Anticompetitive Acquiescence

Mark A. Lemley[1] & Jacob Noti-Victor[2]

Forthcoming 78 Florida Law Review (2026)

Abstract

Across a wide range of lawsuits, regulations, and administrative adjudications, companies are giving up. They settle cases they are likely to win. They agree to regulations they know they could avoid. And they pay for intellectual property (IP) and other assets even when the law does not require it.

We think the explanation for this puzzling behavior is a phenomenon we call "anticompetitive acquiescence." We argue that companies behave in this seemingly irrational way in many different circumstances because they know that even if they will suffer the consequences of paying too much or limiting their behavior, doing so will make their competitors suffer even more. We document nearly a dozen different categories of conduct that fit within the anticompetitive acquiescence label, from generative AI companies agreeing to pay for data that they might not be legally required to license, to generic drug manufacturers agreeing not to invalidate a patent that prevents them from entering the market, to social media companies asking Congress to subject them to costly regulation.

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[1] William H. Neukom Professor, Stanford Law School; of counsel, Lex Lumina LLP.

[2] Professor of Law, Benjamin Cardozo School of Law, Yeshiva University. We thank Jeremy Bock, Michael Carrier, Daniel Francis, Kristelia García, Luís Calderón Gómez, Paul Gugliuzza, Rose Hagan, Scott Hemphill, Jocelyn Getgen Kestenbaum, Rachel Landy, Christopher Leslie, Michael Pollack, Zalman Rothschild, Guy Rub, Stew Sterk, Xiyin Tang, Saurabh Vishnubhakat, Tim Wu, and participants in the Temple IP Colloquium, the Cardozo summer faculty workshop, IPSC 2025, and TKTK for comments on a prior draft and Jack Gleiberman for research assistance.

In providing the first account of anticompetitive acquiescence, we also explain why this problem is particularly complicated, and why courts and regulators have so far done virtually nothing to stop it. Settlements, and compromise in general, are generally considered good for litigants and good for society, and it can be hard to disentangle good faith attempts to resolve disputes from anticompetitive motivations. We offer four categories of solutions to reduce the harm from anticompetitive acquiescence without sacrificing the benefits of settlement: procedural solutions that focus court attention on problematic behavior, substantive legal solutions that minimize the impact settlements and private deals have on third parties, safeguards for regulators intervening in competitive industries, and proposals to ban certain of the most problematic categories of anticompetitive acquiescence.

Introduction

Sometimes, in law, you can win by giving up. We don't just mean settling a case, though many of the cases we describe do involve settlements. Rather, we mean agreeing to an adverse outcome when you could have gotten a better result from the courts or agencies.

This practice turns out to be surprisingly common in a range of different circumstances. Generative AI companies, which depend on copyright's fair use doctrine for their very existence and are facing more than two dozen suits challenging their training practices, are nonetheless busy signing licensing deals for training data that may undermine that fair use argument. Patent defendants settle cases they are sure to win, burying the killer piece of prior art that would invalidate the patent.

Competitors settle bogus trademark and trade secret lawsuits with an agreement that they won't compete with each other. And streaming platforms agree to pay for copyright licenses that the law may not actually require them to pay.

The practice isn't limited to litigation or to IP. Businesses voluntarily seek out guidance on tax law from the IRS, even when aware that that such guidance will raise their tax liability. Facebook and OpenAI have both publicly asked to be subjected to burdensome regulation And a variety of professions similarly agree to and even directly promote regulations that cost them money and restrict their ability to do their jobs.

In all of these cases and many more we discuss in this Article, presumably rational market actors are imposing costs on themselves. They are paying money to settle cases they are likely to win, foregoing business opportunities the law allows them, or willingly subjecting themselves to government regulation they could have avoided. Why?

The key to understanding this puzzling behavior is that settling a case or agreeing to a regulation doesn't just affect the parties to the settlement. A settlement[3] may bury valuable information that others could use in later litigation. It may impose costs on everyone, including the settling party, in circumstances in which the settling party is better able than its competitors to bear those costs. It may even change the law, being used as precedent to set norms of behavior even though no court or agency ever

3 We use "settlement" in a slightly more expansive ways than the term is typically used, to cover acquiescence in general, including in non-adversarial regulatory contexts.

made a ruling in a contested case. And even if a company is hurt by a settlement or a change in the law, it may still benefit comparatively if its current or future competitors are hurt more. Companies are using agreements in litigation or with regulators to hide information that would benefit their competitors. Worse, they are engineering those agreements in ways that may change the law for the worse for everyone else. And when they don't like the law that results from a case, they may even agree to make the court decision disappear altogether.

We call this phenomenon "anticompetitive acquiescence." Companies acquiesce in lawsuits, collusive settlements, or regulation as a way of raising their rivals' costs.[4] They suffer the costs, but they may still come out ahead if their competitors suffer more – or, even better (from their perspective), if potential competitors never enter the market at all.

Anticompetitive acquiescence has evaded scrutiny because it's hard to detect and even harder to combat. Settlements and license terms are generally confidential, and courts are reluctant to peek behind the curtain to evaluate those settlements. And district judges like it when cases settle, so they are reluctant to question anything the parties agree to that gets a case off their docket.

The problem is also challenging to confront because it can appear in different guises, and not all of them are uniformly problematic. While some of the settlements, agreements, and regulatory interventions we discuss are solely the result of bad faith or

[4] *See* Thomas Krattenmaker & Steven C. Salop, *Anticompetitive Exclusion: Raising Rivals' Costs to Achieve Power Over Price*, 96 YALE L.J. 209 (1986).

rent seeking, others are more complicated, reflecting a combination of a reasonable motivation to avoid liability and a more problematic desire to gain an edge over competitors. Sometimes the problem stems less from the settlement itself, but from how courts and regulators treat it in future decision-making. And in other instances, a settlement that may otherwise be sound becomes problematic in the context of broader competition problems in an industry. We parse these complicated scenarios to arrive at a unified account of the problem of anticompetitive acquiescence, one that highlights how the problem transcends litigation, administrative adjudication, and regulation more broadly.

While others have discussed many of our examples in isolation, we are the first to bring them together and identify a unifying theme behind this phenomenon. And we are also the first to suggest some unified solutions, including requiring courts and agencies to more closely scrutinize the anticompetitive effects of settlements in a public interest evaluation, weakening or eliminating legal doctrines that determine what the law is based on what private parties have done in earlier settlements, requiring transparency in settlement terms, and banning certain agreements that are particularly problematic.

In Part I, we introduce the problem of anticompetitive acquiescence and identify multiple examples from litigation, administrative adjudication, and regulation. In Part II, we explain why anticompetitive acquiescence is problematic and consider potential justifications for some instances of acquiescence. Finally, in Part III we suggest several

solutions to reduce the harm while preserving the value of settlements and regulation more generally.

I. The Puzzle of Unnecessary Acquiescence

We begin by documenting the surprising prevalence of parties agreeing to settle a case, acquiesce in a rulemaking, or accept or even invite regulation when they don't have to. Companies that are likely or even certain to prevail in a court or before an agency or Congress nonetheless often settle the dispute, agreeing to pay money or have a costly rule or decision applied to them. That is true even when – perhaps especially when – doing so sets a bad precedent they could have avoided. While we observe this phenomenon most commonly in IP[5], it is more widespread.

A. Settling Litigation

A wide variety of companies pay to settle disputes when they don't need to or even when doing so might appear to hurt them. Here are a few examples.

1. *Generative AI Copyright Licensing*

AI companies are engaged in more than thirty pending lawsuits over the legality of their training large language models (LLMs) on copyrighted material.[6] It is fair to

[5] This is perhaps because we are both IP scholars. But, as we discussed above, IP also conceptualizes settlements in particularly favorable terms, which might make it particularly difficult for decisionmakers and commentators to call out anticompetitive acquiescence in the IP context. *See supra* notes 187-191 and accompanying discussion.

[6] Ed Lee maintains a full list of the cases and their status. Ed Lee, *Chat GPT is Eating the World*, https://chatgptiseatingtheworld.com/2024/08/27/master-list-of-lawsuits-v-ai-chatgpt-openai-

say that those suits represent an existential threat to generative AI. If merely training an AI on a copyrighted work is illegal, AI companies owe hundreds of billions, if not trillions, in statutory damages.[7] Plus, they would likely have to throw their models away and start from scratch. And training a text model only on works made before

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microsoft-meta-midjourney-other-ai-cos/. One of us (Lemley) represents a defendant (Stability AI) in one of these pending cases and has in the past represented Meta in other pending cases.

[7] In pure numerical terms a successful class action presents the largest risk for damages claims. A large language model might train on billions or even tens of billions of works; stable diffusion models train on roughly 2 billion images. If each of those works was registered before the infringement began and infringed (an outcome we view as essentially impossible given the much smaller number of registrations granted by the Copyright Office), even the minimum statutory damages could run into the trillions of dollars. 17 U.S.C. § 505 (setting statutory damages in a range from $750 and $150,000 per work infringed).

In practice that likely overstates the damages risk. Even if ownership is established, copyright registration is a prerequisite to suit. Fourth Estate Public Benefit Corp. v. Wall-Street.com, LLC, 139 S. Ct. 881, 886 (2019) ("Registration occurs, and a copyright claimant may commence an infringement suit, when the Copyright Office registers a copyright."); *see also* 17 U.S.C. § 411(a) ("[N]o civil action for infringement of the copyright in any United States work shall be instituted until preregistration or registration of the copyright claim has been made in accordance with this title."). It is likely that the vast majority of images and text on which AI might train were not registered with the Copyright Office within three months of publication or before the infringement began (timely registration). Thus, any class of registered works eligible for statutory damages is likely to be much smaller than the number of works on which a database is trained. But it will still run into the millions of works and therefore into the many billions of dollars. The Copyright Office issues about 450,000 registrations a year, though many of those are (often improperly) for multiple copyrighted works.

