternative dispute resolution] is often hampered by unpredictability and criticized for lack of transparency of previous decisions.”¹⁸

Commentators have also noted this confidentiality problem in the context of arbitration.¹⁹ Most of these comments do not offer specific

16. A recent UK case, *Unwired Planet International Ltd. v. Huawei Technologies Co.* [2017] EWHC 711 (Pat), distinguished between what it called “general non-discrimination” and “hard-edged non-discrimination” obligations. The former, it said, requires that rates do not differ based on the licensee but only based “primarily” on the value of the portfolio licensed. *Id.* ¶ 175. Hard-edged discrimination, on the other hand, “to the extent it exists, is a distinct factor capable of applying to reduce a royalty rate (or adjust any licence term in any way) which would otherwise have been regarded as FRAND.” *Id.* ¶ 177. Determining where there is discrimination in either sense would require information about rates applicable to different licensees.

17. See Complaint, Charter Commc’ns, Inc., v. Rockstar Consortium US LP, No. 1:14-cv-00055-UNA (D. Del. filed Jan. 17, 2014), http://www.aipla.org/committees/committee_pages/antitrust-law/Committee%20Documents/Subcommittee%20on%20Standards/20140117%20Charter%20v.%20Rockstar%20Complaint.pdf [<https://perma.cc/SG9V-84PZ>]; Vikas Kathuria & Jessica C. Lai, Validity of Non-Disclosure Agreements in SEP Licensing, TILEC Discussion Paper DP 2018-004 (Jan. 2018), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3092219 [<https://perma.cc/M53Q-PPEP>]; FAIR STANDARDS ALL., INPUT IN RESPONSE TO EU COMMISSION WORKSHOP ON STANDARD ESSENTIAL PATENTS IN THE CONTEXT OF NEW ICT STANDARDIZATION DEVELOPMENTS, HELD ON 25 JANUARY 2017 5 (2017), http://www.fair-standards.org/wpcontent/uploads/2017/04/FSA-Input-Paper-regarding-SEP-Guidelines_29.03.2017.pdf [<https://perma.cc/VC4P-2K7H>] (“By requiring extensive secrecy from all licensees, some SEP holders seek to prevent prospective licensees from knowing the terms that have been offered to others, and thereby from reliably evaluating whether the terms they are negotiating are FRAND.”).

18. EUROPEAN COMM’N, COMMUNICATION FROM THE COMMISSION TO THE EUROPEAN PARLIAMENT, THE COUNCIL, AND THE EUROPEAN ECONOMIC AND SOCIAL COMMITTEE, SETTING OUT THE EU APPROACH TO STANDARD ESSENTIAL PATENTS, § 3.4 (2017) (Nov. 29, 2017) [hereinafter EC Communication on SEPs].

19. See EUROPEAN COMM’N, TRANSPARENCY, PREDICTABILITY, AND EFFICIENCY OF SSO-BASED STANDARDIZATION AND SEP LICENSING 89 (2016), <https://ec.europa.eu/docsroom/documents/20506/attachments/1/translations/en/renditions/native> [<https://perma.cc/QVB5-7PNM>]; Jorge L. Contreras & David L. Newman, *Developing a Framework for Arbitrating Standards-Essential Patent Disputes*, 2014 J. DISP. RESOL. 23, 39–41; Yoonhee Kim, *Lifting Confidentiality of FRAND Royalties in SEP Arbitration*, 16 COLUM. SCI. & TECH. L. REV. 1 (2014); Mark A. Lemley & Carl Shapiro, *A Simple Approach to Setting Reasonable Royalties for Standard-Essential Patents*,

solutions to the confidentiality problem, but Jorge Contreras and David Newman suggest that SSOs could require disclosure of FRAND arbitrations.²⁰ The European Commission also took up this proposal in its communication.²¹ Although that would be a partial solution, there is no indication that SSOs would take such a step.²² In any event, the problem extends beyond the FRAND context and beyond arbitration to litigation settlements and private licensing.

This Article argues that where confidentiality injures competition, antitrust law offers a solution.²³ Antitrust already plays a role in the validity context. The United States Supreme Court in *FTC v. Actavis, Inc.*²⁴ addressed a settlement that precluded a validity challenge and said that “patent-related settlement agreements can sometimes violate the antitrust laws.”²⁵ Further, courts and agencies in multiple jurisdictions have treated agreements that prevent such challenges to patent validity as antitrust violations.²⁶ These decisions have focused on the potential for invalidation of patents rather than on patent or royalty information per se,²⁷ but outside the patent context the Supreme Court has held that

28 BERKELEY TECH. L.J. 1135, 1141, 1145–46 (2013) [hereinafter Lemley & Shapiro, *A Simple Approach*]. Lemley and Shapiro also note the confidentiality problem more generally in Mark A. Lemley & Carl Shapiro, *Patent Holdup and Royalty Stacking*, 85 TEX. L. REV. 1991, 2022 (2007) [hereinafter Lemley & Shapiro, *Patent Holdup*], but their focus is on the effect on royalty rates, not on solutions to the confidentiality problem.

20. Contreras & Newman, *supra* note 19, at 41.

21. EC Communication on SEPs, *supra* note 18, §§ 1.2.1, 3.4.

22. The 2015 amendments to the FRAND policy of the Institute of Electrical and Electronics Engineers (IEEE) were quite controversial. See Jorge L. Contreras, *IEEE Amends Its Patent (FRAND) Policy*, PATENTLY-O (Feb. 9, 2015), <https://patentlyo.com/patent/2015/02/amends-patent-policy.html> [http://perma.cc/PYT2-3P4H]. Since then other SSOs have not followed the IEEE’s lead, despite calls for them to do so. *Id.*

23. Prior work pointing to the problems of non-disclosure in this context have not advocated an antitrust solution. See sources cited in *supra* note 17.

24. 570 U.S. 136 (2013).

25. *Id.* at 137 (citations omitted). *Actavis* was of course unusual, involving a “reverse-payment” settlement of litigation between brand-name and generic pharmaceutical manufacturers in the context of the Hatch-Waxman Act, but the problem is a more general one. See Herbert Hovenkamp, Mark Janis & Mark A. Lemley, *Anticompetitive Settlement of Intellectual Property Disputes*, 87 MINN. L. REV. 1719, 1722 (2003); Megan M. La Belle, *Against Settlement of (Some) Patent Cases*, 67 VAND. L. REV. 375, 409 (2014) (observing that reverse payment settlements “are not the only type of patent settlements to raise antitrust concerns”). Moreover, one of the cases cited by the Court in *Actavis* was more directly analogous, as is discussed below. See *infra* text accompanying notes 151–154.

26. See Thomas K. Cheng, *Antitrust Treatment of the No Challenge Clause*, 5 N.Y.U. J. INTELL. PROP. & ENTER. L. 437 (2016).

27. For an earlier discussion of *Actavis* as presenting a specifically informational problem, see Patterson, *supra* note 1.

agreements that suppress price and other important market information can be antitrust violations.²⁸ Combining these two sets of decisions—those condemning anticompetitive patent settlements and those condemning private agreements suppressing information—reveals the policy justifications for applying antitrust scrutiny to confidentiality agreements in patent dispute resolution.

Part I of this Article outlines the nature of confidentiality in patent dispute resolution, addressing both arbitration and private litigation settlements and licensing. Among the points discussed in this part is a widely ignored section of U.S. patent law requiring public filings of arbitration awards. Part II then discusses generally the competitive implications of confidentiality in patent dispute resolution, emphasizing particularly arbitration and the FRAND context. This portion of the Article also draws an analogy between confidentiality agreements and reverse-payment settlements in the pharmaceutical industry. Part III then analyzes how antitrust law would treat both agreements on confidentiality and unilateral suppression of information about patent disputes, with a focus on patent information as the relevant market. Finally, Part IV outlines some approaches for eliminating the confidentiality concerns while still retaining the benefits of resolving patent disputes without litigation, and particularly through arbitration.

I. CONFIDENTIALITY AND PATENT DISPUTE RESOLUTION

The transparency of patent dispute resolution differs dramatically between litigation and other forms of dispute resolution. The results of courtroom litigation are rarely confidential. Although parties sometimes seek to seal not just filings but also court decisions, those attempts seldom succeed.²⁹ In contrast, patent licenses, settlements of patent litigation, and arbitration of patent disputes all are often accompanied by confidentiality agreements. Such agreements are not always entirely effective, because courts in subsequent proceedings may allow discovery and sometimes admission of the information at issue. But even if parties can ultimately obtain access to arbitration awards, settlements, or licenses by initiating subsequent litigation, the need for litigation to overcome confidentiality imposes a considerable cost and burden.

28. *FTC v. Ind. Fed'n of Dentists*, 476 U.S. 447 (1986); *Nat'l Soc'y of Prof'l Eng'rs v. United States*, 435 U.S. 679 (1978).

29. ROBERT TIMOTHY REAGAN, *FED. JUDICIAL CTR., SEALING COURT RECORDS AND PROCEEDINGS: A POCKET GUIDE* (2010), https://www.fjc.gov/sites/default/files/2012/Sealing_Guide.pdf [<https://perma.cc/GQ9G-CA64>].

The paragraphs below discuss these aspects of confidentiality. The first section describes the nature and scope of confidentiality agreements in both the arbitration and settlement/licensing contexts. The second then discusses the extent to which the results of dispute resolution will be available despite confidentiality agreements. The goal in these first two sections is not to present an exhaustive description of the applicable rules, even in the U.S., but simply to illustrate the obstacles imposed by confidentiality. The final section concludes by describing how the effect of confidentiality clauses can be viewed as imposing a cost on uninformed licensees that places them at a competitive disadvantage.

A. *Confidentiality Agreements in Patent Dispute Resolution*

A court seldom denies the public access to litigation documents, and when it does, the decision to do so is the court's, not the parties'. That gives some reason to believe that the decision will be made with reference to the public interest. Outside the courtroom, however, parties typically exercise control over whether the resolution of their dispute is confidential, whether it comes through arbitration, pre-litigation licensing, or settlement of litigation. That makes it less likely that the confidentiality decision will be in the public interest.

1. *Arbitration*

Although confidentiality is often said to be one of the fundamental attributes of arbitration, the rules of most arbitration bodies do not require confidentiality.³⁰ As many commentators point out, it is privacy, not confidentiality, that is an essential part of arbitration.³¹ That is, although the process takes place behind closed doors—it is “private” in that sense—the parties must generally enter into a separate agreement to

30. They do not require confidentiality from the parties; they do generally require confidentiality from the arbitration tribunal itself. See Scott D. Marrs & Joseph W. Hance III, *You Thought Arbitration Was Confidential?: A Practical Comparison of Confidentiality (or Lack Thereof) in Major Arbitration Forums*, 77 TEX. BAR J., 152, 152–56 (2014); David Perkins, *Protective Orders in International Arbitration*, 33 ASA BULL. 274, 274 (2015) (“[B]oth the UNCITRAL Model Law and most national arbitration legislation are silent on issues of confidentiality.”). In some jurisdictions, there is arguably an implied duty of confidentiality, but there are sometimes exceptions, and it is also often unclear what law will apply to subsequent efforts seeking disclosure. See Jeffrey W. Sarles, *Solving the Arbitral Confidentiality Conundrum in International Arbitration*, at 3–5, https://www.josemigueljudice—arbitration.com/xms/files/02_TEXTOS_ARBITRAGEM/01_Doutrina_ScolarsTexts/confidentiality/Confidentiality_in_International_Arbitrations_-_Sarles.pdf [<https://perma.cc/WG3K-P943>].

31. See Sarles, *supra* note 30; M.A. Smith et al., *Arbitration of Patent Infringement and Validity Issues Worldwide*, 19 HARV. J.L. & TECH. 299, 315–18 (2006).

keep the proceedings confidential. In the absence of such an agreement, either of the parties would typically be permitted to reveal information from the arbitration, though the tribunal itself is generally bound to confidentiality.³²

The scope of a typical confidentiality agreement between parties to arbitration can be illustrated by a recommended provision:

The parties shall maintain the confidential nature of the arbitration proceeding and the Award, including the Hearing, except as may be necessary to prepare for or conduct the arbitration hearing on the merits, or as may be necessary in connection with a court application for a preliminary remedy, a judicial challenge to an Award or its enforcement, or unless otherwise required by law or judicial decision.³³

Under this provision, neither party would be permitted, in the absence of a legal obligation,³⁴ to disclose information about the arbitration to others without the permission of the other party.

The quoted confidentiality provision is one recommended by practitioners because confidentiality is viewed by many as a benefit of arbitration, in general and in the patent context. It is not entirely clear, however, to what extent confidentiality really is viewed as essential by parties to arbitration.³⁵ Some descriptions of the advantages of arbitration do not even mention confidentiality.³⁶ Moreover, a study by the Queen Mary School of International Arbitration found that only 35% of respondents would not use arbitration if results were not confidential,³⁷ and 65% said that a lack of confidentiality in court was not a principal reason for choosing arbitration.³⁸

32. Marrs & Hance III, *supra* note 30, at 152–56.

33. *Id.*

34. For discussion of whether a court would order discovery of the arbitration award or other materials, see *infra* section I.B.2.

35. Stefano Azzali, *Confidentiality vs. Transparency in Commercial Arbitration: A False Contradiction to Overcome*, TRANSNAT'L NOTES (Dec. 28, 2012), <http://blogs.law.nyu.edu/transnational/2012/12/confidentiality-vs-transparency-in-commercial-arbitration-a-false/> [<http://perma.cc/ACL3-CQ3L>].

36. See, e.g., SEC. OF INTELLECTUAL PROP. LAW ABA, PATENT LITIGATION STRATEGIES HANDBOOK 85–88 (Barry L. Grossman & Gary M. Hoffman eds., 3d ed. 2010) (listing speed, affordability, flexibility, choice of decisionmaker, and control over the process as reasons to arbitrate).

37. Of the others, 38% said they would still use arbitration, and 26% did not know. SCH. OF INT'L ARBITRATION, QUEEN MARY UNIV. OF LONDON, 2010 INTERNATIONAL ARBITRATION SURVEY: CHOICES IN INTERNATIONAL ARBITRATION 30 (2010), http://www.arbitration.qmul.ac.uk/media/arbitration/docs/2010_InternationalArbitrationSurveyReport.pdf [<https://perma.cc/FET3-AF25>].

38. *Id.*

In fact, there is arguably a move toward greater transparency in arbitration, as evidenced by the United Nations Convention on Transparency in Treaty-based Investor-State Arbitration, known as the “Mauritius Convention on Transparency.”³⁹ States parties to the convention agree to apply the UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration.⁴⁰ Those rules provide for publication (or, in the case of expert reports, availability) of documents, including awards, from the arbitration.⁴¹ The rules also provide, however, that “confidential business information” shall not be made public.⁴² The convention and rules therefore hardly reflect a wholesale adoption of transparency, but they do reflect some recognition that confidentiality need not be an essential part of arbitration.

The investor-state arbitration context is very different from the patent one, of course, and the respondents to the Queen Mary study cited above appeared to consider information related to intellectual property as particularly sensitive.⁴³ Another commentator notes that “[in arbitration, it is more likely that secret information will remain confidential” and that “[s]pecifically in patent validity disputes, parties are more likely to keep silent to maintain their technology advances.”⁴⁴

In the FRAND context, though, and in pure royalty disputes more generally, where validity is not at issue, there is no question of keeping technology secret. Furthermore, some commentary points to costs of confidentiality that are directly relevant to the patent context, and particularly to FRAND licensing:

[C]onfidentiality of arbitral decisions may lead to inconsistent resolution of disputes arising out of the same business transaction but decided by different arbitral tribunals. This carries the risk of conflicting awards. In these circumstances, more transparency is desirable, especially for the stakeholders in

39. UNCITRAL, UNITED NATIONS CONVENTION ON TRANSPARENCY IN TREATY-BASED INVESTOR-STATE ARBITRATION (2014), http://www.uncitral.org/uncitral/uncitral_texts/arbitration/2014Transparency_Convention.html [<http://perma.cc/8QE7-T234>].

40. UNCITRAL, UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration (effective Apr. 1, 2014).

41. *Id.* art. 3.

42. *Id.* art. 7. The scope of this provision is not entirely clear. Where royalty rates are the issue in dispute, they might or might not be viewed as confidential business information. In that respect, they could be distinguished from, for example, trade secrets.

43. *Id.* at 31.