Notably, registration is not required for foreign plaintiffs, 17 U.S.C. § 411, though even foreign plaintiffs are also ineligible for statutory damages unless they have timely registrations, 17 U.S.C. § 412.

It is also possible that, when the training sets come from works that were made publicly available on the internet with the permission of the copyright owner, those works are all "US works" according to the definition thereof, since they may well have been first published simultaneously in the US and elsewhere. This would make registration a prerequisite to suit even if the copyright owner is foreign. Deborah R. Gerhardt, *Copyright Publication on the Internet*, 60 IDEA 1 (2020). However, the cases are almost hopelessly confused on this point.

Plaintiffs would also likely assert, in the alternative, damages claims based on lost licensing fees and claims to the profits made from the resulting AI models. Timely registration is not required for either of these remedies. However, it is unlikely that lost licensing fees would be anywhere in this range, except for the largest collective copyright owners, and they would be difficult if not impossible to calculate in a class action.

1929, or the few modern works that are in the public domain, is likely to be ineffective.[8] So winning these cases is a big deal for AI companies.

Because there is no dispute that the companies make internal copies of billions of works during training, whether AI companies will win these cases turns on copyright's fair use doctrine.[9] And whether they will prevail on fair use depends on the application of a four-factor test that asks about the purpose of the use, the nature of the work, the amount copied, and the market effect of infringement.[10] Of those factors, the purpose of the use and the market effect are the most important.[11] Recent Supreme Court precedent has devalued the purpose of the use, making market effect the most important question.[12]

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[8] There is a such a training dataset, called Common Corpus, though it includes open sources as well as public domain works. Pierre-Carl Langlais, *Releasing Common Corpus: the largest public domain dataset for training LLMs* (March 20, 2024), https://huggingface.co/blog/Pclanglais/common-corpus. But it doesn't work well across all domains. *See* Stefano Maffulli, *Why datasets built on public domain might not be enough for AI*, OPEN SOURCE INITIATIVE (May 7, 2024), https://opensource.org/blog/why-datasets-built-on-public-domain-might-not-be-enough-for-ai; *see also* Pablo Villalobos et al. *Will we run out of data? Limits of LLM scaling based on human-generated data*, https://arxiv.org/pdf/2211.04325; Shayne Longpre et al. *Consent in Crisis: The Rapid Decline of the AI Data Commons*, https://www.dataprovenance.org/Consent_in_Crisis.pdf

[9] Mark A. Lemley & Bryan Casey, *Fair Learning*, 99 TEXAS LAW REVIEW 743 (2021); Matthew Sag, *The New Legal Landscape for Text Mining and Machine Learning*, 66 JOURNAL OF THE COPYRIGHT SOCIETY OF THE U.S.A. 291–367 (2019); Matthew Sag, *Copyright and Copy-Reliant Technology*, 103 NORTHWESTERN UNIVERSITY LAW REVIEW 1607–1682 (2009).

[10] 17 U.S.C. § 107.

[11] *See* Clark D. Asay et al., *Is Transformative Use Eating the World?*, 61 BOSTON COLLEGE LAW REVIEW 905 (2020). David Nimmer has called the market effect factor "the fairest of them all" because it drives the results in so many cases. David Nimmer, *"Fairest of them All" and Other Fairy Tales of Fair Use*, 66 LAW AND CONTEMPORARY PROBLEMS 263-288 (Winter 2003).

[12] Andy Warhol Foundation for the Visual Arts, Inc. v. Goldsmith, 598 U.S. 508 (2023).

A plaintiff cannot show effect on the market merely by demonstrating that the defendant competes with the plaintiff, however.[13] Market effect in fair use normally means that the defendant's infringing work takes sales away from the plaintiff's copyrighted work. That isn't generally true in the generative AI copyright cases, because while AIs are trained on copyrighted works, they rarely generate output that is substantially similar to a copyrighted input.[14]

While traditional market effect analysis focused on lost sales of the copyrighted work, courts increasingly allow plaintiffs to bootstrap a second theory of market harm by showing that they would have been paid to license the otherwise-fair use, provided there is an established or developing market for such licensing.[15] Whether training an AI is legal therefore depends in significant part on whether there is an existing market for licensing copyrighted works for use in AI training. There was no such market when plaintiffs began filing suits in 2022. But remarkably, the very companies defending those suits – the ones whose victory depends on showing that there is no licensing market – are busy signing licensing deals with copyright owners in which they pay to

[13] Sega Enterprises Ltd. v. Accolade, Inc., 977 F.2d 1510 (9th Cir. 1992); Sony Computer Entm't, Inc. v. Connectix Corp., 203 F.3d 596 (9th Cir. 2000).

[14] Peter Henderson, Xuechen Li, Mark A. Lemley, Dan Jurafsky, Tatsunori Hashimoto, and Percy Liang, *Foundation Models and Fair Use*, 24 JOURNAL OF MACHINE LEARNING RESEARCH 1 (2023).

[15] American Geophysical Union v. Texaco, Inc., 60 F.3d 913 (2d Cir. 1995); *see also* Mark A. Lemley, *Should a Licensing Market Require Licensing?*, 70 LAW AND CONTEMPORARY PROBLEMS 185 (2007); Lydia Pallas Loren, *Redefining the Market Failure Approach to Fair Use in an Era of Copyright Permission Systems*, 5 J. INTELL. PROP. L. 1, 38 (1997); James Gibson, *Risk Aversion and Rights Accretion in Intellectual Property Law*, 116 YALE L.J. 882, 948 (2007).

license AI training data.[16] These aren't settlements of existing lawsuits; they are deals with copyright owners who have not sued them. But they are creating the very licensing market that may doom their fair use defense.

Why would a company undermine its own important, high-profile case? Perhaps they are just avoiding a lawsuit with uncertain result by licensing content in advance.[17] But that can't be the whole explanation. They are vigorously fighting dozens of cases with potentially much greater damages exposure even as they are licensing content from certain copyright owners.[18] It doesn't make a lot of sense to undermine those existing cases, which they aren't settling, by taking licenses to small subsets of the content the AI needs to train.

We think one answer to this puzzle is that establishing a licensing market affects not just the company that signs the deal but everyone else as well. If OpenAI sets a precedent of paying news outlets for training data, for instance, later courts may conclude that everyone has to pay them, because there is an established market for licensing that data for training. OpenAI may pay more than it would have if it had litigated the fair use question and won, but it will likely pay less than other companies

[16] Many of these deals are confidential, but our experience indicates they are happening. And some arer public. *See, e.g.,* Michael M. Grynbaum & Cade Metz, *The Times and Amazon Announce an AI Licensing Deal*, N.Y. TIMES, May 29, 2025; Lucas Shaw, *Record Labels in Talks to License Music to AI Firms Udio, Suno,* Bloomberg, June 1, 2025; https://www.cbinsights.com/research/ai-content-licensing-deals/ (compiling a list of AI content licensing deals as of July 2024, mostly with OpenAI, but also including Microsoft, Google, and Meta).

[17] *See* Gibson, *supra* note 15

[18] Lee, *supra* note 6.

who are now faced with an established licensing market.[19] More important, setting the precedent that you have to pay to license will make it much harder for small new entrants to develop and train their own AIs. OpenAI and a few other big players trained without having to pay, but anyone who follows after them will have to pay up front. And well-funded companies like OpenAI, Google, and Meta can afford ongoing license fees much more easily than the startups that would otherwise compete with them.[20]

2. *Google Book Search*[21]

If generative AI companies win their fair use defenses, it will be in large part because of a prior fair use case, this one involving a class action suit brought by book publishers against Google. In a 2015 decision, the Second Circuit held that scanning and (partial) reproduction of copyrighted books for the Google Books Project's search tool was fair use. The decision applied the concept of "transformative use" to cover uses that "communicate[] something new and different from the original or expand[] its utility,

[19] Of course, the terms of a settlement could very well require payment for prior uses of training data. But even if such a settlement approximates the costs that new entrants would have to pay (an unlikely scenario given the fact that content owners would also likely be eager to settle might accept a lower price), existing players have already reached the size and profitability that they can cover such back-payments. Moreover, unlike new entrants, incumbents would be able to continue operating their existing models without concern over the burdensome transaction costs that often accompany IP licensing.

[20] This is one example of how established tech companies can protect themselves against disruptive startups, a process Mark Lemley and Matt Wansley call "coopting disruption." Mark A. Lemley & Matthew Wansley, *Coopting Disruption*, 105 B.U. L. REV. 457 (2025).

[21] One of us (Lemley) represented Google in this case.

thus serving copyright's overall objective of contributing to public knowledge."[22] This extension of fair use[23] set the stage for future applications of the doctrine to new technologies, including, potentially, machine learning for purposes of training generative AI models.[24]

But this landmark decision could very well have never come to be. Google and the plaintiff book publishers initially reached a settlement that would have relied on paid licensing, rather than fair use, to enable Google's use of copyright-protected content. Among other things, the proposed class action settlement would have required Google to pay for scanned books, as well as create a revenue sharing scheme where copyright owners could claim a portion of future revenue via a Books Rights Registry.[25] In exchange, copyright owners would have released Google from infringement liability, enabling Google to scan the books, operate its search service, create a marketplace for e-

[22] Authors Guild v. Google, Inc., 804 F.3d 202, 214 (2d Cir. 2015). In particular, Google Book's search tool, despite providing small "snippets" of books to readers, primary purpose was to "make available significant information about those books," rather than to provide direct access to the protectable content. This different transformative purpose weighed strongly in favor of fair use.

[23] *See* Jacob Victor, *Utility-Expanding Fair Use*, 105 MINN. L. REV. 1887 (2021) (examining the extension of fair use to new technologies that use copyrighted works en masse).

[24] Matthew Sag, *Fairness and Fair Use in Generative AI*, 92 FORDHAM L. REV. 1887, 1908 (2024); Matthew Sag, *Copyright Safety for Generative AI*, 61 HOUS. L. REV. 295, 305 (2023).

[25] See Amended Settlement Agreement, https://authorsguild.org/app/uploads/2012/08/Amended-Settlement-Agreement.pdf; *see also* James Grimmelmann, *Future Conduct and the Limits of Class-Action Settlements*, 91 N.C. L. REV. 387, 401–03 (2013) (summarizing settlement).

book purchases, and provide larger sections of each scanned book (up to 20%, as opposed to small snippets) to the public for free.[26]

The district court rejected the settlement as not in the public interest, enabling the case to proceed to its fair use outcome.[27] But the road not taken reveals some of the perils of the anticompetitive acquiescence. Of course, Google had some good reasons to try to settle: its fair use argument, though strong, was by no means a sure thing, and a loss would have led to a massive award of damages.[28] And the settlement would have offered the public some things they didn't ultimately get from fair use, like access to 20% of the book. But, in agreeing to the settlement, Google likely also had an eye towards consolidating its power in burgeoning markets for book digitization and search. Indeed, the briefing in opposition to the settlement focused extensively on competition issues, arguing in particular that the settlement would have given Google dominance over the market for book search and e-books sales, and de facto exclusivity

[26] *Id*.

[27] Authors Guild v. Google, Inc., 770 F. Supp. 2d 666 (S.D.N.Y. 2011).

[28] *See* Pamela Samuelson, *The Google Book Settlement As Copyright Reform*, 2011 WIS. L. REV. 479, 493 (2011) (noting potential holes in Google's fair use argument and speculating that "If Google recognized that its fair-use defense was not a sure winner, this may have contributed to its receptivity when representatives of the Authors Guild and AAP approached it to suggest a settlement of the litigation"); *see also* Xiyin Tang, *The Class Action As Licensing and Reform Device*, 122 COLUM. L. REV. 1627, 1655 (2022).

over access to out-of-print books.[29] The district court, though primarily relying on other arguments against the settlement,[30] echoed some of these concerns.[31]

While scholars at the time were divided on the degree to which these concerns were legitimate,[32] the settlement's likely harms to competition come into focus when contrasted with the ultimate fair use outcome. If the settlement had been approved, new entrants would have faced large barriers to entry to in the search and e-book digitization markets. Not only would there not be fair use precedent set by the case,[33] the settlement itself would have set the precedent that other book search and similar systems can pay licensing fees to copyright owners. In the absence of a fair use determination and in the face of a license by a competitor, other companies would probably have been required to pay their own licensing fees to publishers, as well as

[29] Grimmelmann, *supra* note 25, at, 425–26 n.137(collecting sources); *see also* Samuelson, *supra* note 28, at 1335 (noting specific concerns over institutional library subscriptions for access to out of print and orphan works).

[30] In particular, the court took issue with the large number of objections to the class action settlement, as well as the risk that certain provisions of the settlement would bypass important provisions of copyright law without congressional approval. Authors Guild v. Google, Inc., 770 F. Supp. 2d 666, 674 (S.D.N.Y. 2011).

[31] *Id*. at 682-83

[32] *Compare* Einer R. Elhauge, *Why the Google Books Settlement Is Procompetitive*, 2 J. Legal Analysis 1 (2010); Marina Lao, *The Perfect Is the Enemy of the Good: The Antitrust Objections to the Google Books Settlement*, 78 ANTITRUST L.J. 397 (2012) *with* Randal C. Picker, *The Google Book Search Settlement: A New Orphan-Works Monopoly?*, 5 J. COMP. L. & ECON. 383 (2009); Randal C. Picker, *Assessing Competition Issues in the Amended Google Book Search Settlement* (John M. Olin Law & Econ. Working Paper No. 499, 2009), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1507172; Samuelson, *supra* note 28, at 1335. One of us (Lemley) also argued at the time in favor of the settlement on behalf of his client, Google. Mark A. Lemley, *An Antitrust Assessment of the Google Book Search Settlement*, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1431555.

[33] Authors Guild v. HathiTrust, 755 F.3d 87 (2d Cir. 2014), did establish a more limited right to digitize books for accessibility to the disabled.

account for the transaction costs of finding and negotiating with book copyright owners.[34] In contrast, Google, thanks to its size and the existence of its settlement-mandated Book Rights Registry, would have faced few problems in continuing to offer its search product. Of course, other search tool operators could have attempted their own fair use arguments again book publishers, but the existence of the Google licensing regime would have potentially weighed against a fair use finding.[35] In this respect, the rejection of the settlement and the ultimate merits decision offered the promise of a more competitive search and e-book ecosystem,[36] as well as set the stage for further applications fair use in new-technology markets that might otherwise be forced to rely on expensive licensing.

3. *Settling Suits Over Invalid Patents*

Patent litigation is big business, with roughly 4000 suits filed every year. Most patent cases – like most cases of every type – settle. But when cases do go to judgment, either in court or in administrative revocation proceedings before the Patent Trial and Appeal Board (PTAB), nearly half of all patents are invalidated.[37] The most common

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[34] In many ways, these potential harms exceed the specific concerns from scholars and litigants at the time of the settlement, which focused predominantly on Google's monopoly over orphan works digitization and access. *See supra* notes 27-32.

[35] *See infra* Parts II, III.b (discussing the problematic role of existing licensing markets in fair use determinations).

[36] That promise didn't fully materialize, in part because Google remains so dominant in the search market generally. But the case did give cover to entities like the Internet Archive to collect other forms of content and make them searchable.

[37] Lex Machina data shows that of the 8,616 final PTAB decisions since the AIA, 3,441 (39.9%) invalidated all the claims in the patents, 856 (9.9%) produced a mixed decision, and 4,319 (50.1%) resulted in a complete win for the patent owner. Lex Machina, www.lexmachina.com (visited February 7, 2025). It probably makes sense to treat a mixed verdict as a win for the patent owner,

basis for invalidation is prior art – evidence that the same or a similar invention was disclosed before the filing of a patent application.[38] While some of that art is well-known, much of it is obscure, which is why the Patent and Trademark Office didn't find it during the patent application process. Courts have found secret uses inside a factory,[39] underground drilling for oil on private land,[40] the wearing of underwear under one's clothing,[41] and the placement of a single copy of a thesis in a basement in a library in Germany (before the internet),[42] among many others, to be sufficient to invalidate a patent.

Quite often in our experience,[43] however, a defendant who finds a killer piece of prior art that would invalidate a patent doesn't actually use it to invalidate the patent. Instead, they quietly settle the case, presumably for a very favorable sum, far less than the cost of continuing to litigate. The defendant gets rid of the (minor) threat of losing a case to a baseless patent and avoids the cost of having to continue to litigate the case. The settlement is secret, so the plaintiff gets to keep their patent, which they can use to sue others. (If it had been invalidated, by contrast, they would lose the right to sue

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since some of the patent claims survive. If we do, patent owners fare better in the PTAB than they do in court, where 43.7% of patents are invalidated.

[38] John R. Allison et. al., *Understanding the Realities of Modern Patent Litigation*, 92 TEX. L. REV. 1769, 1782 (2014) (showing invalidation rates for sections 102 and 103, both of which involve prior art).

[39] Metallizing Eng'g Co. v. Kenyon Bearing & Auto Parts Co., 153 F.2d 516, 518 (2d Cir. 1946).

[40] Rosaire v. Baroid Sales Div., Nat. Lead Co., 218 F.2d 72, 74 (5th Cir. 1955).

[41] Egbert v. Lippmann, 104 U.S. 333, 336 (1881).

[42] In re Hall, 781 F.2d 897, 899 (Fed. Cir. 1986).

[43] One of us (Lemley) has been litigating patent cases for more than 30 years.

anyone else under the patent).[44] And the prior art the defendant found stays hidden in confidential and potentially even privileged litigation files.

Hiding the fact that the patent is invalid obviously benefits the patent owner, who can license or sue to enforce the patent against others. But it also benefits the settling defendant, and not just because they may pay nothing or only a small amount to settle the case. Rather, defendants benefit because their competitors will still have to pay to license the patent or face a suit and try to invalidate it. Perhaps the patent scares off other entrants that don't know it is invalid.[45] But even if it doesn't, forcing rivals to deal with it raises rivals' costs.[46] Put another way, invalidating a bad patent is a public good.[47] The company that invalidates it pays all the cost, but its competitors share in the benefit of that invalidation. So the company has an incentive to impose those costs on its competitors instead.

Because settlements are secret, it is hard to know how often this happens. But in our experience it is quite common. It may help explain why so many patent cases settle, and in particular why patentees who sue many different defendants obtain so many settlements even on patents that ultimately end up being invalidated.[48] One piece of

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[44] Blonder-Tongue Lab'ys, Inc. v. Univ. of Illinois Found., 402 U.S. 313, 330 (1971).

[45] *See* Christopher Leslie, *Patents of Damocles*, 83 Ind. L.J. 133 (2008) (making this argument).

[46] *See* Krattenmaker & Salop, *supra* note 4 (explaining the anticompetitive consequences of raising rivals' costs).