44. Wei-Hua Wu, *International Arbitration of Patent Disputes*, 10 J. MARSHALL REV. INTELL. PROP. 384, 403 (2011). However, royalty rates presumably would not be viewed as “technology advances.”

order to benefit of [from?] documents and information relevant to each of the disputes.⁴⁵

These benefits of transparency are surely apparent to parties to patent disputes, so it is possible that there is simply a collective-action problem. Some parties, or some classes of parties, like licensees, might prefer a world in which arbitration, like litigation, was a public process, but they are unlikely to prefer that only their own arbitrations be public. Hence, since parties to one arbitration have no ability to ensure that others are public, they will keep their own arbitrations confidential. In that sense, there may be a market failure that leads the parties to this result. As will be discussed below, this failure could and perhaps should be remedied by any of the actors that are involved in these disputes: standard-setting bodies, courts, or arbitration organizations.⁴⁶

A fundamental point of this Article, though, is that even if confidentiality is preferred by the parties to dispute resolution, it may not be beneficial to the public. Indeed, U.S. patent law requires that patent arbitrations be public.⁴⁷ Section 294 of the Patent Act requires that when a patent dispute is arbitrated, a notice including a copy of the award “shall” be given to the Director of the Patent and Trademark Office.⁴⁸ The Director then “shall” enter the notice in the prosecution history of “each patent involved in such proceeding.”⁴⁹ This requirement is, however, widely ignored.⁵⁰ The reason for the non-compliance, presumably, is that the only penalty is that the award is unenforceable.⁵¹

When parties ignore this requirement, they apparently benefit sufficiently from keeping their resolution confidential so that neither discloses the award,⁵² but the fact that parties do not typically comply

45. Azzali, *supra* note 35.

46. *See infra* sections IV.C–E.

47. The U.S. (unlike many other jurisdictions) allows arbitration of patent disputes, even those “relating to patent validity or infringement.” 35 U.S.C. § 294(a) (2012).

48. *Id.* § 294(d).

49. *Id.*

50. An inquiry to the PTO’s Office of the Solicitor produced the information that “one, or two, or maybe three” such filings are made each year. Telephone Interview with PTO Office of the Solicitor Employee (further information on file with author). Even in instances where a filing is made, it might not provide useful information. For example, in the filing in the prosecution history of U.S. Patent No. 5,648,477, the arbitration award is redacted.

51. 35 U.S.C. § 294(e).

52. There have been occasions in which parties have sought to enforce arbitration awards in the U.S., so there is presumably some potential for the absence of a filing to cause difficulty in that situation. *See* Martyn Williams, *Nokia Seeks to Block Sale of Some RIM Products*, COMPUTERWORLD (Nov. 27, 2012), <http://www.computerworld.com/article/2492458/data-center/nokia-seeks-to-block-sale-of-some-rim-products.html> [http://perma.cc/A3M9-XD5C];

with the disclosure requirement should give us pause. Even if there are private benefits to the parties from keeping the resolution of patent disputes confidential, that confidentiality does not necessarily benefit the public.⁵³ If parties prefer that their patent arbitrations be confidential, that preference may be one for competitive advantage rather than for a more defensible reason.

2. *Settlement and Licensing*

Many patent disputes are resolved through litigation settlements or private licensing rather than through arbitration or litigation to judgment. In some cases, litigation may be initiated, but the parties subsequently settle the case through private agreement. In others, the parties may come to a private agreement on licensing terms without any formal dispute resolution. These circumstances present somewhat different issues than arbitration, particularly in evaluating the potential benefits of secrecy,⁵⁴ but these private forms of dispute resolution are, as with arbitration, often confidential.

The absence of transparency in the settlement context has been recognized for many years, most notably in Owen Fiss's 1984 article "Against Settlement."⁵⁵ The issue has been taken up more recently both in the patent⁵⁶ and arbitration⁵⁷ contexts. However, the primary concern of Fiss and others has been the legitimacy of confidential dispute resolution, and the focus in the present article is different. The focus here is on the competitive implications of confidentiality, given the importance of information to the functioning of markets.

As with arbitration, "[p]arties regularly opt to keep terms, conditions and licensing agreements confidential when settling patent infringement disputes."⁵⁸ As will be discussed below, the effectiveness of such

Parties Agree to Dismiss Petition to Confirm Swedish Arbitration Award (Jan. 29, 2013), <http://www.lexisnexis.com/legalnewsroom/international-law/b/international-law-headlines/archive/2013/01/29/parties-agree-to-dismiss-petition-to-confirm-swedish-arbitration-award.aspx> [<http://perma.cc/U7SL-9AQP>] (noting settlement of that case).

53. See La Belle, *supra* note 25; Patterson, *supra* note 1.

54. See *infra* section III.C.

55. Owen M. Fiss, *Against Settlement*, 93 YALE L.J. 1073 (1984).

56. La Belle, *supra* note 25; Patterson, *supra* note 1.

57. Emilie M. Hafner-Burton et al., *Against International Settlement?: The Social Cost of Secrecy in International Investment Arbitration* (Jan. 2016), http://pages.ucsd.edu/~ehafner/pdfs/ILAR_Working_Paper_26.pdf [<https://perma.cc/QGV7-BKRM>].

58. James Amend, *Protecting Confidentiality of Patent Infringement Settlements: Is Mediation Necessary?*, (Nov. 3, 2014), <http://www.law.com/sites/jamesamend/2014/11/03/protecting->

provisions, like those for confidentiality of arbitrations, is not entirely clear, but the provisions are similar, as this example from a “Settlement and Patent License Agreement and Mutual Release” shows:

5.3 The contents, but not the mere existence[,] of this Agreement are and shall be kept confidential by the Parties and their Affiliates. Philips shall be permitted to list the Licensee on a Philips website identifying the Licensee as having obtained a license under the Philips SSL Luminaire and Retrofit Bulb License Program. [redacted]

5.4 No confidentiality obligation shall apply to the extent information so acquired:

...

(iv) must be disclosed pursuant to an order of a competent court or administrative authority or pursuant to any mandatory law.⁵⁹

Licensing agreements in the absence of litigation typically have similar provisions.⁶⁰

The agreement quoted above was available because it was included in a required securities filing. Securities law requires that a party must include as exhibits to its filings material agreements that were not entered into in the ordinary course of business.⁶¹ This requirement might be expected, then, to result in the disclosure of the terms of many significant license agreements.⁶² However, license terms may remain undisclosed because the filing party may request, and receive,

confidentiality-of-patent-infringement-settlements-is-mediation-necessary/?slreturn=20170104132207 [http://perma.cc/B3S8-59AY].

59. Nexxus Lighting, Inc., Settlement and Patent License Agreement (Exhibit No. 10.1 to Form 10-Q) (Nov. 14, 2012), <https://www.sec.gov/Archives/edgar/data/917523/000119312512469039/d422675dex101.htm> [https://perma.cc/DUT2-CHPS].

60. For example, a license agreement between Scient’x S.A. and Alphatec Spine Inc. contains this clause:

Except as otherwise provided herein or required by law, no party shall originate any publication, news release or other public announcement, written or oral, whether in the public press, stockholders’ reports, or otherwise, relating to this Agreement or to any sublicense hereunder, or to the performance hereunder or any such agreements, without the prior written approval of the other party, which approval shall not be unreasonably withheld.

Alphatec Holdings, Inc., License Agreement (Exhibit No. 10.21 to Form 10-K) (Apr. 2, 2007), <https://www.sec.gov/Archives/edgar/data/1350653/000119312507072229/dex1021.htm> [https://perma.cc/6TSA-KDN2].

61. Regulation S-K, Item 601(b)(10), describes the contracts required as exhibits:

Every contract not made in the ordinary course of business which is material to the registrant and is to be performed in whole or in part at or after the filing of the registration statement or report or was entered into not more than two years before such filing.

17 C.F.R. § 229.601(b)(10) (2016).

62. See Lemley & Shapiro, *Patent Holdup*, *supra* note 19, at 2022.

confidential treatment for important information in the filing.⁶³ “Common examples of this kind of information include pricing terms, technical specifications and milestone payments.”⁶⁴ As a result, the relevant licensing terms of the contracts included as exhibits may in fact be redacted, as they were in both the agreements cited above.⁶⁵

Settlements and licenses differ from arbitration awards in a number of respects, but an important one is the time at which the parties agree on confidentiality. Settlements and licenses are agreements on particular terms, so when parties include a confidentiality provision in such an agreement, they do so with knowledge of those terms. In arbitration, however, the parties typically enter into a confidentiality agreement when they agree to arbitrate, when the royalty or other terms are as yet undetermined.⁶⁶ As a result, parties entering into licenses and settlements can make decisions on confidentiality based on how favorable are the terms they have received. One commentator says that often “patentees do not want the license terms to serve as precedent in other assertions of the patent(s),”⁶⁷ but that will depend, of course, on whether the terms are favorable or not. For example, a patentee might insist on confidentiality when it accepts a low royalty rate but negotiate for disclosure when it receives a high one. Licensees would surely be a constraint on this practice because licensees “may also not want other potential patent plaintiffs to believe they are a ‘soft touch,’”⁶⁸ but the point is that there are opportunities for gaming the disclosure in a way that also exacerbates the potential competition problems.

B. *Limits on Confidentiality*

A confidentiality agreement between parties resolving a patent dispute will not always maintain confidentiality. Most importantly, as the confidentiality clauses quoted above illustrate, legal requirements

63. SEC DIV. OF CORP. FIN., STAFF LEGAL BULLETIN NO. 1 (WITH ADDENDUM), “CONFIDENTIAL TREATMENT REQUESTS” (Feb. 28, 1997), <https://www.sec.gov/interps/legal/slbcl1r.htm> [<http://perma.cc/X3EQ-XMD4>].

64. Ze’-ey D. Eiger, et. al., *Frequently Asked Questions About Confidential Treatment Requests*, MORRISON & FOERSTER LLP (2017), <https://media2.mofo.com/documents/faq-confidential-treatment-requests.pdf> [<https://perma.cc/9ZJ7-7M7P>].

65. That is true, for example, for the contract quoted in *supra* note 60.

66. Sarles, *supra* note 30, at 2 (observing that with pre-dispute arbitration agreements, “[i]f [the parties] do think about the confidentiality issue, they may be unsure what their position would be in the context of a particular dispute and its arbitral resolution”).

67. Amend, *supra* note 58.

68. *Id.*

such as court orders or discovery obligations may require disclosure of information that the parties have agreed to keep confidential. As the paragraphs below explain, however, the law in this area is not very clear, with courts often, but not always, ordering disclosure. Even if courts were always willing to issue such orders, though, confidentiality agreements would still be important, because many disputes do not, or do not immediately, come before a court, as discussed in the subsequent section.

1. Discovery and Admissibility in Court

In the U.S., the tests for discovery and admissibility of patent-related agreements are generally decided by the United States Court of Appeals for the Federal Circuit.⁶⁹ The rules for settlements, licenses, and arbitration documents differ, to the extent that those rules can be determined. The Federal Circuit has addressed a number of cases on settlements and license agreements, and although it has found both admissible in certain circumstances, it has been more willing to allow agreements that did not involve litigation. With respect to arbitration, the law both in the U.S. and in other countries is even less clear.

The Federal Circuit has issued a series of not-always-consistent decisions on discovery of settlement agreements and negotiations, and many of these decisions have focused on the relevance of such discovery to royalty rates. The court has indicated that both patent law and evidence law have changed significantly enough so that it is not bound by the Supreme Court's 130-year-old statement that "[i]t is clear that a payment of any sum in settlement of a claim for an alleged infringement cannot be taken as a standard to measure the value of the improvements patented, in determining the damages sustained by the owners of the patent in other cases of infringement."⁷⁰

The Federal Circuit's approach to the issue relies both on the rules of evidence and on the context of the agreement. Some authors have suggested that Federal Rule of Evidence 408 prohibits the introduction

69. *Advanced Cardiovascular Sys., Inc. v. Med-tronic, Inc.*, 265 F.3d 1294, 1307 (Fed. Cir. 2001) ("As to discovery matters, we have held that Federal Circuit law applies when deciding whether particular written or other materials are discoverable in a patent case, if those materials relate to an issue of substantive patent law.").

70. *Rude v. Westcott*, 130 U.S. 152, 164 (1889), *discussed in* *Prism Techs. LLC v. Sprint Spectrum L.P.*, 849 F.3d 1360, 1371–73 (Fed. Cir. 2017).

of settlement agreements.⁷¹ But Rule 408 makes inadmissible evidence of “furnishing, promising, or offering—or accepting, promising to accept, or offering to accept—a valuable consideration in compromising or attempting to compromise *the claim*,”⁷² which appears to focus on settlement of the claim at issue, not settlement of prior, related claims. On this point, the Federal Circuit states that “[t]he propriety of using prior settlement agreements to prove the amount of a reasonable royalty is questionable,” but apparently as a result not of Rule 408 but of the settlement context, which makes it difficult to determine whether any payments were in exchange for use of the technology or in exchange for termination of litigation.⁷³

For that reason, the Federal Circuit has instead balanced the probative value of the prior settlement agreement with possible prejudicial effects under Federal Rule of Evidence 403. In its most recent case on the issue, it noted the obvious “strong connection a settlement can have to the merits of an issue common to the earlier and later suits,”⁷⁴ but it also emphasized other considerations:

71. Jackson Taylor Kirklin & Tejas N. Narechania, *Beyond ResQNet: Clarifying the Standard for the Use of Patent Settlements*, 6 LANDSLIDE 22 (2014), https://www.americanbar.org/publications/landslide/2013-14/january-february/beyond_resqnet.html [<https://perma.cc/34B8-Z563>].

72. FED. R. EVID. 408(a)(1) (emphasis added); *see, e.g.*, *Towerridge, Inc. v. T.A.O., Inc.*, 111 F.3d 758, 770 (10th Cir. 1997) (“Rule 408 does not require the exclusion of evidence regarding the settlement of a claim different from the one litigated, though admission of such evidence may nonetheless implicate the same concerns of prejudice and deterrence of settlements which underlie Rule 408.”) (citations omitted). *But see* *Kennon v. Slipstreamer, Inc.*, 794 F.2d 1067, 1069 (5th Cir. 1986) (“While a principal purpose of Rule 408 is to encourage settlements by preventing evidence of a settlement (or its amount) from being used *against* a litigant who was involved in a settlement, the rule is not limited by its terms to such a situation. Even where the evidence offered favors the settling party and is objected to by a party not involved in the settlement, Rule 408 bars the admission of such evidence unless it is admissible for a purpose other than ‘to prove liability for or invalidity of the claim or its amount.’” (emphasis in original) (citations omitted)). The decisions on this issue are fact dependent, but cases in which courts exclude evidence of settlements appear generally to be those in which a party argues that a prior settlement has or has not already compensated, fully or partially, a claimant. *See, e.g.*, *Portugues-Santana v. Rekomdiv Int’l*, 657 F.3d 56, 63 (1st Cir. 2011); *Kennon*, 794 F.2d at 1069.

73. *LaserDynamics, Inc. v. Quanta Computer, Inc.*, 694 F.3d 51, 77 (Fed. Cir. 2012). This has not, however, prevented some lower courts from admitting such evidence. *High Point SARL v. Sprint Nextel Corp.*, No. 09-2269-CM-DJW, 2012 WL 234024 (D. Kan. Apr. 30, 2012); *SPH Am., LLC v. Acer, Inc.*, Civil No. 09cv2535 JAH (AJB), 2010 WL 11508569 (S.D. Cal., Nov. 19, 2010); *John Kenneth Felter & Samuel Brenner, Settlement Evidence and Patent Damages*, TRIAL EVID. (2013) (“Although the federal courts have not spoken unanimously, the trend is to allow *discovery* of both settlement license agreements and settlement license negotiations. There is less agreement regarding whether and in what circumstances agreements and negotiations are *admissible* at trial.”).

74. *Prism Techs. LLC v. Sprint Spectrum L.P.*, 849 F.3d 1360, 1369 (Fed. Cir. 2017) (citations omitted).

On the other side of the balance, for various reasons a settlement may be pushed toward being either too low . . . or too high . . . relative to the value of the patented technology at issue in a later suit. As to the former, for example, even if the technology is identical in the earlier and later suits, the earlier suit's settlement figure may be too low to the extent that it was lowered by the patent owner's discounting of value by a probability of losing on validity or infringement. As the unchallenged jury instructions in this case indicate, the hypothetical-negotiation rubric for the assessment of royalty damages assumes that the asserted patents are valid and infringed. . . .

At the same time, various factors may work in the opposite direction, tending to make a settlement of an earlier suit too high as evidence on the valuation question presented in a later suit. . . . The earlier suit may have included a risk of enhanced damages, a factor in the settling parties' assessment of risk that would push settlement value above the value of the technology. And, of course, the litigation costs still to come at the time of settlement may loom large in parties' decisions to settle.⁷⁵

Ultimately, then, the court concluded that “[t]he particulars of the case that was settled and the settlement, as well as of the case in which the settlement is offered as evidence, matter to the Rule 403 balance.”⁷⁶

Included in those particulars, perhaps, is the significance of confidentiality itself.⁷⁷ Quoting a Second Circuit decision from the mediation context, the court said that,

[B]ecause “confidentiality in [mediation] proceedings promotes the free flow of information that may result in the settlement of a dispute,” a party seeking discovery of confidential communications must make a heightened showing “demonstrat[ing] (1) a special need for the confidential material, (2) resulting unfairness from a lack of discovery, and (3) that the

75. *Id.* at 1369–70.