[47] Joseph Farrell & Robert P. Merges, *Incentives to Challenge and Defend Patents: Why Litigation Won't Reliably Fix Patent Office Errors and Why Administrative Patent Review Might Help*, 19 BERKELEY TECH. L.J. 943, 952 (2004).

[48] John R. Allison et. al., *Patent Quality and Settlement Among Repeat Patent Litigants*, 99 GEO. L.J. 677, 679 (2011)

evidence that this is happening is the surprising number of cases in which the parties settle *after* the patent has been invalidated *and then jointly ask the court to vacate the decision and restore the validity of the patent!*[49] We discuss those cases in more detail below.[50]

4. Reverse Payment Settlements

As just discussed, even companies that could invalidate a patent will often take a sweetheart deal rather than take the case to judgment and invalidate the patent. In the pharmaceutical industry, things are even worse.

Ironically, the Hatch-Waxman Act anticipated the public goods problem with invalidating patents we just described, and it tried to deal with it. The Act gives a special incentive to generic companies that invalidate a patent, giving them 180 days of "generic exclusivity" before other generics can enter the market.[51] This exclusivity is significant; in many cases generics that challenge patents earn most of their revenue during that period.[52] And in one sense it seems to have solved the public goods

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[49] Jeremy W. Bock, *An Empirical Study of Certain Settlement-Related Motions for Vacatur in Patent Cases* 88 Ind. L.J. 919 (2013).

[50] *See infra* notes 78-79and accompanying text.

[51] 21 U.S.C. § 355(j)

[52] FEDERAL TRADE COMMISSION, AUTHORIZED GENERIC DRUGS: SHORT-TERM EFFECTS AND LONG-TERM IMPACT 4 (August 2011). And the generic need not even succeed in the challenge in order to gain that generic exclusivity; they often gain it by settling their dispute in a way that allows them to enter 180 days before other rivals. For an explanation and criticism of this practice, see C. Scott Hemphill & Mark A. Lemley, *Earning Exclusivity: Generic Incentives and the Hatch-Waxman Act*, 77 ANTITRUST L.J. 947 (2011).

problem; lots of generic companies chase 180-day exclusivity by seeking to invalidate patents.[53]

Patent owners responded by upping the ante: they began not just to offer sweetheart deals to generic companies to avoid having their patents invalidated, but affirmatively *paying* defendants to avoid invalidating their patents. In return, the generic would agree to drop its challenge to the patent and delay entering the market until well after it would have been able to if it had won its challenge. Often, the generic agreed to stay out of the market until 180 days before the patent would have expired – just long enough to take advantage of the bounty the government offered in hopes of invalidating the patent.[54] The defendants are motivated to settle even if they are sure they will win, because the patentee can afford to pay the defendant more than it would have made even if it invalidated the patent.[55] These "reverse payments" or "pay-for-delay settlements" effectively split improperly-obtained monopoly profits that come from keeping the patent in force.[56] And because the first generic to enter gets

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[53] C. Scott Hemphill, Mark A. Lemley, *Earning Exclusivity: Generic Drug Incentives and the Hatch-Waxman Act*, 77 ANTITRUST L.J. 947, 949 (2011)

[54] Id. at 959-61. For an argument that generics shouldn't get 180-day exclusivity if they settle a case without invalidating a patent, see *id*. See also Michael A. Carrier, *Solving the Drug Settlement Problem: The Legislative Approach*, 41 RUTGERS L.J. 83, 99 (2009) (supporting legislation that would expand parties eligible for 180-day exclusivity to include successful litigants).

[55] *See, e.g.*, In re Ciprofloxacin Hydrochloride Antitrust Litig., 544 F.3d 1323 (Fed. Cir. 2008), abrogated by F.T.C. v. Actavis, Inc., 570 U.S. 136 (2013).

[56] HERBERT HOVENKAMP, MARK D. JANIS, MARK A. LEMLEY, CHRISTOPHER R. LESLIE & MICHAEL A. CARRIER, 1 IP AND ANTITRUST: AN ANALYSIS OF ANTITRUST PRINCIPLES APPLIED TO INTELLECTUAL PROPERTY LAW ch. 16 (3d ed. 2016); Michael A. Carrier, *Payment After Actavis*, 100 Iowa L. Rev. 7, 8 (2014); Robin Feldman, *The Price Tag of "Pay-for-Delay"*, 23 Colum. Sci. & Tech. L. Rev. 1 (2021) ,

exclusivity, other generics remain bottled up behind it, unable to enter the market as long as the settling defendant delays entry.

Courts permitted this practice to go on for more than a decade. The Supreme Court finally held that it generally violated the antitrust laws in 2013 in *Federal Trade Commission v. Actavis*.[57] Nonetheless, despite that ruling and despite aggressive public and private enforcement, pharmaceutical companies regularly seek to settle patent disputes with some form of disguised payment from the patent owner to the defendant in exchange for delaying entry.[58] And courts sometimes let them.[59] And in a very meta move, companies are settling the antitrust cases challenging their unlawful settlements.[60]

5. Agreeing Not to Compete

Pharmaceutical pay-for-delay settlements are not the only ones in which parties settle an IP dispute by agreeing not to enter the market. Competitors also enter into agreements to settle weak cases with provisions that agree that neither will compete with each other. Two notable (and distressingly common) examples are bid-rigging in

[57] F.T.C. v. Actavis, Inc., 570 U.S. 136 (2013).

[58] Courts have generally extended the antitrust analysis to non-cash payments that offer other valuable consideration. *See, e.g.,* In re Loestrin Antitrust Litig., 814 F.3d 538, 549 (1st Cir. 2016); King Drug Co. of Florence v. Smithkline Beecham Corp., 791 F.3d 388 (3d Cir. 2015); see also C. Scott Hemphill, P*aying for Delay: Pharmaceutical Patent Settlement as a Regulatory Design Problem*, 81 N.Y.U. L. REV. 1553, 1556 (2006).

[59] HOVENKAMP et al., *supra* note 56, ch. 16.

[60] *See* Michael A. Carrier & Edward Bank, *The Missing Caselaw of Reverse-Payment Settlements*, 98 ST. JOHN'S L. REV. 959 (2025).

the advertising market and employee no-poach agreements. These agreements are even more naked examples of anticompetitive acquiescence. Here, companies don't just take a loss knowing it will hurt their competitors more; they resolve a lawsuit by agreeing to prevent competition altogether.

On the internet, companies place ads by bidding to have those ads appear when people search for certain terms (so-called "keyword advertising"). Trademark owners objected when competitors bought ads that allowed them to compare their products, and filed a wave of suits against bidding on trademarks to allow ad placement.[61] All of those suits failed.[62] Nonetheless, despite the fact that defendants are essentially certain to prevail on these claims, plaintiffs continue to bring them. And they often settle these cases by agreeing that the two litigants won't place ads when people search for each other's products.[63] Agreeing not to compete in advertising bids and not to engage in comparative advertising is pretty clearly a violation of the antitrust laws, and certainly

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[61] Stacey L. Dogan & Mark A. Lemley, T*rademarks and Consumer Search Costs on the Internet*, 41 HOUS. L. REV. 777, 780 (2004)

[62] *See, e.g.,* 1-800 Contacts, Inc. v. JAND, Inc., 119 F.4th 234, 249 (2d Cir. 2024); Lerner & Rowe PC v. Brown Engstrand & Shely LLC, 119 F.4th 711, 717 (9th Cir. 2024); See also Eric Goldman, *Three Keyword Advertising Decisions in a Week, and the Trademark Owners Lost Them All* (Aug. 17, 2020), https://blog.ericgoldman.org/archives/2020/08/three-keyword-advertising-decisions-in-a-week-and-the-trademark-owners-lost-them-all.htm.

[63] Because these settlements are confidential, and are even more likely to be hidden because they probably violate the antitrust laws, this is tough to document. One public example is 1-800-Contacts, whose bid-rigging agreements were disclosed in open court. 1-800 Contacts, Inc. v. Fed. Trade Comm'n, 1 F.4th 102, 109 (2d Cir. 2021) But we have encountered several others in our personal litigation experience. *See* American Airlines v. Google, N.D. Tex. 2007 (pretrial decision before settlement).

is anticompetitive. But companies do it. Worse, at least one court has let them get away with it because the bid-rigging agreement nominally involved settlement of a lawsuit.[64]

Something similar has happened in employment law.[65] A remarkably wide range of companies have entered into "no poach" agreements with their competitors in which they promised not to hire each other's employees.[66] Some of these agreements were just flat-out cartel agreements, but others are nominally designed to resolve trade secret or noncompete disputes that arise when an employee leaves one company to go work for another. No-poach agreements are most certainly illegal per se under any rational antitrust system; they are agreements not to compete.[67] Indeed, they are likely criminal.[68] And California doesn't enforce noncompetes, so there was no legal basis for

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64 1-800 Contacts, Inc. v. Fed. Trade Comm'n, 1 F.4th 102, 122 (2d Cir. 2021); *see also* Christopher R. Leslie, *Disapproval of Quick-Look Approval: Antitrust After NCAA v. Alston*, 100 WASH. U.L. REV. 1, 30-32 (2022) (critiquing *1-800 Contacts* opinion's reasoning).

65 *See* Mark A. Lemley, *Free the Market: How We Can Save Capitalism from the Capitalists*, 76 U.C. L.J. 115 (2024), from which portions of this paragraph are adapted.

66. *See* Tom Krazit, *DOJ Settles No-recruit Claims Against Tech Companies*, CNET (Sept. 25, 2014, 10:00 AM), https://www.cnet.com/culture/doj-settles-no-recruit-claims-against-tech-companies.