76. *Id.*

77. See KYRIAKI NOUSSIA, CONFIDENTIALITY IN INTERNATIONAL COMMERCIAL ARBITRATION: A COMPARATIVE ANALYSIS OF THE POSITION UNDER ENGLISH, US, GERMAN AND FRENCH LAW 27–28 (2010) (discussing two leading cases: *United States v. Panhandle Eastern Corp.*, 118 F.R.D. 346 (D. Del. Jan. 7, 1988), and *Contship Containerlines, Ltd. v. PPG Industries, Inc.*, No. 00-Civ.-0194 RCCHBP, 2003 WL 1948807 (S.D.N.Y. Apr. 23, 2003), and noting that although both allowed discovery, “[n]either . . . dealt with situations in which the parties had executed a confidentiality agreement”).

need for the evidence outweighs the interest in maintaining confidentiality.”⁷⁸

The case in which it made this statement involved an attempt to introduce evidence of settlement discussions, not just settlement terms, though, so it is possible that the court would be more willing to admit a settlement agreement itself.

In contrast to settlement agreements, licenses agreed to in the absence of litigation, and thus arguably undistorted by it, are more generally admissible. The Federal Circuit’s concerns about admission of settlements relate primarily to the particular distortions that can be introduced by the litigation context, as shown in the quotation above. Licenses agreed to in the absence of litigation are less likely to be subject to those distortions, though the obvious possibility of subsequent litigation could presumably have similar effect.⁷⁹ Licenses are often admitted only under seal, though, given that they often contain confidential information like royalty rates.⁸⁰ As a result, admission of a license in one litigation (or, of course, one arbitration) may not make it generally available, and subsequent litigation may be required to gain access to it.

The availability in court of prior arbitration awards and documents from arbitration proceedings is less clear. Some courts have been willing to order disclosure of arbitration documents, but in many of these cases there was not a confidentiality agreement between the parties.⁸¹ That is,

78. *Id.* (quoting *In re Teligent, Inc.*, 640 F.3d 53, 57–58 (2d Cir. 2011) (internal quotation marks omitted)).

79. It is not entirely clear that this consideration is as important as the Federal Circuit treats it, though, or at least that settlements and licenses agreed upon outside of litigation differ significantly in this respect. As Jonathan Masur has written, “[p]atent licenses are best understood as civil settlements in anticipation of possible litigation.” Masur, *supra* note 6, at 127 (citation omitted); see also Erik Hovenkamp & Jonathan S. Masur, *How Patent Damages Skew Licensing Markets*, 36 REV. LITIG. 379 (2017).

80. See, e.g., *Apple, Inc. v. Samsung Elecs. Co., Ltd.*, No. 11-CV-01846 LHK, 2013 WL 3958232, at *2–4 (N.D. Cal. July 29, 2013) (granting a third party’s motion to seal the portions of a license agreement containing “information relating to [the moving party’s] pricing terms, royalty rates, and payments”).

81. After surveying cases, one commentator argues that the absence of an express provision leaves the court free to balance private and public interests:

However, where there is no *express* provision in favour of confidentiality, but only what has been called an *implied obligation* or what has also come to be recognised as a rule of law rather than of contract, then, it seems to me that the law is free to mould the contours of that obligation for itself. The shaping of these contours has become increasingly apparent as time has gone by: from which it is becoming clear that the implied obligation is not so much an all-embracing requirement of confidentiality, so much as an accommodation of private and public interests with a line to be drawn, wherever possible, in favour of *both* privacy where that matters *and also* transparency where that matters.

the argument for confidentiality was based solely on the fact of arbitration. In that context, given that confidentiality is not in fact an inherent characteristic of arbitration,⁸² disclosure is unsurprising. Furthermore, many arbitrations required that arbitration documents be destroyed following the arbitration, so it is possible that only the award itself would be available. If that award did not provide all the information in the other documents, discovery of the award alone would be of limited value.

In any event, even within a single court, decisions on these issues can differ dramatically. For example, in a case in which a party sought confirmation of an arbitration award and both parties moved to keep documents apparently from that arbitration under seal, the Seventh Circuit in *Baxter International, Inc. v. Abbott Laboratories*⁸³ denied the motion without prejudice, but said that the party opposing confirmation of the award “had, and spurned, a sure path to dispute resolution with complete confidentiality: accept the result of the closed arbitration.”⁸⁴ Although it is not entirely clear that the court meant to say that “complete confidentiality” would also be maintained in other, subsequent cases, the statement appears to support such an interpretation.

On the other hand, the Seventh Circuit made a conflicting, and sweeping, statement about the availability of arbitration documents in discovery in *Gotham Holdings, LP v. Health Grades, Inc.*⁸⁵ (an opinion from the same Judge Easterbrook):

Contracts bind only the parties. No one can “agree” with someone else that a stranger’s resort to discovery under the Federal Rules of Civil Procedure will be cut off. We applied this principle in *Jepson, Inc. v. Makita Electric Works, Ltd.*, 30 F.3d 854 (7th Cir.1994), to confidentiality agreements reached during litigation. That conclusion is equally applicable to confidentiality agreements that accompany arbitration. Indeed,

Professor Sir Bernard Rix, Confidentiality in International Arbitration: Virtue or Vice?, Jones Day Professorship in Commercial Law Lecture at SMU, Singapore 16 (Mar. 12, 2015), https://law.smu.edu.sg/sites/default/files/law/CEBCLA/Notes_Confidentiality_in_International_Arbitration.pdf [<https://perma.cc/FBR6-V45F>].

82. See *supra* text accompanying notes 31–32.

83. 297 F.3d 544 (7th Cir. 2002).

84. *Id.* at 548.

85. 580 F.3d 664 (7th Cir. 2009).

we have stated more broadly that a person's desire for confidentiality is not honored in litigation.⁸⁶

Perhaps all that can be said is that context matters. As noted above, in *Baxter International*, the case arose in part from the same arbitration that was apparently the source of the documents the parties sought to keep confidential. In *Gotham Holdings*, one of the parties, Health Grades, had introduced some of the documents from a previous arbitration to which it had been party but opposed the introduction of others, even though the other party to the arbitration was willing to produce them. Under these circumstances, it is hardly surprising that the court allowed discovery in *Gotham* and refused to seal the documents in *Baxter*.

Beyond the federal courts in the U.S., the issue gets even less clear.⁸⁷ Some U.S. state laws purport to impose absolute confidentiality on arbitration proceedings. An example (one that arguably conflicts with its "show me state" nickname) is Missouri's:

Arbitration, conciliation and mediation proceedings shall be regarded as settlement negotiations. Any communication relating to the subject matter of such disputes made during the resolution process by any participant, mediator, conciliator, arbitrator or any other person present at the dispute resolution shall be a confidential communication. No admission, representation, statement or other confidential communication made in setting up or conducting such proceedings not otherwise discoverable or obtainable shall be admissible as evidence or subject to discovery.⁸⁸

However, the extent to which this or other similar provisions will be enforced by courts is unclear.⁸⁹ Moreover, as with Rule 408, it is possible that the provision could be interpreted, particularly in its reference to settlement negotiations and mediation, to apply only to admissibility in the same case if the alternative methods fail.

The same lack of clarity exists outside the United States. A 2005 English decision, *Glidepath BV v. Thompson*,⁹⁰ sets out a position very protective of confidentiality:

86. *Id.* at 665.

87. A brief outline of the law in other countries can be found in Sarles, *supra* note 30, at 3–7.

88. MO. REV. STAT. § 435.014(2) (2016).

89. Samuel Estreicher & Steven C. Bennett, *The Confidentiality of Arbitration Proceedings*, N.Y. L.J. (Aug. 13, 2008).

90. [2005] EWHC 818 (Comm) (citation to *Ali Shipping Corp. v. Shipyard Trogir*, [1999] 1 WLR 314, omitted).

There can be no doubt that arbitration proceedings and materials produced in the course of them are treated as confidential to the parties and the arbitrator subject to certain exceptions. The result of the most recent Court of Appeal authority, is that the exceptions to the general rule of arbitral confidentiality include disclosure by leave or order of the court which may be given when and to the extent that it is reasonably necessary to protect or establish the legal rights of a party to the arbitration by a third party or otherwise in the interests of justice. There appears to be no authority for the proposition that a third party can outside the ambit of disclosure by a party to an arbitration obtain an order from the court for access to materials in an arbitration to which he is not a party so that he can deploy them as evidence in other proceedings in which he is a party.⁹¹

But the law in the U.K. is not as clear as this passage would suggest. In *Ali Shipping Corp. v. Shipyard Trogir*,⁹² the Court of Appeals discussed several possible “exceptions” to confidentiality, including the “public interest,” and acknowledged that the scope of those exceptions is not clear and must be resolved in future decisions.⁹³ The law on this issue in other countries is also unclear. Recent commentary on confidentiality in arbitration discusses cases from a variety of jurisdictions and ultimately is able only to provide “tentative observations.”⁹⁴ Among the factors that are important are not only the jurisdiction at issue but also whether it is the award or other documents that are sought to be disclosed,⁹⁵ the context more generally, and the scope of the “public interest” exception.⁹⁶

2. *Disclosure in Arbitration*

It is even less clear whether a confidentiality agreement will be honored in arbitration.⁹⁷ An arbitral tribunal generally has no power to

91. *Id.* ¶ 15.

92. [1999] 1 WLR 314.

93. *Id.* at 326–28.

94. NOUSSIA, *supra* note 77, at 106.

95. *Id.* at 107–21.

96. *Id.* at 103–06.

97. See generally Luca G. Radicati di Brozolo & Flavio Ponzano, *Confidentiality Within Arbitration*, in CONFIDENTIAL AND RESTRICTED ACCESS INFORMATION IN INTERNATIONAL ARBITRATION (ASA Special Series No. 43) (Elliott Geisinger ed., 2016) (noting, among other difficulties, that the law applicable to different items of information might differ depending on the origin of that information).

enforce discovery orders. So, if a patentee arbitrated or otherwise settled a royalty dispute with licensee A with a confidentiality agreement and then subsequently agreed to an arbitration with alleged infringer/potential licensee B, the royalty that resulted from the first arrangement with licensee A might not be available in the second. Of course, B might refuse to agree to arbitration without the availability of the materials from the prior arbitration, but the patentee might not be able to disclose those materials unilaterally, without the consent of A, and perhaps also the consent of the prior arbitral tribunal.

This is so despite the Federal Arbitration Act's grant to arbitrators of the power to "summon in writing any person to attend before them . . . as a witness and in a proper case to bring with him . . . any book, record, document, or paper which may be deemed material as evidence in the case."⁹⁸ First, this section has been held by a majority of circuits considering it to apply in the actual arbitral hearing.⁹⁹ More importantly, it is unclear, just as it is in litigation, whether an arbitral tribunal would order disclosure of licenses or prior arbitral awards subject to confidentiality agreements, or even to confidentiality orders of courts or arbitral tribunals.

The International Bar Association's Rules on the Taking of Evidence in International Commercial Arbitration address confidentiality, but not in a particularly helpful way. The rules provide that parties can request production of documents, but that the tribunal "shall . . . exclude from evidence or production any document" on "grounds of commercial or technical confidentiality that the Arbitral Tribunal determines to be compelling."¹⁰⁰ There appears to be little commentary on this issue, with most discussion of confidentiality in arbitration addressing how to maintain the confidentiality of arbitrations in later court proceedings, not in later arbitrations.

3. *Voluntary Disclosure*

Of course, all of these difficulties could be avoided if the party in control of information were willing and able to disclose it voluntarily. But that would be a breach of the confidentiality agreement unless that agreement provided for disclosure. Such provisions are possible, as this agreement shows:

98. 9 U.S.C. § 7 (2012).

99. See *CVS Health Corp. v. Vividus, LLC*, 878 F.3d 703 (9th Cir. 2017) (discussing cases).

100. INT'L BAR ASS'N, *Rules on the Taking of Evidence in International Commercial Arbitration*, art. 9.2(e) (1999).

Each Party and their [*sic*] attorneys agree that the terms of this Agreement shall be kept and maintained as confidential, and they shall not disclose the terms to any person . . . , unless disclosure is required by law, regulation, governmental authority, or by a court of competent jurisdiction. . . . Hygia may disclose the terms of this Agreement to any potential third party purchaser of Hygia (and such third party's attorneys, principal, accountants and financial advisors), and Masimo may disclose the principal terms of this Agreement to any third party with whom it may have a dispute similar to the dispute at issue in the Lawsuit, provided that the third party agrees, in writing, to maintain in confidence any information relating to the Agreement that is disclosed by Masimo. Hygia and Masimo acknowledge and recognize that this covenant of confidentiality is a material and significant provision of this Agreement.¹⁰¹

This provision gives the patentee, but apparently not the licensee, the right to disclose the agreement's terms. It thus illustrates that the interests of the parties to a license or settlement may differ with respect to confidentiality. As one commentator says, often "patentees do not want the license terms to serve as precedent in other assertions of the patent(s)."¹⁰² But that is exactly the point, particularly in the FRAND context: to the extent that terms differ among licensees, there are competitive implications of the differences.

C. *The Costs of Confidentiality*

Despite the uncertainties discussed above, it certainly can be said that a confidentiality agreement in any of the above contexts will sometimes make access to the results of the dispute resolution less accessible. Even if those results would be disclosed in litigation or arbitration, requiring a party to initiate litigation or arbitration in order to gain access to information is a significant obstacle. As described above, the law of disclosure is unclear enough so that bringing a subsequent action might not produce a disclosure order. It is not even clear that, say, a potential licensee seeking access to a patentee's previous licenses would have a cause of action with which to initiate a suit.¹⁰³ The contrast between

101. Exhibit No. 10-1 to Form 8-K, Masimo Corp. (July 19, 2010), <https://www.sec.gov/Archives/edgar/data/937556/000119312510163361/dex101.htm> [<https://perma.cc/8897-NAFY>].

102. Amend, *supra* note 58.

103. In the FRAND context, a potential licensee could perhaps bring an action for breach of the patentee's FRAND obligation, or even for declaratory judgment of reasonable royalty rates. See *Realtek Semiconductor, Corp. v. LSI Corp.*, No. C-12-3451-RMW, 2014 WL 2738226, *4-6 (N.D.

these circumstances and reliance on public court decisions is dramatic, with court decisions generally available to the public at little or no cost.

Furthermore, a court or arbitral order to disclose previous royalty terms will typically not make those terms available to other market participants because tribunals will often issue protective orders and redact license information in their opinions.¹⁰⁴ A telling recent illustration of this point comes from Germany. The usual rule in Germany is that parties and intervenors, and not only their attorneys, are entitled to access to documents filed in litigation.¹⁰⁵ Despite this background rule, the Higher Regional Court of Düsseldorf deviated from it in approving a non-disclosure agreement that allowed access only to four employees of the defendant, all of whom were required to maintain confidentiality, and only to the attorneys for an intervenor.¹⁰⁶ Thus, even where disclosure would otherwise have been mandated, the use of the disclosed information was limited to that case.

One might argue that there should be no expectation of disclosure outside of litigation. After all, even absent obligations of confidentiality, one or both parties in a license negotiation might decline to disclose the terms of prior licenses, settlements, or arbitrations. For arbitration, though, the correct baseline is not whether the parties would have chosen to disclose the information even without a confidentiality agreement but whether the information would have become public in litigation.

Cal. June 16, 2014); *Microsoft Corp. v. Motorola, Inc.*, No. C10-1823 JLR, 2011 WL 11480223, *2 (W.D. Wash. June 1, 2011). Although in the absence of an infringement suit it is not clear whether such a claim would be ripe, one court can be read to suggest that it would. In *Microsoft Corp. v. Motorola, Inc.*, a FRAND dispute, the court wrote that “[a]ll that is required for a claim to be ripe is ‘a substantial controversy, between parties having adverse legal interests, of sufficient immediacy and reality to warrant the issuance of a declaratory judgment.’” 2011 WL 11480223, at *3 (citing *Principal Life Ins. Co. v. Robinson*, 394 F.3d 665, 668 (9th Cir. 2005)). Although the patentee in that case had previously filed infringement actions, the court did not appear to rely on that fact.

104. See Findings of Fact and Conclusions of Law at ¶¶ 407–54, *Microsoft Corp. v. Motorola, Inc.*, No. 10-cv-1823 (W.D. Wash. Apr. 25, 2013) (redactions), <http://www.essentialpatentblog.com/wp-content/uploads/sites/64/2013/04/2013.04.25-D.E.-681-Findings-of-Fact-and-Conclusions-of-Law-setting-RAND-royalty1.pdf> [<https://perma.cc/UZ9X-GMVV>]; Contreras & Newman, *supra* note 19, at 40 n.22 (“[E]ven in this case, the details of certain private license agreements disclosed to the court and which factored into his analysis were redacted from the public versions of the opinion.”); Perkins, *supra* note 30.

105. Annsley Merelle Ward, *Is German SEP Litigation Set to Increase with the ‘Confidentiality Club Decision’ of the Higher Regional Court of Düsseldorf?*, IPKAT (Feb. 7, 2017), <http://ipkitten.blogspot.com/2017/02/german-court-prowls-into-realm-of.html> [<http://perma.cc/S7EK-PN8N>]. In the U.S., protective orders often limit disclosure of confidential information to attorneys.

106. Oberlandesgericht Düsseldorf [OLG] [Higher Regional Court] Jan. 17, 2016, I-2 U 31/16, English translation at <https://www.katheraugenstein.com/wp-content/uploads/2017/02/2017-01-17-Confidentiality-Order.pdf> [<https://perma.cc/VKK3-C9L4>].

Arbitration is of course an alternative to litigation. The advantages of arbitration may support allowing the parties to opt for it in lieu of litigation, but as described above arbitration does not necessarily require confidentiality. At the least, the benefits of confidentiality should be balanced against its harms.

Furthermore, a dispute in arbitration is one in which the parties have not been able to reach agreement. As a result, the arbitration award is the reasoned conclusion of a disinterested third party, the tribunal, in the same way that a court decision is. For that reason, a decision reached in arbitration is arguably more valuable than private negotiations, which might be more the product of the bargaining power of the parties. One could argue that the harm from suppressing information about purely private agreements is not great, given that the information might reflect the particular characteristics of the parties rather than a more objective measure. Allowing the parties to suppress information produced by a third party, however, is more problematic. These issues are discussed further in the context of the competitive effects of confidentiality.

As will be discussed below, the key antitrust question is whether raising the costs of obtaining information about patent validity and royalty rates can provide a competitive advantage. To the extent that such information is difficult or costly to obtain, it can give the patentee or a licensee a competitive advantage that can be the source of market power. In that respect, the question is not a binary one of whether the information is or is not available but instead a question of the cost of obtaining it. Thus the important point is less whether arbitration materials, settlements, or licenses are available, sometimes and to some degree, in subsequent proceedings, and more whether access to such materials is important enough and costly enough to make confidentiality a source of competitive harm.

II. PATENT DISPUTES AND SUPPRESSION OF INFORMATION

Information is important both in patent law and in antitrust. In each body of law, the courts have limited private parties' abilities to suppress information. The first section below discusses the way in which patent law has done so, focusing primarily on information regarding patent validity but also drawing comparisons to royalty information.¹⁰⁷ The

107. Although much of the focus in this area has been on validity determinations, royalty rates are also often the subject of litigation. The determination of FRAND royalty rates has in fact been the subject of several recent and important court decisions. *In re Innovatio IP Ventures, LLC Patent Litig.*, MDL No. 2303, No. 11-C-9308, 2013 WL 5593609 (N.D. Ill. Oct. 3, 2013); *Microsoft Corp.*

second section then discusses antitrust law's condemnation of agreements not to disclose both price and non-price information. The third section describes how antitrust law has also found violations in the extrajudicial resolution of patent disputes. The fourth section then builds on the first three to argue that the importance of patent royalty information is such that confidentiality in patent dispute resolution can be contrary to both bodies of law.

A. The Importance of Patent Information

The United States Supreme Court has affirmed the value of patent litigation, making clear that its value lies not only in the resolution of the dispute for the parties, but also in maintaining the proper functioning of the patent system. In *Lear, Inc. v. Adkins*,¹⁰⁸ the Court invalidated the doctrine of licensee estoppel, under which the licensee of a patent was estopped from challenging the patent's validity. The Court pointed specifically to the important public policy and competition issues at stake:

Surely the equities of the licensor do not weigh very heavily when they are balanced against the important public interest in permitting full and free competition in the use of ideas which are in reality a part of the public domain. Licensees may often be the only individuals with enough economic incentive to challenge the patentability of an inventor's discovery. If they are muzzled, the public may continually be required to pay tribute to would-be monopolists without need or justification. We think it plain that the technical requirements of contract doctrine must give way before the demands of the public interest in the typical situation involving the negotiation of a license after a patent has issued.¹⁰⁹

The Court extended this approach in *MedImmune, Inc. v. Genentech, Inc.*,¹¹⁰ holding that even a current licensee could challenge patent validity while continuing to pay royalties under the license, thus avoiding the possibility of paying enhanced damages and attorney's fees if it lost.¹¹¹

v. Motorola, Inc., No. C10-1823JLR, 2013 WL 2111217 (W.D. Wash. Apr. 25, 2013); *Unwired Planet Int'l Ltd. v. Huawei Tech. Co.* [2017] EWHC (Pat) 711.

108. 395 U.S. 653 (1969).

109. *Id.* at 670-71.

110. 549 U.S. 118 (2007).

111. *Id.* at 122, 134, 137.

The problematic nature of confidentiality in patent disputes can be illustrated, too, by the practices of the U.S. Patent and Trademark Office's Patent Trial and Appeal Board (PTAB).¹¹² The PTAB is a review board that considers primarily validity challenges. Parties may choose to settle their disputes before the PTAB, but the PTAB does not always terminate its proceedings when the parties do so.¹¹³ And regardless of whether the proceeding is terminated after settlement, the parties must file a copy of the settlement with the PTAB and must make a particular request to keep it confidential.¹¹⁴ If such a request is made, the settlement is available only to a government agency or to "any other person upon written request to the Board to make the settlement agreement available, . . . and on a showing of good cause."¹¹⁵

Although these decisions focused on patent validity, the difference between validity information and royalty information is one more of degree than of kind, as suggested above. Many patent disputes, including most SEP disputes, involve the licensing of large portfolios of many patents.¹¹⁶ In such circumstances, it is exceedingly unlikely that an alleged infringer could invalidate all of the patents in a portfolio. As a result, licensing is necessary. Indeed, because in a given portfolio it is almost certain that some patents will be valid and others will not, the royalty rate is in fact a reflection of or proxy for validity information.¹¹⁷

The validity-royalty is especially compelling in the SEP/FRAND context. Although validity challenges are still possible in that context, the adoption of a patent in a standard is probably at least some indication of validity. More importantly, FRAND's requirement of non-discriminatory (ND) licensing makes license terms essential information. That is, just as patent validity is essential information for potential

112. See generally Anthony A. Hartmann, *Protecting Confidential Information Before the Patent Trial and Appeal Board*, FINNEGAN: OUR INSIGHTS (Apr. 19, 2013), <http://www.finnegan.com/resources/articles/articlesdetail.aspx?news=a5395b90-a3db-42f2-b855-e9ed6958d1b2> [<http://perma.cc/G99K-VHGS>].

113. See 37 C.F.R. § 42.74(a) (2016); Stephen Kenny, FOLEY HOAG LLP, *When Joint Settlement Agreements Do Not Settle*, PTAB BLOG (Oct. 30, 2015), <http://www.ptab-blog.com/2015/10/20/when-joint-settlement-agreements-do-not-settle/> [<http://perma.cc/862F-HWDJ>].

114. 37 C.F.R. §§ 42.74(b), (c).

115. *Id.*; Hartmann, *supra* note 112.

116. Parchomovsky & Wagner, *supra* note 1.

117. See Lemley & Shapiro, *supra* note 1; Parchomovsky & Wagner, *supra* note 1; *cf.* FTC v. Actavis Inc., 570 U.S. 136, 158 (2013) ("In a word, the size of the unexplained reverse payment can provide a workable surrogate for a patent's weakness, all without forcing a court to conduct a detailed exploration of the validity of the patent itself.").

licensees in archetypical licensing contexts, so is royalty-rate information for potential licensees of SEPs.

Indeed, the prevalence of arbitration might make royalty information even more important to competition than is validity information. Although U.S. patent law provides for arbitration of validity,¹¹⁸ many other jurisdictions do not because it is viewed as implicating a public interest.¹¹⁹ Hence, confidential validity determinations are likely to be less common than confidential royalty determinations. In fact, this may be why the implications of the confidentiality of arbitrations for competition and antitrust have not often been at issue. Moreover, if an arbitral tribunal invalidates a patent, but that information is not available to the public, the patent may continue to be enforced, just as it would if the dispute were settled.¹²⁰ U.S. patent law, in fact, states that “[a]n award by an arbitrator shall be final and binding between the parties to the arbitration but shall have no force or effect on any other person.”¹²¹ Hence, this sort of validity determination might better be seen as analogous merely to a private agreement by the patentee not to enforce the patent against that particular alleged infringer.¹²²

Furthermore, if a patent is invalidated, the prevailing “infringer” will be free to practice the invention without paying any royalty fees, regardless of whether information about the invalidity becomes public. The result can be a dramatic drop in prevailing prices,¹²³ from which

118. 35 U.S.C. § 294(a) (2012).

119. Thomas H. Lee, *International Arbitration of Patent Claims*, in *CONTEMPORARY ISSUES IN INTERNATIONAL ARBITRATION AND MEDIATION: THE FORDHAM PAPERS 2015* (Arthur W. Rovine ed., 2016); Smith et al., *supra* note 31, at 305.

120. See Smith et al., *supra* note 31, at 305 (“The effect of the award, however, generally remains inter partes. Thus, an arbitral tribunal award finding a patent invalid generally will not preclude the enforcement of that patent against nonparties to the arbitration.”).

121. 35 U.S.C. § 294(c). It is possible, however, that enforcement against other infringers would be an antitrust violation under the *Walker Process* doctrine. See *Walker Process Equip., Inc. v. Food Mach. & Chem. Corp.*, 382 U.S. 172 (1965). The doctrine is generally viewed as applicable to invalidations by a court, though, and it is not clear how a court considering a *Walker Process* claim would view an effort to enforce a patent invalidated by an arbitration tribunal.

122. One author has taken a similar position:

This point of view argues that because arbitration is a consensual process, the effect of it should be confined to the parties participating in the arbitration voluntarily. Thus, it is impossible for the arbitration tribunals to render an award invalidating a patent because the award would affect the public—an involuntary party. Because an arbitral award is only a private affair, it cannot bind the third party and any arbitral award attempting to invalidate a patent would exceed the arbitrator’s powers.

Wu, *supra* note 44, at 392–93 (citations omitted).

123. This effect may differ by market, however, and by the number of entrants. For example, some evidence suggests that in the pharmaceutical market, one generic entrant will not always lower prices significantly. One FDA analysis shows a price charged by the first generic entrant that is

potential competitors could perhaps infer the invalidity result.¹²⁴ A determination of royalties is different, because the licensee's required royalty payment may prevent prices from dropping significantly. As a result, potential competitors may have trouble drawing any inferences about the royalty rate being paid, given the likely differences in other costs among potential licensees. It has even been argued that "it is difficult to see why an accused infringer would have the complete invalidation of the patent as one of its litigation objectives."¹²⁵

In the FRAND context, where manufacturers generally practice hundreds or thousands of patented inventions, it is even more difficult to draw any conclusions about particular royalty rates paid by competitors. A manufacturer that sees a higher or lower price charged by a competitor will not be able to tell whether that competitor is paying higher or lower royalty rates, has licenses for more or fewer of the essential patents, or instead simply has different costs. Moreover, in that context, with many patented inventions, the overall cost of ascertaining the aggregate royalty burden would be prohibitive. Hence the cost of being denied low-cost access to royalty information is even more important in the aggregate than it is for individual patents or patent portfolios.

Moreover, it could be argued that the FRAND context and the obligation of non-discriminatory licensing raise the level of importance of royalty information. As will be discussed below,¹²⁶ courts have recognized the importance of information in the FRAND context, and it is difficult to see how compliance with the non-discrimination

almost the same as that for the brand-name drug, but a price for generics that is almost 50% less than the brand-name price after two entrants. See *Generic Competition and Drug Prices*, U.S. FOOD & DRUG ADMIN., <https://www.fda.gov/aboutfda/centersoffices/officeofmedicalproductsandtabacco/cder/ucm129385.htm> [<http://perma.cc/XK2T-APQC>]. Of course, generic drugs lack the trademark of brand-name drugs, so competition is imperfect; in other markets, the effect would presumably be greater.

124. The same inference could be drawn if, as would presumably be the case, the patentee ceased seeking to enforce the now-declared-invalid patent. The *Walker Process* doctrine in the U.S. makes it an antitrust violation to enforce an invalid patent, and although it is not entirely clear whether this would apply to a patent invalidated in an arbitration proceeding, a patentee would be taking a considerable risk in seeking to enforce the patent against other infringers. See *supra* note 121. Although a FRAND obligation could create an analogous, if weaker, constraint on patentees, it is not clear that potential licensees would be able to assess whether a patentee's conduct was being constrained by a FRAND obligation.

125. Smith et al., *supra* note 31, at 312. The authors note that "[t]he alleged infringer is likely to prefer a broad and irrevocable patent license, leaving the monopoly intact for non-party competitors, and leaving the enforcement costs with the patentee." *Id.*

126. See *infra* text accompanying notes 192–200.

requirement could be determined without access to license terms.¹²⁷ In that respect, although information about patents and royalty rates is always important, the obligation of FRAND licensing makes it essential.

B. Agreements to Suppress Information Under Antitrust Law

The U.S. Supreme Court has condemned restrictions on both price and non-price information that could be seen as analogous to royalty rates. In *National Society of Professional Engineers v. United States*,¹²⁸ the Court addressed a professional engineering society's ban on competitive bidding. The ban required engineers to refuse to discuss prices with potential customers until the customers had made an initial selection of an engineer.¹²⁹ The effect, then, was to make it more difficult for customers to compare the prices offered by different engineers,¹³⁰ just as confidential royalty agreements make it difficult for potential licensees to assess offers by patentees.

Confidential resolutions of royalty disputes are different in that they deny potential licensees the prices paid by their competitors, rather than denying a potential customer price quotes from multiple sellers. Nevertheless, the Court's language in *Professional Engineers* regarding the importance of market information was broad:

Price is the "central nervous system of the economy," and an agreement that "interfere[s] with the setting of price by free market forces" is illegal on its face. In this case, we are presented with an agreement among competitors to refuse to discuss prices with potential customers until after negotiations have resulted in the initial selection of an engineer. While this is not price-fixing as such, no elaborate industry analysis is required to demonstrate the anticompetitive character of such an agreement. It operates as an absolute ban on competitive bidding, applying with equal force to both complicated and simple projects and to both inexperienced and sophisticated customers. As the District Court found, the ban "impedes the ordinary give and take of the market place," and substantially deprives the customer of "the ability to utilize and compare prices in selecting engineering services." On its face, this

127. See Contreras & Newman, *supra* note 19, at 39–41; Kim, *supra* note 19, at 23–26; Lemley & Shapiro, *A Simple Approach*, *supra* note 19, at 1145–46.

128. 435 U.S. 679 (1978).

129. *Id.* at 683–84.

130. *Id.* at 692–93.

agreement restrains trade within the meaning of § 1 of the Sherman Act.¹³¹

The confidentiality of royalty rates similarly “impedes the ordinary give and take of the market place” and “the ability to utilize and compare prices.”

The Supreme Court took a similar approach to non-price information in *FTC v. Indiana Federation of Dentists*.¹³² In that case, an organization of dentists agreed not to provide x-ray information to insurers reviewing the services provided by the dentists.¹³³ The dentists argued that the FTC had shown no injury in the market for dental services.¹³⁴ As in *Professional Engineers*, though, the Court took a more summary approach, stating that no such showing was necessary because a showing of harm in the information market was sufficient:

A concerted and effective effort to withhold (or make more costly) information desired by consumers for the purpose of determining whether a particular purchase is cost justified is likely enough to disrupt the proper functioning of the price-setting mechanism of the market that it may be condemned even absent proof that it resulted in higher prices or, as here, the purchase of higher priced services, than would occur in its absence.¹³⁵

There is a recent parallel from the EU courts. In *F. Hoffmann-La Roche Ltd. v. AGCM*,¹³⁶ Advocate General Saugmandsgaard Øe wrote that when parties had agreed to disseminate misleading information, there was a restriction by object under Article 101 TFEU:

To my mind, the concerted communication of misleading allegations of the lesser safety of one medicinal product compared to another is, by its very nature, harmful to the proper functioning of the normal competition, so much so that an examination of its effects on competition is not necessary.¹³⁷

131. *Id.* (citations omitted).

132. 476 U.S. 447 (1986).

133. *Id.* at 450–51.

134. *Id.* at 461.

135. *Id.* at 461–62.

136. Opinion of Advocate General Saugmandsgaard Øe, Case C-179/16, *F. Hoffmann-La Roche Ltd v. Autorità Garante della Concorrenza e del Mercato (AGCM)*, 2018 E.C.R., <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:62016CC0179> [https://perma.cc/2T6F-4RGE].

137. *Id.* ¶ 156.