67. Deslandes v. McDonald's USA, LLC, 81 F.4th 699, 704–05 (7th Cir. 2023) (reversing dismissal of per se claim in franchise no-poach agreement). Unfortunately, courts sometimes misunderstand the law, most frequently because they don't think of companies entering into no-poach deals as competitors in the market for buying labor, and so mistakenly treat the agreements as vertical rather than horizontal). *See* Giordano v. Saks & Co., 2025 WL 799270 (2d Cir. Mar. 13, 2025).

68. *See* Cooper Spinelli & Eric A. Tate, *No-Poach Case Alert: DOJ's No-Poach Strategy Dealt Another Blow as Court Tosses Case Before It Reaches Jury*, JDSUPRA (May 12, 2023), https://www.jdsupra.com/legalnews/no-poach-case-alert-doj-s-no-poach-3641250/#:~:text=Overview%20of%20DOJ%20No%2DPoach%20Enforcement&text=Criminal%20liability%20under%20the%20Sherman,to%2010%20years%20in%20prison.&text=The%20DOJ%20brought%20its%20first,no%2Dpoach%20agreements%20in%202021 (listing several cases in which the Department of Justice has brought criminal charges in connection with no-poach agreements).

a California company to object to an employee leaving from a competitor.[69] But that didn't stop people like Steve Jobs and other highly-placed tech executives from deciding that they didn't want to face competition for their employees.[70] After all, if employees could change jobs at will, they could negotiate higher salaries. The antitrust agencies have started cracking down on no-poach agreements, and companies have paid hundreds of millions of dollars to settle the antitrust cases that result.[71] Courts have been surprisingly resistant to enforcing the law,[72] and in any event enforcing the law doesn't seem to have stopped the practice.[73] It is likely to continue underground, as part of confidential "settlements" of employment disputes whether or not they have any merit.

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[69] *See* Edwards v. Arthur Andersen LLP, 189 P.3d 285, 296 (Cal. 2008).

[70]. Alex Wilhelm & Sarah Buhr, *Apple, Google, Other Silicon Valley Tech Giants Ordered to Pay $415M in No-Poaching Suit*, TECHCRUNCH (Sept. 3, 2015, 10:02 AM PDT), https://techcrunch.com/2015/09/03/apple-google-other-silicon-valley-tech-giants-ordered-to-pay-415m-in-no-poaching-suit.

[71] *See* Gabriella Khorasanee, *Judge Koh Rejects Silicon Valley Anti-poaching Settlement,* https://archive.findlaw.com/blog/judge-koh-rejects-silicon-valley-anti-poaching-settlement/ (district judge rejected a $324 million settlement as insufficient; the parties later settled for a higher number); Lauren Berg, *RTX Will Pay $34M to End Engineers' No-Poach Class Action*, LAW360, Dec. 19, 2024).

[72]. Matt Modell & Harlan Rosenson, *DOJ Suffers Historic Defeat in its Fourth Failed Criminal No-Poach Prosecution but Shows No Sign of Letting Up Enforcement*, NAT'L L.J. (May 24, 2023, 9:00 AM), https://www.law.com/nationallawjournal/2023/05/24/doj-suffers-historic-defeat-in-its-fourth-failed-criminal-no-poach-prosecution-but-shows-no-sign-of-letting-up-enforcement; Bryan Koenig, *DOJ Abandons Last Remaining No-Poach Prosecution*, LAW360 (Nov. 14, 2023, 6:10 PM EST), https://www.law360.com/articles/1766482/doj-abandons-last-remaining-no-poach-prosecution. For a discussion of the case law, see Eric A. Posner & Sarah Roberts, *No-Poach Antitrust Litigation in the United States* (U. Chi. Coase-Sandor Inst. L. & Econ., Working Paper No. 933, 2023), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4620378.

[73]. *See* Rochella Davis et al., *No-poach agreements – Closing the Enforcement Gap*, CONCURRENCES: COMPETITION L. REV., Nov. 2023, at 2–4.

A final, and most extreme, form of agreeing not to compete involves merging with your competitor.[74] Mergers in general reduce competition, and antitrust law often prohibits them for that reason.[75] But our particular concern in this paper involves a curious subset of cases in which defendants facing an antitrust lawsuit from a plaintiff for prior anticompetitive conduct resolve that lawsuit by buying the antitrust plaintiff! The PGA Golf Tour, for example, tried to shut down LIV, a new competitor. When LIV sued it for monopolizing the professional golf market, PGA resolved the suit by buying LIV.[76] And when sports streaming service Fubo successfully sued ESPN, Fox, and Warner Discovery for colluding to produce their own exclusive sports streaming service, Disney, ESPN's parent company, bought Fubo on the eve of trial, shutting down the lawsuit.[77]

6. *Making Law Disappear*

The most extreme form of anticompetitive acquiescence occurs when the parties agree to settle a case after it has already been decided, conditional on the court vacating its ruling. This practice is surprisingly common. Jeremy Bock documents dozens of

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74 Clayton Act § 7 regulates mergers.

75 Not often enough, however. *See* Lemley, *Free, supra* note __.

76 https://www.cnn.com/2023/06/07/golf/pga-tour-liv-golf-partnership-explainer-spt-intl/index.html.

77 https://arstechnica.com/gadgets/2025/01/disney-makes-antitrust-problem-go-away-by-buying-majority-stake-in-competitor/. That acquisition prompted antitrust scrutiny of its own, with good reason. https://thedesk.net/2025/04/fubo-disney-merger-doj-investigation/.

cases in patent lawsuits alone in a five-year period.[78] He finds that judges were willing to vacate their substantive decisions 78.5% of the time when the parties asked them to.

Agreeing to vacate decisions – to make the law disappear – is perhaps the most blatant and unjustifiable example of anticompetitive acquiescence. The settling parties are literally agreeing to make the law disappear because one of them (the losing party) doesn't like the result. Collusive vacatur directly hurts third parties who might benefit from that decision by asserting res judicata or collateral estoppel against the party who lost the decision. It also hurts the public at large, who loses the benefit of a decision that adds to the fabric of the law. And it brings the court system into disrepute, giving the impression (unfortunately correct in that instance) that a party can buy immunity from the legal rules that bind everyone else.

Unfortunately, district courts in particular seem to sign these vacatur motions as a matter of course. As Bock notes, "district courts appear to prioritize near-term docket management concerns when granting vacatur—even when it would undermine judicial economy and the public interest. Indeed, district courts routinely granted vacatur without providing a reasoned explanation, without regard to the litigation history of the patent or the litigiousness of the patentee, and with a degree of alacrity that would effectively prevent interested third parties from filing timely motions to intervene to oppose vacatur."[79] Ironically, these agreements – which do tremendous harm – actually

[78] Bock, *supra* note 49.

[79] *Id*. at 919.

offer very little benefit to busy judges, because they happen after the court has already done the work of hearing the case and writing and publishing the opinion.

This is an extreme form of anticompetitive acquiescence, because the winning party isn't just giving up on a case they seemed likely to win; they had already won. They agree to this presumably either because they have been paid off or because they hope to deny their competitors the benefit of res judicata and collateral estoppel, making they relitigate the very issue the settling party just won.

B. Administrative Adjudication and Industry Licensing

Getting ahead by giving up isn't limited to litigation. We see the same behavior in administrative agency adjudication as well. Anticompetitive acquiescence also occurs through private licensing deals happening in the shadow of complicated regulatory regimes, which often explicitly or implicitly impact how administrative agencies treat competitors. .

1. Interactive Streaming and Mechanical Royalties

The highly complicated web of regulatory regimes that govern music distribution has been particularly fertile ground for anticompetitive settlement. Understanding this history requires some background on the unusual nature of music copyright. Unlike other copyrighted works, the dissemination of a recorded song often requires the approval of two different sets of copyright owners: the owners of the musical composition (the copyright in the specific collection of notes, lyrics and the like, that

vests in the song's composer) and the owners of the specific sound recording (that vests in the artists that record the song).[80] Making things even more complicated, different forms of dissemination can implicate different exclusive rights under the Copyright Act. Playing a song on the radio implicates the musical composition owner's right to public performance,[81] whereas the selling of recorded music implicates the right to reproduce the composition (often called the right to "mechanical" reproduction).[82] Sound recordings are even more complicated, because while there is a right to control public performance and to control reproductions of sound recordings (over and above the rights granted to musical compositions), the public performance right for sound recordings has historically been limited to certain forms of digital distribution such as streaming.[83]

Counterintuitively, these different rights in the same song are often controlled by different entities. Songwriters' performance rights are generally licensed out by a Performance Rights Organization (PRO), for example, while mechanical licenses are provided by music publishers and, more recently, via a Mechanical Rights Collective.[84] Adding even more confusion, some music licensing is governed by statutory

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[80] *See generally* Jacob Noti-Victor, *Copyright's Law of Dissemination*, 44 CARDOZO L. REV. 1769, 1790 (2023).

[81] 17 U.S.C. § 106(4).

[82] 17 U.S.C. § 106(1).

[83] Digital Performance Right in Sound Recordings Act, Pub. L. No. 104-39, 109 Stat. 336 (codified at 17 U.S.C. § 114). That law changed substantially in 2018 with the passage of the Music Modernization Act, which created a partial new public performance right for non-digital sound recordings. Pub. L. 115–264, 132 Stat. 3676.

[84] *See* Noti-Victor, *supra* note 80, at 1790.

compulsory licenses that mandate licensing at government-set fees, while other licensing occurs in the free market.[85] Most relevant is the Section 115 compulsory license that governs mechanical licensing.[86] The Copyright Royalty Board (CRB) is the regulatory entity charged with setting prices for this license and does so every few years via an administrative proceeding.