The CJEU's judgment¹³⁸ was not quite so explicit, but it also made clear that the informational agreement “must be regarded as being sufficiently harmful to competition to render an examination of its effects superfluous”.¹³⁹

[I]t must be held that the information whose notification to the EMA and the general public, according to the AGCM's decision, was the subject of a cartel agreement between Roche and Novartis, are, failing compliance with the requirements of completeness and accuracy laid down in [relevant pharmaceutical regulations], to be regarded as misleading if the purpose of that information, which is a matter for the referring court to determine, was (i) to confuse the EMA [European Medicines Agency] and the Commission and have the adverse reactions mentioned in the summary of product characteristics so as to enable the MA [marketing authorization] holder to launch a communication campaign aimed at healthcare professionals, patients and other persons concerned with a view to exaggerating that perception artificially, and (ii) to emphasise, in a context of scientific uncertainty, the public perception of the risks associated with the off-label use of Avastin, given, *inter alia*, the fact that the EMA and the Commission did not amend the summary of characteristics of that product in respect of its “adverse reactions” but merely issued “Special warnings and precautions for use”.¹⁴⁰

In both the U.S. and Europe, then, informational restraints are themselves sufficient for condemnation in some circumstances, even where the information at issue is market information about another product. To be sure, the agreeing parties in the cases just discussed were horizontal competitors. That is also the case for many patentees and licensees, however, and even where a patentee and licensee do not compete in a product market, they can be seen as competitors in the market for licensing information, as will be discussed below.¹⁴¹

138. Case C-179/16, *F. Hoffmann-La Roche Ltd v. Autorità Garante della Concorrenza e del Mercato* (AGCM), 2018 E.C.R., <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:62016CJ0179> [<https://perma.cc/TZE4-Z5GK>].

139. *Id.* ¶ 94.

140. *Id.* ¶ 92.

141. *See infra* text accompanying note 183.

C. *Actavis and Information Suppression*

The anticompetitive potential of confidential patent information can be further illustrated by noting parallels between the reverse-payment settlements that the Supreme Court considered in *FTC v. Actavis, Inc.*¹⁴² and confidential resolutions of patent disputes. As compared to litigation, both prevent patent information from reaching the public, or at least raise the costs of acquiring such information. Reverse-payment settlements do so when the parties agree to avoid the litigation arguably contemplated by the Hatch-Waxman Act,¹⁴³ and confidential arbitrations, settlements, and licenses do so by replacing public litigation with a process that the parties agree to keep confidential.

Moreover, in both instances there are federal statutes requiring disclosure of the information at issue, even if with arbitrations the statute is rarely complied with.¹⁴⁴ The Medicare Prescription Drug, Improvement, and Modernization Act of 2003¹⁴⁵ introduced a requirement that parties settling patent infringement litigation brought pursuant to the Hatch-Waxman Act file copies of their agreements with the FTC and the Department of Justice.¹⁴⁶ Similarly, as discussed above,¹⁴⁷ U.S. patent law requires the public filing of patent arbitration awards. Both requirements recognize the importance of patent-related information, though the royalty information suppressed by confidential dispute resolution may be even more important than the validity information that would be disclosed by Hatch-Waxman litigation.

The Court's opinion in *Actavis* is focused primarily on the suppression of competition in the pharmaceutical market covered by the patents at issue in settlements.¹⁴⁸ But I have previously suggested another harm that reverse-payment settlements cause: that of suppressing

142. 570 U.S. 136 (2013).

143. As the Supreme Court said, a claim by the generic drug manufacturer that the patent is invalid or not infringed "automatically counts as patent infringement . . . and often 'means provoking litigation.'" *Id.* at 143 (citations omitted).

144. *See supra* note 50.

145. Medicare Prescription Drug, Improvement, and Modernization Act of 2003, Pub. L. No. 108-173, 117 Stat. 2066.

146. *Id.* § 1112, 117 Stat. at 2462–63.

147. *See supra* text accompanying notes 47–51.

148. Even thorough discussions of the competitive implications of patent settlements that emphasize uncertainty do not necessarily take an informational approach. *See, e.g.,* Hovenkamp et al., *supra* note 25 (focusing on the market for pharmaceutical products).

information about patent validity.¹⁴⁹ And there is some language in *Actavis* that points in that direction:

The patent here may or may not be valid, and may or may not be infringed. . . . And that exclusion may permit the patent owner to charge a higher-than-competitive price for the patented product. But an *invalidated* patent carries with it no such right. And even a valid patent confers no right to exclude products or processes that do not actually infringe. The paragraph IV litigation in this case put the patent's validity at issue, as well as its actual preclusive scope. The parties' settlement ended that litigation. The FTC alleges that in substance, the plaintiff agreed to pay the defendants many millions of dollars to stay out of its market, even though the defendants did not have any claim that the plaintiff was liable to them for damages.¹⁵⁰

The focus in this passage on uncertainty, and on the way the settlement maintains it, carries with it the implication that the problem is at bottom an informational one.

Furthermore, *Actavis* cited one of the Court's prior cases, *United States v. Singer Manufacturing Co.*,¹⁵¹ which produced an opinion that took a specifically informational approach. *Singer* involved agreements among several patentees of inventions related to sewing machines. The patentees agreed both to combine their patents and enforce them jointly to seek to exclude Japanese manufacturers from the U.S. market for their mutual benefit and not to seek to limit the protection of each other's patents. The Court focused on the former of these agreements, which it said violated the Sherman Act because "the conspiracy arises implicitly from the course of dealing of the parties, here resulting in *Singer*'s obligation to enforce the patent to the benefit of all three parties."¹⁵² The Court's focus there was on the product market for the sales of sewing machines.

More interesting for present purposes, though, was the parties' second agreement, not to challenge each other's patents. That agreement implicated not just the product market but the market for information relevant to the parties' patent rights, and Justice White's dissent focused particularly on the information issue. He points out that the public interest is in granting only valid patents, so that a settlement that "prevent[s] an open fight over validity" can subordinate that public

149. Patterson, *supra* note 1, at 495–503.

150. *FTC v. Actavis Inc.*, 570 U.S. 136, 137 (2013) (emphasis in original).

151. 374 U.S. 174 (1963).

152. *Id.* at 194.

interest to the settling parties' private interests.¹⁵³ As a result, he says that suppressing prior art constitutes an antitrust violation:

[C]ollusion among applicants to prevent prior art from coming to or being drawn to the Office's attention is an inequitable imposition on the Office and on the public. In my view, such collusion to secure a monopoly grant runs afoul of the Sherman Act's prohibition against conspiracies in restraint of trade—if not bad per se, then such agreements are at least presumptively bad.¹⁵⁴

Although these informational issues underlay the *Actavis* decision too, the Court there returned to a focus on product markets. But it did address the implications of uncertainty on the antitrust assessment. Although competitive harm is caused by a reverse-payment settlement only if the patent is invalid (or not infringed), and its validity is unknown, the Court observed that the nature of the settlement could be an indicator of patent validity: “the size of the unexplained reverse payment can provide a workable surrogate for a patent's weakness, all without forcing a court to conduct a detailed exploration of the validity of the patent itself.”¹⁵⁵ It therefore directed courts to use that consideration and others to evaluate the competitive impact of the settlement: “the likelihood of a reverse payment bringing about anticompetitive effects depends upon its size, its scale in relation to the payor's anticipated future litigation costs, its independence from other services for which it might represent payment, and the lack of any other convincing justification.”¹⁵⁶

In the same way, the circumstances surrounding an agreement to arbitrate while maintaining the proceeding's confidentiality can be used to determine the competitive effects of such an agreement.¹⁵⁷ If the case is one for determination of royalties, for example, the suppressed royalty rates themselves need not generally be known to assess the significance of their suppression. The potential competitive harm results not just from the missing information itself but from the nature of the market and the parties' justifications for suppressing the royalty rates, and these market considerations implicate antitrust law, as is discussed in the next section.

153. *Id.* at 199 (White, J., concurring).

154. *Id.* at 200 (White, J., concurring) (citations and footnote omitted).

155. *Actavis*, 570 U.S. at 158.

156. *Id.* at 159.

157. The general approach would be similar to that described by Hovenkamp, Janis, and Lemley for settlements of IP disputes in Hovenkamp et al., *supra* note 25, at 1738–65.

D. *Royalty Information and Competition*

The preceding sections described the importance of information, and particularly patent information. For antitrust to be applicable, though, the harm caused by the suppression of royalty information must be harm to competition. Is there such harm if royalty information is made unavailable? Many seller-buyer transactions are non-public without posing competition problems, so this question really turns on whether patentee-licensee transactions are sufficiently different from typical sales so that a lack of information about them has greater competitive effects. At least in certain circumstances, it is likely it does.

First, it matters that confidentiality *agreements* are often involved in the patent context. Not only does that bring into play section 1 of the Sherman Act, or Article 101 of the TFEU, as outlined above,¹⁵⁸ but it also indicates that both parties have cooperated in the confidentiality or, more likely, that one party has found confidentiality important enough to bargain for.¹⁵⁹ That is some indication that the information is of value. In the more typical seller-buyer context, where the terms of a transaction might not be publicized but also are not subject to confidentiality obligations, there is no such indication.

Second, the existence of competitive effects will often depend on whether the licensee is an intermediate manufacturer or the ultimate buyer. In the latter case, as in the typical sale of a patented product to a consumer, the differential pricing that could result from a lack of transparency usually would not have any effect on competition, because consumers are not engaged in competition.¹⁶⁰ Whether there would be injury to other patentees would depend on whether the patent faced competition from other products, as the mere fact that a technology is patented does not mean that it faces no competition.¹⁶¹ If the patented technology faced no, or little, competition, price-discrimination among its customers might extract more profits from them but would not be likely to injure competition further. On the other hand, if the technology did face competition, harm would be possible, but it is not likely that the patentee would have the power to price-discriminate at all.

158. *See supra* section II.B.

159. The situation is somewhat more complicated when parties seek a court order of confidentiality, because in the U.S. state actions and private petitioning for state actions are not generally considered matters of antitrust law.

160. *Cf. Reiter v. Sonotone Corp.*, 442 U.S. 329 (1979).

161. *See Ill. Tool Works Inc. v. Indep. Ink, Inc.*, 547 U.S. 28 (2006).

By contrast, when a patentee licenses its patent to intermediate downstream manufacturers, as in FRAND licensing, lack of access to royalty information is more likely to cause harm through differential pricing. In those circumstances, the downstream licensee that paid the higher price could be disadvantaged in its competition with other licensees. It could, however, be difficult to distinguish the effect of confidentiality from that of the differential pricing. That is, it is possible that even with full disclosure of licensing terms, the patentee could still employ differential pricing. Perhaps, for example, the pricing would be a result of the parties' relative bargaining power, and information played only a small role. In this respect, the source of the confidentiality clause could be relevant. If it originated with the patentee, and if the royalty rate was high, it seems unlikely that it would be intended to harm competition at the licensee level. On the other hand, if a licensee prompted the clause, or if the patentee demanded it as a condition of a lower rate, then harm from the confidentiality itself seems more plausible.

Third, the relative values of the patented technology at issue and the downstream innovation of the licensees are important. To the extent that licensee innovation is important relative to the patented technology, the potential harm to competition at the licensee level is greater. Consequently, the potential harm from confidentiality will also be greater. This too is particularly relevant in the FRAND context. Patented technologies may be essential to standards, and thus subject to FRAND obligations, without being in themselves very innovative, but innovative competition among standardized products—cellphones, for example—may be intense. In such instances, the harm from differential royalty rates, and thus confidentiality, may be significant.

Finally, the number of standard-essential patents in the FRAND context is also important. Not only does it mean that the aggregate royalty differences paid by licensees can be significant, but it also means that the informational burden of confidentiality is greater. As described above, SEPS are often licensed as portfolios of many patents. Therefore, a licensee, needing licenses to a large portfolio of SEPs, would find it prohibitively expensive to value a portfolio without information about the rates paid by other licensees. In other words, there is likely to be no alternative to information about portfolio license rates, an issue that is discussed further in the context of market power.

III. ANTITRUST ANALYSIS OF CONFIDENTIAL PATENT DISPUTE RESOLUTION

Arbitration and presumably other forms of confidential dispute resolution may be used specifically to obtain the competitive benefits of confidentiality:

In license disputes, the licensee or licensor may not want competitors or other licensees to have access to royalty rates or other sensitive terms and conditions of the business relationship. While protective orders may be used to protect sensitive financial information in court, the very existence of a dispute can be kept secret in an arbitral setting by agreement of the parties.¹⁶²

This part of the Article discusses whether the use of confidentiality to achieve such competitive advantages could be an antitrust violation.

As described above,¹⁶³ both the United States Supreme Court, in *Professional Engineers*¹⁶⁴ and *Indiana Federation of Dentists*,¹⁶⁵ and the CJEU, in *Hoffman-La Roche*,¹⁶⁶ have summarily condemned information restraints. More importantly for the form that antitrust analysis of such agreements should take, these courts focused specifically on the market information restrained, rather than on the ultimate product markets. In the discussion below, then, the focus is on the effects in the market for royalty information, not the market for patent licensing.

Despite the summary condemnations in the cases just discussed, though, it seems likely that if a court were to consider these agreements under antitrust law, it likely would apply the rule of reason.¹⁶⁷ The rule

162. David A. Allgeyer, *In Search of Lower Cost Resolution: Using Arbitration to Resolve Patent Disputes*, 12 CONFLICT MGMT. 1, 10 (2007).

163. See *supra* section II.B.

164. Nat'l Soc'y of Prof'l Eng'rs v. United States, 435 U.S. 679 (1978).

165. FTC v. Ind. Fed'n of Dentists, 476 U.S. 447 (1986).

166. Case C-179/16, F. Hoffmann-La Roche Ltd v. Autorità Garante della Concorrenza e del Mercato (AGCM), 2018 E.C.R. <http://curia.europa.eu/juris/document/document.jsf?text=&docid=198644&pageIndex=0&doclang=en&mode=lst&dir=&occ=first&part=1&cid=1075349> [<https://perma.cc/TZE4-Z5GK>].

167. Hovenkamp, Janis, and Lemley argue that the rule of reason is likely to be inappropriate for evaluating settlements of cases in which “the agreement itself looks like an antitrust violation but the presence of IP rights might absolve it.” Hovenkamp et al., *supra* note 25, at 1724; see also Mark R. Patterson, *When Is Property Intellectual: The Leveraging Problem*, 73 S. CAL. L. REV. 1133 (2000). That is true, but only if the settlement (or arbitration) actually resolves issues that implicate intellectual property protection, as in the cases they discuss. Because royalty information is not itself intellectual property, an agreement on confidentiality of such information does not implicate intellectual property rights (except perhaps trade secrets in the royalty rates, see *infra* text accompanying notes 214–22). Therefore, application of the rule of reason is appropriate.

of reason requires an assessment and balancing of anticompetitive and procompetitive effects, and usually (though not always) also involves an assessment of market power.¹⁶⁸ Each of these three elements is discussed below.

A. *Market Power*

Although patents themselves do not necessarily provide market power,¹⁶⁹ it is likely that a patent whose validity or royalty terms is arbitrated, or even one that results in a licensing agreement, does give the patentee and its licensees power. Even if arbitration is less costly than litigation, the cost of either process is sufficient to allow an inference that access to the patent is valuable.¹⁷⁰ Licensing, too, is an indication that a patent is valuable, at least if the licensee pays royalties.

But the focus here is on the effects of confidentiality, so it is the value of confidentiality, not the value of the patent, that is at issue. In other words, the patent could be very valuable, but if the confidentiality of the results of an arbitration or license related to that patent did not have competitive implications, then the confidentiality would not raise competitive concerns.¹⁷¹ It might be, for example, that if there had previously been nine public decisions determining that a patent was valid and establishing FRAND royalty rates, the confidentiality of a tenth proceeding determining royalty rates might be thought to have no competitive implications.

Even under these circumstances, though, if the tenth proceeding resulted in a significantly lower rate for the licensee, then that *would* have market implications.¹⁷² Not only would the lack of access to the lower rate injure competitors paying a higher rate, so too would the lack

168. See Mark R. Patterson, *The Role of Power in the Rule of Reason*, 68 ANTITRUST L.J. 429 (2000).

169. See *Ill. Tool Works Inc. v. Indep. Ink, Inc.*, 547 U.S. 28 (2006).

170. HERBERT HOVENKAMP, ET. AL., *IP AND ANTITRUST: AN ANALYSIS OF ANTITRUST PRINCIPLES APPLIED TO INTELLECTUAL PROPERTY LAW* (online 3d ed. 2016) (“To be sure, patents litigated in infringement suits are probably more valuable as a group than patents that are never litigated.” (footnote omitted)).

171. Conversely, the patent might not be intrinsically valuable, yet information about it could still be important. Suppose, for example, that a patent declared essential to a standard were in fact invalid or not actually essential to practicing the standard. Until a declaration of invalidity or inessentiality, manufacturers of the standardized products might still take and pay for licenses to it, and information about the royalty rates paid would then be valuable.

172. Of course, the likelihood of a FRAND royalty determination deviating significantly from previous determinations for the same patent portfolio presumably decreases as the number of previous determinations increases, but there is little empirical evidence on these issues.

of access to information *about* the lower rate. These two harms may seem one, but they are not. For example, if a competitor paying a higher rate had a license with a most-favored-nation clause, it would be the lack of information about lower rates offered to others, not those rates themselves, that would prevent it from using that clause to demand a lower rate. And even assuming that a competitor paying a higher rate could not negotiate to lower it, information that others are paying less would be valuable. The competitor might want, for example, to redirect its efforts to other markets in which it was not at a cost disadvantage.

The value of confidentiality could also be inferred from the parties' actions. The economic literature suggests that cases that proceed to trial, and thus presumably those that are arbitrated, are the ones in which the result is more uncertain.¹⁷³ Hence, the cases in which parties agree on a license agreement in the absence of formal dispute resolution are likely to be those for which results are more clear. For those cases, even if the license precludes, say, an invalidity decision or royalty determination, affected parties may well be able to assess with some confidence the value of the patent at issue. In contrast, when parties proceed to arbitration or litigation, there is likely more uncertainty—uncertainty that would be lessened with the disclosure that confidentiality prevents.

The confidentiality of these outcomes would be especially important in the FRAND context because they could indicate that the licensing terms were not only anticompetitive but also discriminatory.¹⁷⁴ Disclosure of such terms would likely give rise to both contract and antitrust claims based on non-FRAND licensing by the licensees disadvantaged by higher rates. The *prevention* of disclosure, then, could be viewed as a way of maintaining the ability to price above cost that is market power.¹⁷⁵ And because that power would itself arise from the lessening of competition among licensees, it would implicate antitrust law.¹⁷⁶

173. The literature on this issue is surveyed in Bruce L. Hay & Kathryn E. Spier, *Settlement of Litigation*, in THE NEW PALGRAVE DICTIONARY OF ECONOMICS AND THE LAW 442–45 (Peter Newman ed., 1998).

174. On the relationship between these two characteristics, see *supra* notes 209–10.

175. *Cf.* NYNEX Corp. v. Discon, Inc., 525 U.S. 128, 136 (1998) (describing “a deception worked upon the regulatory agency that prevented the agency from controlling New York Telephone’s exercise of its monopoly power”).

176. *Id.* (“[C]onsumer injury naturally flowed not so much from a less competitive market for removal services, as from the exercise of market power that is *lawfully* in the hands of a monopolist.” (emphasis in original)). In the patent-licensing context, in contrast, the harm would be from the less competitive market among licensees as a result of the differential licensing rates.

The confidentiality of royalty rates in this context is quite similar to restrictions on advertising. Advertising restrictions have long been known to result in higher prices.¹⁷⁷ Although royalty rates are not “advertising,” public knowledge of such rates would serve the same purpose as price advertising. Moreover, public royalty rates would not present any of the problems that can justify some limitations on advertising.¹⁷⁸ Although the usual focus in discussion of advertising restrictions is on the anticompetitive effect of such restrictions, in the increase in price, that higher price is also evidence of the creation of market power.¹⁷⁹

As is often the case with information issues, it is difficult in this context to separate the power and conduct issues.¹⁸⁰ One way to distinguish the two is to assess power based on the ease or difficulty of competitive responses.¹⁸¹ In the context of patent dispute resolution, power could be assessed by considering whether injured parties have a means of countering or otherwise responding to confidential arbitration awards, settlements, or licensing agreements. That is, would they have a way to obtain the confidential information or to eliminate the competitive harm that the lack of access causes? The only really plausible means of responding, it seems, would be the one discussed above: to bring litigation in which a court might order disclosure of the confidential information.¹⁸² Given the expense of such a course of action, to say nothing of the problems of bringing a claim whose validity

177. See, e.g., Lee Benham, *The Effect of Advertising on the Price of Eyeglasses*, 15 J.L. & ECON. 337, 340–45 (1972) (finding that prices for eyeglasses are higher in states that restrict eyeglass advertising).

178. See Robert H. Lande & Howard P. Marvel, *The Three Types of Collusion: Fixing Prices, Rivals, and Rules*, 2000 WIS. L. REV. 941, 951–64.

179. Stephen J. Farr, Carol Horton Tremblay & Victor J. Tremblay, *The Welfare Effect of Advertising Restrictions in the U.S. Cigarette Industry*, 18 REV. INDUS. ORG. 147, 148 (2001) (“[I]f advertising provides information and encourages competition, an advertising ban would increase market power.”); see also WILLIAM S. COMANOR & THOMAS A. WILSON, *ADVERTISING AND MARKET POWER* (1974); John R. Morris & James A. Langenfeld, *Advertising Restrictions as Rent Increasing Costs* (FTC, Working Paper 196, 1992).

180. See MARK R. PATTERSON, *ANTITRUST LAW IN THE NEW ECONOMY: GOOGLE, YELP, LIBOR, AND THE CONTROL OF INFORMATION* 61–84 (2017).

181. *Id.*

182. The information is not otherwise easily available. Even studies of the effects of SEPs on the smartphone market, for example, may not include royalty information. See, FORDHAM L. SCH. CTR. ON L. & INFO. POLICY, *The Impact of the Acquisition and Use of Patents in the Smartphone Industry*, WORLD INTELLECTUAL PROP. ORG. (2012), http://www.wipo.int/export/sites/www/ip-competition/en/studies/clip_study.pdf [<https://perma.cc/A9EQ-BJVV>]. It is presumably difficult to assess the effects of SEPs without royalty information.

would depend on the very information that would be sought in the litigation, confidentiality in this context could provide significant power.

B. Anticompetitive Effects

Accepting that confidentiality of a patentee's royalty arrangements with some of its licensees has the potential to affect royalty rates with other licensees, there still remains the question of whether such effects are anticompetitive in the sense required by antitrust law. Vertical arrangements like those between patentees and licensees are often viewed favorably by antitrust law. Moreover, differences in royalty rates do not necessarily harm competition. Even in the FRAND context, where discriminatory royalty rates would violate FRAND policies, that violation would not in itself establish a violation of antitrust law. As the following paragraphs show, though, confidentiality is in fact anticompetitive in this context.

The restrictions on information in *Professional Engineers* and *Indiana Federation of Dentists* were the products of horizontal agreements among competitors, not vertical agreements like those between patentees and potential licensees. Still, the effect of the horizontal agreements in those cases was to provide sellers with an information advantage over buyers, and that is the effect also of the confidentiality of a royalty award. Such confidentiality denies information to potential licensees who would otherwise learn of the terms to which the patentee has agreed with other licensees. But the patentee, of course, will know of the award, and thus will have an advantage in its greater knowledge of market conditions—the license terms.

Furthermore, in many cases both the patentee and the licensee will be manufacturing competitors.¹⁸³ This is particularly true in the FRAND context, where many manufacturers of the standardized goods—smartphones, for example—are also patentees. In that case, an agreement between a patentee and licensee is vertical with respect to the patent but horizontal with respect to the standardized products themselves. Because it is in that latter market in which harm occurs, by creating differences in input costs between competitors, the effect of an agreement between two competitors is more akin to an information

183. Some of the most prominent smartphone patent disputes, such as the ones between Apple and Samsung and those between Huawei and ZTE, have involved manufacturing competitors. Other patentees in the market, such as Unwired Planet, are non-practicing entities, but even then it is possible that a settlement, at least, could be used by the licensee specifically to attain an advantage over its competitors.

boycott than to the price-fixing effect in *Professional Engineers*, but it is still a horizontal one. Indeed, as the only sources of information regarding a particular license are the patentee and licensee, they are horizontal competitors in the provision of that information, which makes the boycott characterization even more apt.

Furthermore, in the FRAND context, the patentee has made a commitment to license. In other contexts, a patentee is not obligated to license its patents, at least in the U.S.¹⁸⁴ If a patentee is entitled to refuse to license, i.e., if the refusal itself is not deemed to be anticompetitive, then one might argue that a confidential licensing or arbitration would also not likely be anticompetitive. In the FRAND context, however, not only has the patentee committed to license the patent, rather than keep the technology to itself, but it has also agreed to license it on fair, reasonable, and non-discriminatory terms. The ND element of FRAND is intended to ensure that all licensees are on an even playing field with respect to license terms.¹⁸⁵ Only then will the benefits of competition among the licensees be fully realized.

This is not to say that royalty discrimination, even in the FRAND context, is inherently an antitrust violation. A recent U.S. case, *TCL v. Ericsson*,¹⁸⁶ took the view that it was not. In that case, the court said that harm to a firm offered discriminatory rates is sufficient to violate the non-discrimination obligation, whether or not competition as a whole is injured.¹⁸⁷ The court went further and wrote that “[t]he Sherman Act and its long history provide no guide to understanding ETSI’s [the SSO’s] non discrimination under FRAND.”¹⁸⁸ In the *TCL* court’s view, then, there can be a violation of a non-discrimination obligation without a violation of antitrust law.

The UK decision in *Unwired Planet International Ltd. v. Huawei Technologies Co.*¹⁸⁹ took a different view. In that case, the court distinguished between what it called “general” non-discrimination, under which rates would be based on the value of the portfolio licensed but could not be based on the identity or characteristics of the licensee, and “hard-edged” non-discrimination, which apparently would allow a

184. See 35 U.S.C. § 271(d)(4) (2012).

185. The sense in which that is true is disputed, but the dispute is not relevant here. See discussion *supra* note 16.

186. Memorandum of Findings of Fact and Conclusions of Law, *TCL Commc’n Tech. Holdings, Ltd. v. Telefonaktiebolaget LM Ericsson*, No. SACV 14-341 NS(DFMx) (C.D. Cal. Dec. 21, 2017).

187. *Id.* at 91.

188. *Id.*

189. [2017] EWHC (Pat) 711.

licensee that paid rates higher than those charged to another licensee to demand those lower rates. Ultimately the court concluded that the “hard-edged” discrimination would apply, if at all, only to the extent that competition was harmed:

I conclude that the true interpretation of the ETSI FRAND undertaking from the point of view of non-discrimination is that a benchmark FRAND rate should be derived which is applicable to all licensees seeking the same kind of licence. That is what I have called general non-discrimination. If, contrary to this view, the FRAND undertaking also includes a specific non-discrimination obligation whereby a licensee has the right to demand the very same rate as has been granted to another licensee which is lower than the benchmark rate, then that obligation only applies if the difference would distort competition between the two licensees.¹⁹⁰

In the end, neither of these cases sets out rules for determining when FRAND discrimination is also, or is not, an antitrust violation. Hence, there is no reason to think that the antitrust rules governing restrictions on information that were described in the previous part of this article would not apply in the context. To the extent that parties—patentees and licensees—refuse to compete in the provision of information to consumers interested in acquiring that information—other potential licensees—they are refusing to compete, and that refusal has anticompetitive effect that would be legal only if balanced by procompetitive effects.

To be sure, even a commitment to FRAND licensing is not (now¹⁹¹) expressly a commitment to transparent licensing. It would be possible for a patentee to license all its licensees on FRAND terms without revealing to any licensees the licensing terms applied to others, just as it would still be conceivable that all licensees would negotiate the same (or non-discriminatory) terms without those terms being publicly available. The likelihood of that happening is small, though. Moreover, under those circumstances it is not clear what reason the patentee would have for not disclosing its licensing terms. The nondisclosure would increase uncertainty and therefore likely also increase the costs of negotiation.

These points are strengthened by the EU precedent for requiring disclosures in the FRAND context. In its recent decision in *Huawei*

190. [2017] EWHC 711, ¶ 503.

191. See *infra* section IV.C.

Technologies Co. v. ZTE Corp.,¹⁹² the Court of Justice of the European Union said that the patentee of a SEP subject to a FRAND commitment cannot seek an injunction against an alleged infringer without first providing notice to the alleged infringer.¹⁹³ More specifically, the patentee is obligated “to alert the alleged infringer of the infringement complained about by designating that SEP and specifying the way in which it has been infringed.”¹⁹⁴ This disclosure, it should be noted, is required in negotiations, not simply in any subsequent litigation.

On the other hand, the CJEU also seemed to accept that licensing agreements could be confidential: “in the absence of a public standard licensing agreement, and where licensing agreements already concluded with other competitors are not made public, the proprietor of the SEP is better placed to check whether its offer complies with the condition of non-discrimination than is the alleged infringer.”¹⁹⁵ Although at least one German court after *Huawei v. ZTE* has looked to comparable licenses to decide whether a patentee’s offer was FRAND, it too apparently did not require that those licenses be disclosed during negotiations,¹⁹⁶ though the patentee’s terms were apparently publicly available.¹⁹⁷ A later decision by the Higher Regional Court of Düsseldorf, however, did effectively impose a requirement that the patentee disclose the terms of other licenses.¹⁹⁸ A report on this case noted that the court justified this approach on the basis that the potential licensee will not generally have access to that information.¹⁹⁹

Although the CJEU in *Huawei v. ZTE* did not go that far, it did set out a requirement that seems to assume such disclosure. After the patentee provides the disclosure described above, “it is for the alleged infringer diligently to respond to that offer, in accordance with recognised commercial practices in the field and in good faith, a point which must

192. Case C-170/13, *Huawei Techs. Co. v. ZTE Corp.*, 2015 E.C.R. <http://curia.europa.eu/juris/document/document.jsf?text=&docid=165911&pageIndex=0&doclang=en&mode=lst&dir=&occ=first&part=1&cid=1089878> [<https://perma.cc/3BXV-SQPV>].

193. *Id.* ¶ 60.

194. *Id.* ¶ 61.

195. *Id.* ¶ 64.

196. See Giuseppe Colangelo & Valerio Torti, *Filling Huawei’s Gaps: The Recent German Case Law on Standard Essential Patents*, 38 EUR. COMPETITION L. REV. 538, 541 (2017) (discussing *Saint Lawrence Commc’ns v. Vodafone, LG*, Cases 4a O 73/14 and 4a O 126/14 (Mar. 31, 2016)).

197. See 4IP COUNCIL, *Case Law Post CJEU Ruling Huawei v. ZTE: Saint Lawrence v. Vodafone, LG, Düsseldorf* (Mar. 31, 2016), <http://caselaw.4ipcouncil.com/german-court-decisions/saint-lawrence-v-vodafone-lg-dusseldorf> [<https://perma.cc/7JQL-L2VT>].

198. Ward, *supra* note 105.

199. *Id.*

be established on the basis of objective factors.”²⁰⁰ Although this requirement does not make entirely clear that the response must be a FRAND counteroffer, the court does say that if the alleged infringer seeks to claim that the patentee has violated competition law, the alleged infringer must have submitted “a specific counter-offer that corresponds to FRAND terms.”²⁰¹ These references to “objective factors” and to “FRAND terms” seem to imply that the alleged infringer has knowledge of other licenses.²⁰²

One could view the effects of the negotiating disadvantage that *Huawei v. ZTE* recognized as deriving from several possible sources. One possibility is that the sources of anticompetitive effects could be particular agreements to keep arbitrations or licenses confidential. Alternatively, those effects could also be said to derive from the agreements by SSOs to require FRAND licensing without requiring means for licensees to assess whether a licensing offer is in fact FRAND. That would make the scenario akin to those in which courts have found SSOs liable for allowing members to exploit their processes.

For example, in *American Society of Mechanical Engineers, Inc. v. Hydrolevel Corp.*,²⁰³ the United States Supreme Court held that an SSO could be liable for not preventing a member from manipulating its procedures and exploiting the organization’s reputation to injure a competitor. The present context is different because confidentiality does not really exploit the standard-setting process or the SSO’s reputation but instead uses a poorly (or incompletely) designed standard to advantage. That is, if FRAND requirements included not just a licensing standard but also a disclosure requirement, then confidentiality could not be used to avoid the FRAND requirement.²⁰⁴ If an SSO’s rules do not include a disclosure requirement, though, the FRAND requirement is more easily avoidable simply by keeping previous licenses confidential.

As I have argued elsewhere,²⁰⁵ the creation and administration of LIBOR by the British Bankers’ Association (BBA) led to similar problems, but in a pricing context. By defining LIBOR as an average of its member banks’ own (private) estimates of their borrowing costs, the

200. *Huawei Techs. Co.*, Case C-170/13 ¶ 65.

201. *Id.* ¶ 66.

202. In this respect, a recent German court decision appears to require, as a condition of FRAND-compliance, the disclosure of prior licensing agreements. See Oberlandesgericht Düsseldorf [OLG] [Higher Regional Court] Jan. 17, 2016, I-15 U 66/15, ¶ 32; Ward, *supra* note 105.

203. 456 U.S. 556 (1982).

204. See *infra* section IV.C.

205. PATTERSON, *supra* note 180, at 91–94.

BBA provided no way for users of LIBOR to evaluate its accuracy.²⁰⁶ Without an objective measure against which to measure the banks' estimates or LIBOR itself, users were left merely to assume or hope it was accurate.²⁰⁷ The same is true for confidential FRAND licensing. If potential licensees have no reference point for FRAND, the agreement to impose FRAND obligations is one that remains easily exploitable by patentees.