Since its inception, music streaming has had a particularly confused relationship with the already complicated music licensing system. Streaming, like radio, clearly implicated the songwriters' right of public performance, requiring the payment of royalties to a PRO. But whether and how streaming implicated the right of mechanical reproduction was far less clear. As the technology became more ubiquitous, copyright owners argued that all forms of streaming, by virtue of limited server or device-based copies made in the course of streaming, implicated the right to reproduction and thus required the payment of mechanical royalties in addition to performance royalties.[87]

Rather than dispute this interpretation, streaming services entered into a de facto settlement: they agreed to pay for both performance and mechanical rights when

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[85] *Id*.

[86] Curiously, the industry bargains around even statutorily-set fees, often agreeing to different rates. *See* Mark A. Lemley, *Contracting Around Liability Rules*, 100 CAL. L. REV. 463, 477 (2012).

[87] *See* Determination of Royalty Rates and Terms for Making and Distributing Phonorecords (Phonorecords III), 84 FR 1918-01 at 1954 (discussing ambiguous status of such "incidental" digital reproductions). The theory is that temporary copies stored in the memory of a computer still infringe the reproduction right. The law on this is in conflict. *Compare* MAI v. Peak, cite (finding RAM copies to be infringing), with Cartoon Network LP, LLLP v. CSC Holdings, Inc., 536 F.3d 121, 123 (2d Cir. 2008) and CoStar Grp., Inc. v. LoopNet, Inc., 373 F.3d 544, 546 (4th Cir. 2004) (finding that temporary copies do not implicate the reproduction right). *Cf.* Mark A. Lemley, *Dealing with Overlapping Copyrights on the Internet*, 22 U. Dayton L. Rev. 547 (1997) (discussing the possibility of violating multiple, overlapping legal rights in internet communications).

streaming songs. The roots of this settlement are murky. Some interactive streaming services purportedly began paying music publishers for mechanical rights as early as 2001.[88] And in rate-setting proceedings before the CRB as early as 2008, streaming services accepted the proposition that interactive streaming required the payment of mechanical royalties in addition to performance royalties even though, as the CRB judges noted, whether the law required such payments was an open question.[89]

Spotify is the only streaming service to have publicly questioned this arrangement, though its objections were short-lived. In 2016 and 2017, various small musical composition copyright owners brought claims against Spotify alleging that Spotify had infringed their reproduction rights by failing to adequately abide by some of the regulatory formalities necessary for clearing mechanical rights.[90] In response, Spotify argued that the claims were essentially baseless, given that interactive streaming does not implicate mechanical reproduction at all.[91] Many industry players

[88] Comments of the RIAA, *In the Matter of Compulsory License for Making and Distributing Phonorecords, Including Digital Phonorecord Deliveries*, at 3-4. Streaming services that allow users to download songs onto their devices clearly implicate mechanical licensing under past legislation, and this was never open to question. *See* Determination of Royalty Rates and Terms for Making and Distributing Phonorecords (Phonorecords III), 84 FR 1918-01 at 1954 (noting that "Digital Phonorecord Delivery" or "DPD" implicates the copyright reproduction and distribution rights under the Digital Performance Rights in Sound Recording Act).

[89] *See* Determination of Royalty Rates and Terms for Making and Distributing Phonorecords (Phonorecords III), 84 FR 1918-01 at 1954 (discussing Phonorecords I settlement of 2008, and Phonorecords II settlement of 2013).

[90] Specifically, the Complaints alleged that Spotify was required to serve individual "notices of intent" on each copyright owner in order to take advantage of the Section 115 compulsory license. *See, e.g.*, Consolidated Class Action Complaint, Lowery and Ferrick et al., v. Spotify, 2016 WL 4190358 (C.D. Cal. 2016); A4V DIGITAL, INC. et al., v. Spotify, 2017 WL 4068690 (M.D. Tenn. 2017); BLUEWATER MUSIC SERVICES CORPORATION, v. SPOTIFY, 2017 WL 11553277 (M.D. Tenn. 2017).

[91] *See* Defendants' Memorandum of Law in Support of Motion for a More Definite Statement, Gaudi et al v. Spotify, Docket No. 3:17-cv-01052 (M.D. Tenn. Jul 18, 2017) ("The only activity of

were furious that Spotify raised this argument, accusing it of disturbing "a settled legal issue for over 10 years."[92] Spotify ultimately dropped the argument, and most of the lawsuits were settled shortly thereafter.[93]

Years after the streaming industry first agreed to start paying mechanical royalties, the settlement was codified in legislation. The Music Modernization Act of 2019 made a range of changes to the complex music regulatory landscape, including explicitly codifying that streaming implicates the mechanical reproduction right.[94] The MMA was the result of a negotiation between copyright owners and distributors, albeit one that was ultimately codified by Congress.[95]

Understanding this convoluted history as one of anticompetitive acquiescence can help clarify why streaming services might have been willing to agree to pay mechanical royalties for streaming when no clear law required them to do so, and why they ultimately agreed to codify this change in the MMA. True, this settlement yielded some immediate benefits for streaming services that would have been absent had the services fought the copyright owners over the question, including licensing deals, the

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Spotify's that Plaintiffs identify as infringing is its 'streaming' of sound recordings embodying Plaintiffs' copyrighted musical compositions. But 'streaming' – by its very definition – cannot infringe upon either the reproduction right under 17 U.S.C. § 106(1) or the distribution right under 17 U.S.C. § 106(3)").

[92] Ed Christman, *Spotify, Bluewater & Mechanical Licensing: What's Really Driving the Streaming Giant's Latest Legal Fight*, BILLBOARD (September 5, 2017).

[93] *See* Tang, *supra* note 28, at 1663 analyzing settlement).

[94] 17 U.S.C. § 115(e)(13) (an "interactive stream" is a "digital phonorecord delivery," meaning it implicates the right the reproduction and thus requires the payment of mechanical royalties).

[95] Lydia Pallas Loren, *Copyright Jumps the Shark: The Music Modernization Act*, 99 B.U. L. REV. 2519, 2522 (2019) (calling the MMA an extensive and complicated licensing agreement worked out by industry insiders and subsequently codified by Congress.).

avoidance of costly CRB rate-setting proceedings, and some favorable legislative changes codified in the MMA.[96] But the settlement also set the precedent that streaming services must pay what is essentially double royalties to musical composition copyright owners—performance royalties via the Performance Rights Organizations and mechanical royalties for reproduction. Whether or not this double payment scheme explicitly led to higher licensing payments is difficult to gauge,[97] but it certainly raised the transaction costs, regulatory compliance costs, and litigation risks of entering the streaming market.[98] Apple, Google, Amazon and the other tech behemoths that run streaming services were easily able to cover these costs.[99] And Spotify, despite lacking the backing of a big tech company, has been able to reach a scale that allows it to handle higher royalty payments.[100] It is likely no accident that few new streaming services have

[96] In particular, the MMA enables services to stream musical works whose owners cannot be located without fear of later litigation. *Id*. at 2530.

[97] The CRB has occasionally set mechanical royalties using an "all-in" rate designed to account for the cost of both the payment of mechanical royalties and performance royalties. Id. at 2550 n.52. But considering that PRO rate-setting has generally yielded royalty payments more favorable to streaming services, it seems plausible that royalties would have been lower in a world in which streaming services were only required to clear performance rights. *See* Jacob Victor, *Reconceptualizing Compulsory Copyright Licenses*, 72 STAN. L. REV. 915, 990 (2020).

[98] As noted above, at least until the MMA was passed, the payment of mechanical licenses either involved costly negotiations with copyright the owners or the use of the complex regulatory mechanisms of the Section 115 compulsory license (as well as the risk of litigation related to failure to abide by the Section 115 formalities).

[99] As one of us has argued in prior work, these companies tend to treat music streaming as a loss leader, using it to funnel consumers to other, more lucrative products and services. Jacob Noti-Victor & Xiyin Tang, *Antitrust Regulation of Copyright Markets*, 101 WASH. U.L. REV. 851, 864 (2024).

[100] *See* Eamonn Forde, Spotify Comfortably Remains The Biggest Streaming Service Despite Its Market Share Being Eaten Into Forbes (Jan. 20, 2022), https://www.forbes.com/sites/eamonnforde/2022/01/19/spotify-comfortably-remains-the-biggest-streaming-service-despite-its-market-share-being-eaten-into/; *see also* Noti-Victor & Tang, *supra* note 99, at 865 (examining Spotify's success).

successfully entered the market in the last decade, and especially since MMA was passed[101]—the costs are prohibitive and the incumbents are impossible to catch up with.

2. *Adverse Tax Private Letter Rulings*

In highly complex regulatory regimes, administrative agencies often develop their own internal rules and guidance, which can take the form of resolution of specific fact questions as well as more general rulemaking. As in the litigation context, competitors can often try to shape these rules through acquiescence. The Internal Revenue Service (IRS)'s system of private letter rulings (PLRs) is a significant example of this phenomenon.102 A PLR is a letter provided by the IRS in response to a taxpayer's question about how the law applies to its specific circumstances or proposed transactions103 The IRS is generally bound to follow the PLR, giving the taxpayer some assurances about whether their conduct violates the law.104

Though PLRs often define and apply the law in a manner similar to a judicial opinion, they are not supposed to inform future decisionmaking.105 But they nonetheless serve a de facto precedential role.106 Because they are publicly available, similar parties often rely on them in

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101 *See generally The Music Streaming Economy – Part 7: Failed Music Streaming Services* (July 7, 2024), https://musicbusinessresearch.wordpress.com/2024/07/29/the-music-streaming-economy-part-7-failed-music-streaming-services/ (discussing failed music streaming services).

102 Thanks to Luís Calderón Gómez for drawing this example to our attention.

103 See I.R.C. § 601.201(a).

104 Noah Hertz Marks, *Winning by Losing: The Strategy of Adverse Private Letter Rulings*, 66 B.C. L. REV. 659, 672 (2025).

105 I.R.C. § 6110(k)(3)

106 Yehonatan Givati, *Resolving Legal Uncertainty: The Unfulfilled Promise of Advance Tax Rulings*, 29 VA. TAX REV. 137, 159 (2009)

their own tax strategies, especially because the IRS is not permitted to treat similar taxpayers differently.107 And they are frequently cited in court decisions and lawyers' briefs.108

Unlike adversarial judicial proceedings, the PLR process is collaborative; the requesting taxpayer works with the IRS and is often given insight into the agency's likely opinion well in advance of a formal decision. Furthermore, applicants are permitted to withdraw their request at any time, including after learning that they are likely to receive a negative decision.109 This would seem to make it likely that negative PLRs would be relatively rare. After all, why would a taxpayer see the process through if they were likely to receive a binding determination that would ultimately disadvantage them (and make them more susception to an audit)? But, as Noah Hertz Marks has shown in recent work, "adverse" (i.e. negative) PLRs are more common than one might think. By assembling and coding a dataset of 473 adverse PLRs, Marks examines the counterintuitive reasons a taxpayer might see the PLR process to fruition even if an adverse decision is inevitable.110

Based on his data set, Marks identifies several possible reasons a taxpayer might consent to a negative PLR. Competition is one motivating factor:

> Imagine a taxpayer losing business to a competitor that offers its customers or counterparties more favorable terms, where the taxpayer (and/or its accountant auditors) believes tax law prohibits those more favorable terms. The taxpayer submits a request for a PLR, asking for permission to provide such favorable terms--but expecting the answer will be "no." By obtaining a PLR, the taxpayer will either receive direct assurance that it can conform its conduct to its competitor or cause the IRS to publicly release its opinion that the conduct is forbidden. Given the normative force of adverse PLRs [], the PLR will likely

107 Id.

108 Id.

109 Marks, *supra* note XX, at 669-70.

110 Id.

> cause the competitor to cease its conduct (or at least bear adverse financial statement consequences).111

Marks views this strategic use of PLRs essentially procompetitive in that the taxpayer can use them to negate a "competitive disadvantage."112 But the examples he cites showcase the possibility of anticompetitive behavior as well. In one PLR, the life insurance company Keyport Life asked the IRS whether private placement life insurance policies can be invested in hedge funds while still allowing the proceeds from these policies to grow tax free. The IRS declared that this practice is impermissible. This ruling that significantly affected the practice of Keyport's competitors, essentially requiring them to unwind their hedge fund investment offerings.113 Keyport was smaller than some of the other affected firms, so this strategy essentially allowed them to use the PLR as a cudgel against successful business practices by their competitors.

This example showcases the power of PLRs as an anticompetitive acquiescence strategy. As with strategic settlements in the litigation, savvy businesses can acquiesce to a negative PLR ruling when they realize that the de facto precedent set by the PLR will harm their competitors more.

3. *Strategic Licensing to Affect Rate Setting*

111 Marks, supra note XX, at 707. Other commentators have also noted this trend. See, e.g., MICHAEL I. SALTZMAN & LESLIE BOOK, IRS PRACTICE AND PROCEDURE ¶ 3A.03 (2024) ("[O]btaining an unfavorable ruling may be advantageous if it means that other similarly situated taxpayers will also be constrained by the unfavorable ruling.")

112 Marks, supra note XX, at 707.

113 Id. at 711-712; See also I.R.S. P.L.R. 200244001 (Nov. 1, 2002)

Judges and regulators are sometimes tasked with setting prices designed to mimic what might have been paid between two parties in an arms-length transaction. In the patent damages context, for example, judges sometimes seek to calculate a "reasonable royalty" that reflects the parties' market positions. And, in eminent domain cases, courts are tasked with a similar fair market value calculation. This rate-setting is difficult and highly imprecise work, that often lends itself to criticism from scholars.[114]

In the copyright regulatory context, agency rate-setting is surprisingly ubiquitous. As noted above, the Copyright Act contains several compulsory licensing schemes that task regulators—specifically, the Copyright Royalty Board—with setting prices for certain industries every few years.[115] Rates are generally set via adversarial administrative proceedings between copyright owners and licensors. In these administrative adjudications, the already fraught process of rate-setting in a complex regulatory framework has been made even more difficult thanks to the market power imbalances in the industry writ large. This has given rise to a particularly pernicious form of anticompetitive acquiescence: parties agreeing to seemingly good faith licensing agreements with the goal of ultimately using the agreements to sway rate-setting outcomes in subsequent cases.

Consider the Section 114 compulsory license, which governs the licensing paid by "webcasting" streaming services (also known as digital radio or non-interactive

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[114] *See, e.g.*, Michael Risch, *(Un)reasonable Royalties*, 98 B.U. L. REV. 187, 188 (2018); William F. Lee, A. Douglas Melamed, *Breaking the Vicious Cycle of Patent Damages*, 101 CORNELL L. REV. 385 (2016); William F. Lee & Mark A. Lemley, *The Broken Balance: How "Built-in Apportionment" and the Failure to Apply Daubert Have Distorted Patent Infringement Damages*, 37 HARV. J.L. & TECH. 255 (2024)

[115] 17 U.S.C. §§ 114, 115, 116, 118, 119, 122.

services) to sound recording copyright owners. At the first rate-setting proceeding following the creation of the Section 114 license, the rate-setting body then in place[116] was charged with finding rates that mimic those negotiated between a "willing buyer and willing seller" in an unregulated market. To ascertain such a rate, the regulators were presented with "benchmark" evidence, taking the form of real-world licensing agreements from similar markets. However, regulators quickly determined that most of the agreements presented by copyright owners had been strategically entered into in order to affect the ultimate outcome of the rate-setting proceeding.[117] Essentially, copyright owners and certain distributors purported to be entering into good faith agreements, but their real goal was to affect the rate-setting proceedings that, they knew, would rely on these agreements as marketplace evidence to set an industrywide rate.

Only one licensing deal—between the Recording Industry of America (RIAA) and Yahoo! – was ultimately chosen as a benchmark because regulators believed it was the only one that had been negotiated in good faith.[118] But even this seems to have been too naïve. Evidence has since emerged that this deal had also been manipulated to keep licensing prices high—to the benefit of copyright owners and, counterintuitively, to the

[116] At the time, this was body was known as the Copyright Arbitration Royalty Panel (CARP). Today, it is known as the CRB, described in the last section.

[117] Beethoven.com LLC v. Libr. of Cong., 394 F.3d 939, 943 (D.C. Cir. 2005), as amended (Feb. 4, 2005) (Copyright owner "would only close deals that hit its 'sweet spot' to create a favorable record before the CARP, generally with businesses driven by factors other than the value of the sound performance rights."); *see also* Peter Dicola & Matthew Sag, *An Information-Gathering Approach to Copyright Policy*, 34 CARDOZO L. REV. 173, 227 (2012) (documenting this history in detail).

[118] DiCola & Sag, *supra note* 117, at 228 (discussing this RIAA-Yahoo! agreement).

benefit of large internet companies like Yahoo!, who, unlike their small competitors, could afford to pay high royalty rates. Mark Cuban, who worked on the deal when he was a Yahoo! employee, later explained that "The Yahoo! deal I worked on . . . was designed so that there would be less competition, and so that small webcasters who needed to live off of a 'percentage-of-revenue' to survive, couldn't."[119] And, indeed, the rate that the regulators chose, based on this benchmark, ultimately proved so unworkable for small webcasters that Congress intervened, suspending the rate and demanding that copyright owners and services attempt to negotiate new rates that would better allow small services to compete.[120]

Licensing gamesmanship has continued to haunt the compulsory license rate-setting process. Even in the absence of explicit evidence that agreements were made in bad faith, the CRB has frequently struggled with how to translate private agreements into workable benchmarks when market power imbalances (between copyright owners and distributors) and anticompetitive incentives (including larger distributors seeking price out smaller competitors) may taint the negotiating process.[121]

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[119] Paul Maloney & Kurt Hanson, Cuban Says Yahoo!'s RIAA Deal Was Designed to Stifle Competition!, RADIO & INTERNET NEWSL., June 24, 2002, http://www.kurthanson.com/archive/news/062402; *see also* Mark A. Lemley & Philip J. Weiser, *Should Property or Liability Rules Govern Information?*, 85 TEX. L. REV. 783, 834 (2007) (examining this and other evidence).

[120] Small Webcaster Settlement Act of 2002, Pub. L. No. 107-321, §3(1), 116 Stat. 2780, 2781 (codified at 17 U.S.C. § 114); *see also* DiCola & Sag, *supra note* 117, at 229-34.

[121] Victor, *supra* note 97, at 986 (discussing these issues in Web IV, Phonorecords III, and at the PRO rate courts in the SDNY); Xiyin Tang, *Intellectual Property as Labor Policy*, NYU LAW REVIEW (forthcoming 2025), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4761809.