It is true that there might be some objective measures of the "fair" and "reasonable" aspects of FRAND. Recent cases suggest, though, that FRAND estimates differ dramatically.²⁰⁸ If, and when, the law converges on a single rate or methodology for FRAND licensing, then perhaps it will be difficult for patentees to exploit the advantages that confidentiality provides them in the FRAND process. That is to say that if, and when, there are objective measures for FRAND beyond particular royalty negotiations, the confidentiality of such negotiations will not give patentees the market power to impose non-FRAND terms. At the limit, if only one FRAND rate or methodology is accepted,²⁰⁹ then discrimination would presumably be impossible. In the meantime, though, agreements on confidentiality can have anticompetitive effects.

As a final point, many patent licenses, particularly of SEPs, are cross-licenses. In that context, although there is often a balancing royalty payment that reflects the difference in the values of the two portfolios, there is no single royalty payment that reflects the value of either individual portfolio. It might be possible to argue, therefore, that confidentiality imposes no competitive harm, in that no *useful* information is suppressed. However, in such instances, the agreement to cross-license itself has an effect similar to confidentiality, in that it keeps valuable information from becoming publicly available. Therefore, that

206. *Id.* at 71–72.

207. *Id.*

208. *See, e.g.,* Microsoft Corp. v. Motorola, Inc., No. C10–1823JLR, 2013 WL 2111217, *65, *84, *101 (W.D. Wash. Apr. 25, 2013) (deciding that the FRAND royalty rate for one of Motorola's FRAND portfolios was in a range between 0.555¢ and 16.389¢ per unit after Motorola contended it was entitled to between \$3.00 and \$4.50 per unit and Microsoft contended that 0.185¢ per unit was the proper rate), *aff'd*, 696 F.3d 872 (9th Cir. 2012). Generally speaking, the parties in the cases argue for dramatically different FRAND rates, even where courts conclude that their proposals are not inconsistent with their FRAND obligations.

209. In *Unwired Planet International Ltd. v. Huawei Technologies Co.*, [2017] EWHC (Pat) 711, a recent UK case, the court held that there is only a single set of FRAND terms "in a given set of circumstances." *Id.* ¶ 164. This approach, however, poses some particular problems, and it is unclear whether other courts will follow it. *See* Mark R. Patterson, *Prof. Patterson: Teasing Through a Single FRAND Rate*, PATENTLY-O (Apr. 20, 2017), <https://patentlyo.com/patent/2017/04/patterson-teasing-through.html> [https://perma.cc/3SLS-7CTT].

agreement to cross-license, rather than to enter into two separate licenses, could itself be subject to antitrust scrutiny.

C. *Procompetitive Effects*

In considering the possible procompetitive benefits of confidentiality, there are two types of effects that should be considered. One is the possible procompetitive benefit, in general, of suppression of information.²¹⁰ Although this possibility may be less valid in the FRAND context, where there is a non-discrimination obligation, there are circumstances in which information could serve to lessen competition. The second derives from the possible implications of confidentiality for incentives to use dispute resolutions processes that may themselves have procompetitive benefits. Each of these effects is discussed below, both for private licensing negotiations and for arbitration.

1. *Benefits of Confidential Licensing*

Erik Hovenkamp and Jonathan Masur have argued that the use in patent damages calculations of a “reasonable royalty” standard based on prior licenses can distort the licensing market.²¹¹ The reason for this distortion, they contend, is that parties, and particularly patentees, will alter their demands in licensing in order to gain later advantages in litigating with other licensees, where damages may be based on those licensing terms. This argument offers little support for confidentiality agreements, though, as distinguished from different damages rules, because even confidential license terms would almost certainly be disclosed in any litigation, whatever the damages rules.

An analogous argument seems more reasonable in the FRAND context, however. To the extent that a license agreement for a FRAND-encumbered patent to one licensee has implications for licenses to other, later licensees, the same sort of distortion could occur.²¹² Thus, confidentiality would seem to have benefits, to the extent that they could avoid these distortions. It is not clear, however, that these would be *procompetitive* benefits. In *Professional Engineers*, the Supreme Court rejected an argument that making price negotiations more costly was

210. A well-known work that suggests the possibility of such benefits is Oliver Hart & Jean Tirole, *Vertical Integration and Market Foreclosure*, in BROOKINGS PAPERS: MICROECONOMICS 205 (Martin Neil Baily & Clifford Winston eds., 1990).

211. Hovenkamp & Masur, *supra* note 79.

212. See *supra* text accompanying notes 67–68 and *infra* text accompanying note 229.

procompetitive not because it did not have the effects the engineers claimed, but because those effects came from eliminating competition.²¹³ Similarly, one could say that using confidentiality to eliminate the distortion that price competition might in some instances produce in patent licensing could be beneficial, but it would not benefit *competition*.

It does seem, though, that outside the FRAND context one could accept a somewhat similar argument that confidentiality with respect to one licensing negotiation might promote agreement because a confidential agreement will not have unanticipated effects in later negotiations. In this context, this is simply an argument that licensing terms are trade secrets that promote cooperative negotiations. For example, in his recent exploration of the application of antitrust law to trade secrets, Harry First wrote that a trade secret could sometimes be justified “as a way to allow innovators to share their technology and thereby diffuse innovation.”²¹⁴

Although this argument is less compelling in the FRAND context, at least one case has applied it in that context. In *Vringo, Inc. v. ZTE Corp.*,²¹⁵ the parties had initiated negotiations toward a settlement of FRAND licensing terms. As part of those negotiations, the parties entered into a non-disclosure agreement (NDA) that provided in part that information exchanged “shall not be used or referenced in any way by any Party in any existing or future judicial or arbitration proceedings or made the subject of any public comment or press release.”²¹⁶ As the court described, the parties provided for the possibility that the information might be sought by others:

In the event that one of the parties received a request for such information from a governmental entity or a third party, whether via a discovery request or a subpoena, the NDA provided that the recipient must (i) “maintain the confidentiality of the Confidential Information;” (ii) “timely seek a protective order . . . that would afford the Confidential Information the highest level of confidential treatment possible;” and (iii) “notify the other Party within three business days of receiving the initial request for Confidential Information.”²¹⁷

213. Nat’l Soc’y of Prof’l Eng’rs v. United States, 435 U.S. 679, 696 (1978).

214. Harry First, *Trade Secrets and Antitrust Law*, in *THE LAW AND THEORY OF TRADE SECRECY: A HANDBOOK OF CONTEMPORARY RESEARCH* 332, 371 (Rochelle C. Dreyfuss & Katherine J. Strandburg eds., 2011).

215. No. 14-cv-4988 (LAK), 2015 WL 3498634 (S.D.N.Y. June 3, 2015).

216. *Id.* at *5.

217. *Id.* at *2.

Despite the NDA, ZTE submitted a Vringo settlement proposal as part of an antitrust complaint in China.²¹⁸ When Vringo learned of this use of the proposal, it brought a breach of contract action seeking a preliminary injunction requiring ZTE to withdraw any disclosures, and the court held that it was likely to succeed in showing a violation of the NDA.²¹⁹ Strikingly, the court appeared to hold, or perhaps assume, that confidentiality was a benefit of the NDA:

Public disclosure of Vringo's Confidential Information would cause it irreparable injury. Vringo's business depends substantially on the value of its patent portfolio, which it licenses to third parties. The disclosure of Vringo's Confidential Information, including its proposal to settle years of ZTE's alleged patent infringement, would impact the prices others would pay to obtain licenses as well as the prices its competitors would offer for their licenses. Indeed, once such commercially-sensitive information becomes public knowledge, it can "not be made secret again." In short, the disclosure of that information would have a lasting and immeasurable harm to Vringo's business.²²⁰

It is not clear, however, whether ZTE raised competitive effects as an argument for the invalidity of the NDA. The key question, both for contractual validity of the NDA and for assessment of it under antitrust law, is whether any anticompetitive effects of the confidentiality outweigh the competitive benefits of confidentiality. That is, it might well be that it is valuable to Vringo to keep the information confidential (particularly because the information at issue was only a settlement proposal, not the terms to which the parties finally agreed), but if that value is achieved through anticompetitive effects, the law should not preserve it.

As Harry First describes, "[t]here has been little separate focus on the competition problems that trade secrets may present."²²¹ He ultimately concludes that "the arguments for according deference to the use of confidential trade secret information are somewhat different, and far weaker, than the arguments for according such deference to the holders of either patents or copyrights."²²² In the FRAND context, where

218. *Id.* at *2–3.

219. *Id.* at *6–9.

220. *Id.* at *10.

221. First, *supra* note 214, at 332.

222. *Id.* at 333.

information is essential to determine compliance with FRAND licensing obligations, this conclusion seems even more reasonable.

2. *Benefits of Confidential Arbitration*

Neither of these justifications is compelling in the arbitration context. The determination of licensing terms by the arbitral body rather than by negotiation presumably eliminates the incentives effects and gamesmanship discussed by Hovenkamp and Masur. Furthermore, when the parties enter into arbitration, they have failed to agree on a license, so the rationale of encouraging negotiations does not exist. Moreover, in the FRAND context, the patentee has an obligation to license and the parties have turned to an impartial forum. Not only does that mean that the information is no longer confined to just the two parties (though of course a protective order could still preserve obligations of confidentiality), but it also means that the argument for the promotion of cooperation is not applicable.

To be sure, the parties might have chosen arbitration over litigation to resolve their dispute in a less costly fashion, and a lowering of costs can be a procompetitive benefit. As described above, though, parties might be willing to engage in arbitration without engaging in confidential arbitration.²²³ Moreover, arbitration of patent disputes can involve the same sort of extensive discovery and prolonged hearings as does litigation, so it is not evident that it is less costly than litigation. And when one compares any cost savings of arbitration with the increased costs to negotiations of confidentiality, it is even less clear that the arbitration-litigation cost calculus favors arbitration.

IV. MEANS OF AVOIDING COMPETITIVE HARM

The anticompetitive effects of confidentiality are, as suggested above, not essential to arbitration. Confidentiality also may not be essential to private settlements or licensing, though those practices might require a level of cooperation that would be furthered by confidentiality. In either case, to the extent that confidentiality would otherwise be an antitrust violation, the violation could be avoided by ensuring public access to the terms on which patent disputes are resolved. The following paragraphs discuss several ways in which such public access could be created: by parties or potential parties to confidentiality agreements, by courts or

223. See *supra* text accompanying notes 35–46.

agencies outside of antitrust law, by standard-setting organizations, or by arbitral bodies.

A. Joint Action by Parties to Dispute Resolution

The most obvious way to avoid confidentiality is for the parties to an arbitration, settlement, or licensing agreement to decline to agree to confidentiality. The parties could go even further and agree to public disclosure. For arbitration, that is in fact what U.S. patent law requires, even if the law does not provide sufficient penalties to force compliance.²²⁴ And significant licensing agreements and settlements are sometimes ultimately disclosed in securities filings, too, though only when their effects are material to one of the parties, and valuable information is often redacted.²²⁵ So to the extent that parties are, or should be, concerned about possible antitrust liability for agreements on confidentiality, liability would be easy to avoid.

To the extent that parties to dispute resolution are concerned about antitrust liability, refusing to agree to confidentiality would have an additional benefit. Section 1 of the Sherman Act, article 101 TFEU, and corresponding provisions in other jurisdictions require an agreement for liability.²²⁶ Hence, in the absence of an agreement on confidentiality, there would be no antitrust violation under those provisions. What, then, if the parties had no agreement on confidentiality, but neither made the relevant information available?

It still could be possible to infer an agreement, as the U.S. Supreme Court has indicated, from “direct or circumstantial evidence that reasonably tends to prove that the manufacturer and others ‘had a conscious commitment to a common scheme designed to achieve an unlawful objective.’”²²⁷ The Court has also described this standard as one that requires “evidence that tends to exclude the possibility that the [parties] were acting independently.”²²⁸ The law in Europe is similar, though perhaps somewhat more likely to find an implied agreement.

224. See *supra* notes 50–51.

225. See *supra* notes 61–64.

226. Sherman Act § 1, 15 U.S.C. § 1 (2012) (“contract, combination . . . or conspiracy”); Consolidated Version of the Treaty on the Functioning of the European Union art. 101, May 9, 2008, 2008 O.J. (C 115) 47 [hereinafter TFEU] (“[A]greements between undertakings, decisions by associations of undertakings and concerted practices.”).

227. *Monsanto Co. v. Spray-Rite Serv. Corp.*, 465 U.S. 752, 764 (1984).

228. *Id.*

In the FRAND licensing context, it is not entirely clear how this test would be applied.²²⁹ If the royalty rate of an arbitration award were high, the patentee would presumably have the incentive to disclose it, in order to seek similar rates from other licensees. On the other hand, if the rate were high, then the high rate would also give rise to concerns that it was non-FRAND. Incentives would be mixed for licensees paying high rates, too. On the one hand, disclosure would make it more likely that competing licensees would pay similarly high rates; on the other, the disclosure of a high rate would inform competitors that the licensee paying such a rate is at a competitive disadvantage if others were paying lower rates.

Low rates would also have ambiguous implications, though probably only for licensees. A patentee presumably would not want to disclose such rates both because it could lead to other low rates and because it could show that any previous or subsequent higher rates were non-FRAND. For licensees, the decision would not be so clear. A licensee might prefer to disclose a low rate to demonstrate its superior competitive position, but doing so would give other licensees reason to argue for similar low rates as required by FRAND.

Ultimately, it could be difficult to show an agreement by circumstantial evidence because each party could have its own incentives to keep licensing terms confidential. Presumably this in part at least accounts for the general noncompliance with patent law's requirement that arbitration awards be filed with the Patent and Trademark Office.²³⁰ That is, given that requirement, either party to an arbitration and accompanying confidentiality agreement could file the award and point to the legal requirement in defending any breach of contract action. The failure of parties to do so suggest that each party may have its own independent incentive for preferring confidentiality.

It is also possible that the parties could engage in joint action that would maintain partial confidentiality while still retaining the benefits of transparency. The issue in the FRAND context is how the terms of one license compare to those of another, and the U.S. antitrust agencies have pointed to exactly that issue in their discussion of the "messenger model" presented in the *Statements of Antitrust Enforcement Policy in Health Care*:

Messenger models can be organized and operate in a variety of ways. For example, network providers may use an agent or third

229. See also *supra* text accompanying notes 67–68.

230. See *supra* note 50.

party to convey to purchasers information obtained individually from the providers about the prices or price-related terms that the providers are willing to accept. In some cases, the agent may convey to the providers all contract offers made by purchasers, and each provider then makes an independent, unilateral decision to accept or reject the contract offers. In others, the agent may have received from individual providers some authority to accept contract offers on their behalf. The agent also may help providers understand the contracts offered, for example by providing objective or empirical information about the terms of an offer (such as a comparison of the offered terms to other contracts agreed to by network participants).²³¹

Although the usual context for the messenger model is, as the agencies say, “whether the arrangement creates or facilitates an agreement among competitors on prices or price-related terms,”²³² the purpose here would be different. Here the model could be used to create a situation intermediate between confidentiality and disclosure.²³³ License terms could be disclosed to a disinterested messenger that could then provide advice about whether terms were FRAND without disclosing specific terms from one licensee to other licensees. Or the messenger could even disclose whether particular, confidential terms were sufficiently different from other, public terms to make disclosure competitively significant. The value of the messenger model here, instead of preventing collusion, would be to prevent potential harms from unnecessary disclosure while still insuring that confidentiality does not cause competitive harm. As will be discussed below, a somewhat similar approach has been taken in what has been referred to as the German “confidentiality club” decision.²³⁴

B. Action by One Party to Dispute Resolution

Even if the parties have previously agreed to maintain confidentiality, what if one of the parties announced its willingness to disclose? Although that could constitute a breach of contract, the disclosing party could argue that the confidentiality agreement was one in restraint of

231. U.S. DOJ & FTC, STATEMENTS OF ANTITRUST ENFORCEMENT POLICY IN HEALTH CARE 125–26 (1996).

232. *Id.* at 126.

233. A similar approach was adopted, though in a different context, by the Next-Generation Mobile Networks Alliance. See Jorge L. Contreras, *Technical Standards and Ex Ante Disclosure: Results and Analysis of an Empirical Study*, 53 JURIMETRICS 163, 178–79 (2013).

234. See *infra* text accompanying note 257; Ward *supra* note 105.

trade and thus illegal.²³⁵ Disclosure or perhaps even an announcement of the willingness to disclose could be sufficient to constitute withdrawal from the “conspiracy,” though without actual disclosure the party could continue to profit from the confidentiality, and some courts have found that to prevent effective withdrawal.²³⁶

More interestingly, if one party—patentee or licensee—announced a willingness to disclose, that would place responsibility for nondisclosure on the other party. Could that then create antitrust liability for the non-disclosing party? In the absence of a continuing agreement there would be liability only under the law as it applies to unilateral conduct. This intriguing possibility was suggested, though only in passing, in a recent discussion paper from an agency in India.²³⁷ In either the U.S. or Europe, antitrust liability for unilateral conduct requires a high degree of market power. As discussed above, given that the competitive effect at issue is not access to the patent but access to information, the relevant “market” would be that for information about licensing terms.²³⁸

Exploring the possibility of unilateral liability further, one could say that each party to a confidentiality agreement has a 50% share of the market for information about the terms between the two parties.²³⁹ But if

235. Sherman Act section 1 not only makes agreements in restraint of trade antitrust violations but also states that “[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal.” 15 U.S.C. § 1 (2012).

236. ABA SECTION OF ANTITRUST LAW, PROOF OF CONSPIRACY UNDER FEDERAL ANTITRUST LAWS 48 (2010) (“Courts have found that, even where there is proper evidence of withdrawal, continuing to receive benefits from the conspiracy, such as profits from illegal conduct . . . may negate that withdrawal.”).

237. *See* GOV’T OF INDIA, DEP’T OF INDUS. POL’Y & PROMOTION, MINISTRY OF COMMERCE & INDUS., DISCUSSION PAPER ON STANDARD ESSENTIAL PATENTS AND THEIR AVAILABILITY ON FRAND TERMS 26 (Mar. 1, 2016) (asking “[w]hether the practice of Non-Disclosure Agreements (NDA) leads to misuse of dominant position and is against the FRAND terms”). The suggestion here might, as the reference to NDAs indicates, actually assume agreement rather than purely unilateral action.

238. *See supra* section III.A. One might take the view that “information about licensing terms,” either generally or for a particular patent, should not be considered a relevant antitrust market because such information is not generally for sale. That is also true for other informational products, though, as in the search-engine market. *See generally* John M. Newman, *Antitrust in Zero-Price Markets: Foundations*, 164 U. PA. L. REV. 149 (2015). Moreover, one could view the frequent testimony provided by expert witnesses regarding royalty rates as evidence of the existence of a market for such information.

239. In a somewhat analogous context of research and development markets, the U.S. antitrust agencies’ intellectual property guidelines state that “[w]hen entities have comparable capabilities and incentives to pursue research and development that is a close substitute for the research and development activities of the parties to a licensing arrangement, the Agencies may assign equal market shares to such entities.” U.S. DOJ & FTC, ANTITRUST GUIDELINES FOR THE LICENSING OF INTELLECTUAL PROPERTY § 3.2.3 (2017).

one party, A, to an agreement has announced a willingness to disclose, and if the other party, B, refuses to allow disclosure, then party B is unilaterally exercising complete control over the information. One might think, however, that the market should perhaps be broader than that for information about the terms between the two parties. As suggested above in the discussion of market power,²⁴⁰ if there is information available about the licensing terms between other parties, that information could lessen the need for other information about one particular license arrangement. But as noted, in that discussion it is impossible to know whether information about one license arrangement is “reasonably interchangeable” with information about others without knowing the terms of the agreements.

In any event, an antitrust challenge to unilateral action in this context would be analogous to the EU action against Microsoft.²⁴¹ In that case, Microsoft refused to give access to interoperability information that would have allowed application developers to compete with Microsoft’s own applications on its Windows platform.²⁴² Here, the claim would be that a party had refused to give access to royalty information important to competition in the licensee market. Such a claim would be most compelling, perhaps, if made against another licensee, but given that the competition at issue would be in negotiations with the patentee, the patentee would also have an incentive to cause that competitive injury.

C. *Action by a Disadvantaged Licensee*

Another possibility would be action not by the licensee that is party to the confidentiality agreement but by a potential licensee that could be disadvantaged by that agreement. For example, could the potential subsequent licensee simply enter into a license with a most-favored nation clause that required it to be granted terms as favorable as prior licensees? If enforceable, such a provision could indeed solve the competition problem (though it might create another²⁴³), but with confidentiality it is not clear how it would be enforced.

240. See *supra* text accompanying notes 171–72.

241. Case T-201/04, *Microsoft Corp. v. Comm’n*, 2007 E.C.R. II-3601; see also *Intergraph Corp. v. Intel Corp.*, 195 F.3d 1346 (Fed. Cir. 1999) (denial by Intel of access of OEM to confidential information following patent infringement lawsuits by OEM against Intel).

242. *Microsoft*, Case T-201/04 ¶ 36.

243. Most-favored nation clauses raise antitrust concerns because by making a price reduction more costly (because the same reduction must be applied more broadly) it creates an incentive to maintain higher prices. See U.S. DOJ & FTC, PUBLIC WORKSHOP: MOST-FAVORED-NATION CLAUSES AND ANTITRUST ENFORCEMENT AND POLICY (2012), <https://www.justice.gov/atr/events/>

In effect, a most-favored-nation clause would be a private non-discrimination provision. It would therefore be subject to all the problems of confidentiality discussed here. A more superficially attractive solution, perhaps, would be a provision that required the patentee to reveal the terms of prior licenses. Such a provision would confront the problem, though, that if the prior licenses were subject to confidentiality agreements, the patentee could not disclose them without breaching those agreements. In that respect, the patentee might in fact use confidentiality agreements to bind its hands in subsequent negotiations.

D. Action by a Standard-Setting Organization

In the FRAND context, most of the techniques above could also be incorporated in the commitments required by SSOs, as other commentators have suggested.²⁴⁴ That is, in addition to requiring patentees to commit to FRAND licensing, an SSO could also require the patentees to commit to disclosure of licensing arrangements. Although that would probably be sufficient, the SSO could even require the same of potential licensees, since SSO membership usually includes both patentees and potential licensees (especially because many firms are both). Although this sort of disclosure requirement would not be common in SSOs or trade associations, SSOs already require disclosure of patents and, often, as-yet-not-public patent applications, so the requirement would not be entirely novel.

Moreover, an SSO would not have to go so far as to mandate disclosure. It could simply prohibit agreements on confidentiality. Although that might not result in disclosure in every case, because parties individually might lack the incentives to disclose, as suggested above,²⁴⁵ it would likely produce more disclosure. An approach that would arguably be less intrusive yet would be simply to mandate compliance with U.S. patent law's requirement for filing arbitration awards, though it seems likely that if parties to arbitration are not filing awards even with a statutory mandate, an SSO rule is not likely to produce significantly greater compliance.

public-workshop-most-favored-nation-clauses-and-antitrust-enforcement-and-policy
[<https://perma.cc/U3ZY-FZJ3>]; Jonathan B. Baker & Judith A. Chevalier, *The Competitive Consequences of Most-Favored-Nation Provisions*, 27 ANTITRUST 1, 20 (2013).

244. See Contreras & Newman, *supra* note 19, at 41; Lemley & Shapiro, *A Simple Approach*, *supra* note 19, at 1141, 1145–46.

245. See *supra* text accompanying notes 227–29.

Still, there is precedent for changes in SSO rules to address particular problems. Following the *American Society of Mechanical Engineers* case referenced above,²⁴⁶ the Society amended its rules to avoid the sort of exploitation of its name that occurred in that case.²⁴⁷ And in the FRAND context, the Institute of Electrical Electronics Engineers recently adopted a new FRAND policy that addresses several issues that had given rise to controversy.²⁴⁸ SSOs might find it useful to follow these precedents and address confidentiality issues in their policies,²⁴⁹ especially as market participants begin to raise them in litigation, as Apple has recently done in its case against Qualcomm.²⁵⁰

Douglas Melamed and Carl Shapiro have recently argued for a greater focus on SSOs as the locus of possible antitrust liability.²⁵¹ They argue that “the principle requires that the SSO and its members take effective steps to minimize the harm from the monopolies that their collaboration confers upon SEP holders.”²⁵² Although they do not point to the confidentiality problem specifically, instead looking at the problem of SSO policies more generally, they advocate an antitrust analysis similar to the one presented above for organizational agreements,²⁵³ which could be applied to an SSO that failed to forbid confidentiality as well as to individual parties to confidentiality agreements.

E. Definitions of FRAND by Courts or Agencies

Another possibility, though one only applicable in the FRAND context, would be interpretations of FRAND that require disclosure of previous licensing arrangements. As noted above, the *Huawei v. ZTE* decision mandated, as a requirement of FRAND compliance, that patentees “alert the alleged infringer of the infringement complained

246. See *supra* text accompanying notes 203.

247. See CHARLES E. HARRIS, JR., MICHAEL S. PRITCHARD & MICHAEL J. RABINS, *ENGINEERING ETHICS: CONCEPTS AND CASES* 253–55 (2008).

248. Contreras, *supra* note 22.

249. As Jorge Contreras notes, “[o]bservers of these disputes have long wondered why standards-setting organizations (SSOs) like IEEE have not simply clarified these issues in their patent policies.” *Id.*

250. See Redacted First Amended Complaint for Damages ¶¶ 74–78, Declaratory Judgment and Injunctive Relief, *Apple Inc. v. Qualcomm Inc.*, No. 17-cv-0108-GPC-MDD (S.D. Cal. June 20, 2017).

251. A. Douglas Melamed & Carl Shapiro, *How Antitrust Law Can Make FRAND Commitments More Effective*, YALE L. J. (forthcoming).

252. *Id.* at 16.

253. See *supra* section III.B.

about by designating [the] SEP and specifying the way in which it has been infringed.”²⁵⁴ By extending this disclosure requirement to prior license terms, the incentive for confidentiality would be eliminated, or at least lessened.

Apple appears to propose this approach in its response to an EU consultation on standard-essential patents:

A potential licensee should not face a penalty for refusing to take a license at the SEP holders demanded rate if a SEP holder has kept the potential licensee at an information disadvantage, for example, by refusing to provide sufficient information regarding actual past licenses for the SEP(s) at issue to evaluate FRAND compliance, failing to provide adequate disclosure of the basis for the SEP assertion, or refusing to describe the methodology used to calculate the requested royalty.²⁵⁵

Charter Communications goes even further in its complaint against Rockstar Consortium, alleging that Rockstar’s confidentiality agreements were among the acts that violated its FRAND obligations:

Rockstar also used these restrictive non-disclosure agreements to extinguish communications between various participants in the communications industries. Rockstar’s actions were intended to prevent Plaintiffs from ensuring that any license negotiated would be on fair, reasonable, and nondiscriminatory terms, facilitating Rockstar’s efforts to extract fees in excess of those it was entitled to pursuant to its FRAND licensing obligations.²⁵⁶

In light of the informational concerns of *Huawei v. ZTE*, this seems like a plausible approach. Indeed, it appears to be one adopted by the Higher Regional Court of Düsseldorf, which has said that in making a non-discriminatory licensing offer the patentee must provide proof of

254. Case C-170/13, *Huawei Tech. Co. v. ZTE Corp.*, 2015 E.C.R. ¶ 61 <http://curia.europa.eu/juris/document/document.jsf?text=&docid=165911&pageIndex=0&doclang=en&mode=lst&dir=&occ=first&part=1&cid=1089878> [<https://perma.cc/3BXV-SQPV>].

255. APPLE INC., *Response to DG Grow Consultation on Roadmap for Standard Essential Patents for European Digitalised Economy* 9 (May 8, 2017), https://ec.europa.eu/info/law/better-regulation/initiatives/ares-2017-1906931/feedback/F1753_en [<https://perma.cc/Z6UK-Q7YV>].

256. Complaint at ¶ 88, *Charter Commc’ns, Inc., v. Rockstar Consortium US LP*, No. 1:14-cv-00055-UNA (D. Del. filed Jan. 17, 2014), http://www.aipla.org/committees/committee_pages/antitrust-law/Committee%20Documents/Subcommittee%20on%20Standards/20140117%20Charter%20v.%20Rockstar%20Complaint.pdf [<https://perma.cc/SG9V-84PZ>]. The complaint includes these and more allegations regarding the non-disclosure agreements in its breach-of-contract claim, where it alleges that the defendants “breached their express and implied FRAND licensing commitments.” *Id.* ¶ 102.

prior licensing agreements.²⁵⁷ Although the court does not explicitly say that failure to provide that proof would be a violation of the patentee's FRAND obligations, that appears to be the implication of the court's statements. And if the plaintiff's offer is not FRAND, then the alleged infringer presumably would not be required to accept that offer or even respond with a FRAND counteroffer.

However, the Düsseldorf court also suggests that any confidentiality concerns should be resolved by seeking a protective order from the court. As discussed above, the same court in another case later granted such an order, but it is unclear whether court action would be required, or which party would be required to seek it. The sensible approach would presumably be that the patentee should seek the order initially in order to comply with its FRAND obligations, but that the alleged infringer would be required to accept the order in order for it to be FRAND-compliant. Another issue is how extensive the disclosure should be. For example, suppose a patentee disclosed several licenses with higher royalty rates but failed to disclose licenses with lower rates. The extent to which this sort of cherry-picking would violate FRAND obligations is yet to be decided.

F. Action by an Arbitration Body

In the arbitration context, another possibility is that the arbitrators or the arbitration organization itself could mandate disclosure of the results of the arbitration. Particularly in the context of antitrust law, as Vera Korzun has discussed, there may be a conflict between the arbitrators' obligation to the parties' choices in invoking arbitration and their obligation (if any) to mandatory law.²⁵⁸ A failure to comply with either obligation may result in unenforceability of an arbitral award, since a failure to comply with the parties' choices may invalidate an award, and an award that is inconsistent with public policy may be unenforceable.²⁵⁹ Korzun proposes that arbitrators themselves should take on, at least informally, the responsibility for ensuring consistency with antitrust law, and thus arbitral enforceability.²⁶⁰

257. Oberlandesgericht Düsseldorf [OLG] [Higher Regional Court] Jan. 17, 2016, I-15 U 66/15, ¶ 32; *see also* Ward, *supra* note 105.

258. *See* Vera Korzun, *Arbitrating Antitrust Claims: From Suspicion to Trust*, 48 N.Y.U. J. INT'L L. & POL. 867, 920–25 (2016).

259. *Id.* at 921–22.

260. *Id.* at 925.

The confidentiality problem is different from the one that Korzun discusses, though. Her concern is the enforceability of awards that are inconsistent with governing antitrust law.²⁶¹ The problem addressed in this article is instead the competition problem presented by awards that are themselves presumably consistent with antitrust law but are kept confidential, thus raising a distinct antitrust issue arising from the confidentiality. Hence, there is no particular problem with enforceability of the arbitration award (unless, perhaps, the award included an order of confidentiality). Nevertheless, the arbitrators or the arbitration body could seek to persuade the parties to disclose the terms of the award, or least not to enter into a confidentiality agreement. To the extent that arbitral bodies were successful in such efforts, they could ensure that the parties are opting for arbitration rather than litigation for reasons other than seeking a competitive advantage.

CONCLUSION

Information is a vital element of markets and competition. That is particularly so for patents, whose value is often a matter of considerable uncertainty.²⁶² Therefore, a market participant in a patent-dependent market that has privileged access to information can be at a considerable competitive advantage. It follows, then, that some efforts to achieve such an advantage may cause competitive harm, and if that harm is not outweighed by competitive benefits, those efforts could constitute antitrust violations.

With respect to royalty rates specifically, the U.S. Supreme Court said in *National Society of Professional Engineers v. United States* that price is the “central nervous system of the economy” and that “an agreement that interfere[s] with the setting of price by free market forces is illegal on its face.”²⁶³ Hence, an agreement that keeps information about royalty rates confidential is at the very least problematic. Although some degree of confidentiality may be beneficial in certain circumstances, as discussed above,²⁶⁴ it is *not* at all clear that those benefits outweigh the competitive harms of suppressing this market information. That is especially so given the public-policy implications of patent protection.²⁶⁵

261. *Id.*

262. See generally Lemley & Shapiro, *supra* note 1.

263. *Nat'l Soc'y of Prof'l Eng'rs v. United States*, 435 U.S. 679, 692 (1978) (internal quotation marks omitted).

264. See *supra* section III.C.

265. See *supra* section II.A.

These considerations become even more important in the context of FRAND licensing. In that context, firms agree collectively on product standards and agree that any patented inventions that are required to implement those standards will be licensed on fair, reasonable, and non-discriminatory terms. The “non-discriminatory” element, particularly, is not likely to be very meaningful without availability of information regarding differences between the terms given to different licensees. And the effects here have more competition significance given the collective action involved in the standard-setting process.

The fundamental points underlying this article are that the availability of information can have important competitive implications and that those implications are a proper subject of antitrust law.²⁶⁶ The relevance of information suppression has been recognized in antitrust law, even if typically in the context of agreements among large groups of competitors, as in *Professional Engineers*.²⁶⁷ And the informational gap created by dispute resolution outside the court system has also long been recognized, raising concerns of legitimacy,²⁶⁸ the integrity of the patent system,²⁶⁹ and discriminatory licensing terms.²⁷⁰ In confidential resolution of patent disputes these two sets of concerns intersect in a critically important part of the economy.

266. See generally PATTERSON, *supra* note 180.

267. See *supra* text accompanying notes 128–29.

268. See *supra* text accompanying notes 55–57.

269. See Hovenkamp et al., *supra* note 25; La Belle, *supra* note 25.

270. See generally *supra* note 19.