A similar problem occurs in patent cases, where the terms of existing licenses are used as benchmarks to set the rates for later licenses of the same or similar patents. That creates significant possibilities for gamesmanship in settlements. And indeed patent owners regularly seek to skew damages calculations by manipulating license agreements. A non-practicing entity in the business of litigation, not making products, will often structure its licensing and litigation campaign to generate spurious "comparable" licenses it can then point to in later litigation.[122] In the worst case, those licenses are actually collusive, with the parties agreeing to a number no one actually pays. But even if the licenses are real, they can be manipulated in a variety of ways. One common approach is to find a small defendant that is either going out of business or makes very few products and charge it a high percentage royalty that turns out to be a small dollar figure. The defendant gets a good deal, paying only a small price, and the plaintiff gets to claim that "comparable" defendants are paying a very high percentage.[123] For this reason, some courts have refused to treat agreements as comparable if they were executed in the context of "the threat of a lawsuit" or "a history

[122] *See* Lee & Lemley, *supra* note __, at 9-10.

[123]. *See* Thomas F. Cotter, John M. Golden, Oskar Liivak, Brian J. Love, Norman V. Siebrasse, Masabumi Suzuki et al., *Reasonable Royalties*, *in* PATENT REMEDIES AND COMPLEX PRODUCTS: TOWARD A GLOBAL CONSENSUS 40 & n. 137 (C. Bradford Biddle, Jorge L. Contreras, Brian J. Love & Norman V. Siebrasse eds., Cambridge Univ. Press 2019) (noting this problem); Jonathan S. Masur, *The Use and Misuse of Patent Licenses*, 110 NW. U. L. REV. 115, 123 (2015). One possible example is *Pavo Solutions LLC v. Kingston Technology Co., Inc.*, where a prior licensee paid a very small price but made a representation that it was a large percentage of profits. 35 F.4th 1367, 1378–80 (Fed. Cir. 2022). The court allowed an expert to testify to the percentage of profits. *See id.* at 1372.

of litigation between the parties."[124] Unfortunately, other courts have permitted plaintiffs to manipulate the royalty rate charged, permitting the jury to rely on a high supposed royalty rate rather than the much lower figure actually paid to license the patent.[125]

4. The Digital Millenium Copyright Act and YouTube'sContentID System

Acquiescence doesn't always have to involve profit sacrifice to be anticompetitive. As we saw with pharmaceutical pay-for-delay settlements, sometimes the other side makes you an offer you can't refuse. In those cases, the fact that accepting that offer disadvantages competitors is an additional benefit to the party who acquiesces.[126]

YouTube's ContentID system may fit in this category as well. After an initial wave of lawsuits against internet intermediaries in the 1990s, Congress passed the Digital Millennium Copyright Act (DMCA) in 1998. The DMCA creates a notice-and-takedown system that immunized intermediaries from copyright liability for infringing content stored on their system by another as long as they follow a procedure set in the statute to remove particular content once they receive notice of infringement.[127] The

[124]. Microsoft v. Motorola, No. C10-1823, 2013 WL 2111217, at *67 (W.D. Wash. Apr. 25, 2013).

[125] EcoFactor, Inc. v. Google LLC, 104 F.4th 243 (Fed. Cir.), reh'g en banc granted, opinion vacated, 115 F.4th 1380 (Fed. Cir. 2024). The case is on en banc review, and hopefully the full court will discount those representations.

[126] The fact that the conduct might have been profitable regardless does complicate remedies, however; we discuss that in Part III.

[127] 17 U.S.C. § 512.

law also requires companies to adopt "standard technological measures" to control infringement and denies immunity for any content the site owners knew or had "red flag" (imputed) knowledge was actually infringing.[128]

YouTube was founded after the enactment of the DMCA and was bought by Google in 2006. Viacom sued YouTube, alleging that it was not eligible for the DMCA safe harbor. YouTube ultimately prevailed in that suit on the major disputed issues.[129] But despite its victory, the parties entered into a confidential settlement.[130] While we don't know the terms of that settlement, we do know that YouTube agreed to one of the principal demands from the content industry: the creation of an automated filtering system to identify and remove infringing content. The DMCA doesn't require that. Instead, the law puts the burden on the copyright owner to identify instances of infringement to be taken down. Still, YouTube created its ContentID system, which today blocks far more infringing content on the site than does the DMCA takedown process.[131] Other companies, including Amazon and Meta, have adopted similar voluntary systems for proactively identifying and taking down allegedly infringing content.[132]

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[128] *Id*.

[129] Viacom Int'l, Inc. v. YouTube, Inc., 676 F.3d 19, 40 (2d Cir. 2012).

[130] *Google and Viacom settle seven-year YouTube row*, BBC (March 18, 2014), https://www.bbc.com/news/technology-25665596

[131] Ben Popper, *YouTube to the music industry: here's the money*, VERGE (July 13, 2016), https://www.theverge.com/2016/7/13/12165194/youtube-content-id-2-billion-paid (98% of content removed from YouTube happens through ContentID).

[132] Xiyin Tang, *Privatizing Copyright*, 121 MICH. L. REV. 753, 766 (2023); Jeanne C. Fromer & Mark P. McKenna, *Amazon's Quiet Overhaul of the Trademark System*, 113 CAL. L. REV. (forthcoming 2025),

ContentID was expensive; estimates are that creating and implementing such a system costs in the range of $100 million or more.[133] It also likely costs quite a bit more in lost advertising revenue associated with the content taken down. And at least some of that content was lawful and wouldn't have been blocked under the DMCA.[134] And the law didn't require it. So why did YouTube do it? The answer is probably that it predicted (correctly) that ContentID would be profitable. When YouTube flags infringing content in the system, it doesn't automatically take it down. Rather, it gives the copyright owner the option to leave it up and monetize it, with YouTube giving the advertising revenue associated with the content to the copyright owner, not the poster, even if the copyright complaint was bogus.[135] That has resulted in more than $2 billion being transferred to copyright owners;[136] how much YouTube profits from having these videos on the site (and whether it compensates for the videos that are taken down or demonetized) is less clear. ContentID also allows YouTube to generally avoid having to

https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4870984 (describing Amazon's "brand registry" system).

133 *Id*. (estimating that Google spent $60 million through 2016 on the system).

134 On abuse and overuse of takedown systems, see Jennifer M. Urban & Laura Quilter, *Efficient Process or "Chilling Effects"? Takedown Notices Under Section 512 of the Digital Millennium Copyright Act*, 22 SANTA CLARA COMPUTER & HIGH TECH. L.J. 621, 622 (2006); Daniel Seng, *Copyrighting Copywrongs: An Empirical Analysis of Errors with Automated DMCA Takedown Notices*, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2563202; Fromer & McKenna, *supra* note 132(discussing abuse of the Amazon system).

135 Erik Kain, *YouTube Responds To Content ID Crackdown, Plot Thickens*, FORBES (Dec. 17, 2013), https://www.forbes.com/sites/erikkain/2013/12/17/youtube-responds-to-content-id-crackdown-plot-thickens/#120ea41f6c52.

136 Popper, *supra* note 105.

administer the costly notice-and-take down process that the DMCA mandates, since content is automatically flagged before a takedown notice is issued.

But even assuming ContentID is not a net moneymaker for YouTube, YouTube benefits from it in another way: it has raised the bar for competing video services. Startups can't easily afford to develop their own ContentID-type system, but failing to do so may get them in trouble with copyright owners, who are still pursuing claims against intermediaries they believe aren't doing enough to stop infringement.[137] So while YouTube didn't necessarily develop ContentID just to pull up the ladder on potential new competitors, it certainly had that effect. As Kristelia Garcia notes,

> successful copyright arbitrage--i.e., arbitrage that results in cost savings while surviving superficial regulatory scrutiny--by one company puts pressure on competitors to employ the same practices, or risk being noncompetitive. If everyone was willing and able to do so, this would eventually erode the competitive advantage gained by the original company. In practice, however, this is usually not the case. The same characteristics that normally advantage larger companies--e.g., capitalization and diversification-- also support these companies' superior ability to engage in copyright arbitrage.[138]

C. Regulation[139]

While agreeing to settle lawsuits or administrative proceedings against them in order to block competition or harm competitors is one way companies can win by losing, it is not the only way. Companies also invite governments to regulate them,

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137 *See, e.g.*, BMG Rts. Mgmt. (US) LLC v. Cox Commc'ns, Inc., 881 F.3d 293, 303 (4th Cir. 2018).

138 Kristelia A. García, *Copyright Arbitrage*, 107 CAL. L. REV. 199, 246 (2019).

139 Portions of this section are adapted from Mark A. Lemley & Matthew Wansley, *Coopting Disruption*, 104 B.U. L. Rev. __ (forthcoming 2025).

and for similar reasons: while regulation is costly for a company, it may be more costly still for its rivals. Some invited regulation may even exclude the rivals from the market altogether.

In 2021, for instance, Facebook began running full-page ads in major print newspapers encouraging governments to regulate the internet.[140] Mark Zuckerberg even wrote an op-ed in the *Washington Post* arguing for greater regulation.[141] Similarly, OpenAI's CEO Sam Altman told the U.S. Congress that it should regulate AI.[142] So has Sundar Pichai, the head of Google,[143] Tim Cook of Apple,[144] and Microsoft President Brad Smith.[145] To be sure, some of this is posturing. Companies can see the ways the

[140] Will Duffield, *About Those Facebook Ads Calling for More Internet Regulation*, CATO INST. (Feb. 7, 2022), https://www.cato.org/commentary/about-those-facebook-ads-calling-more-internet-regulation [https://perma.cc/744V-L8CZ].

[141] Mark Zuckerberg, *The Internet Needs New Rules. Let's Start in These Four Areas*, WASH. POST (Mar. 30, 2019, 3:00 PM), https://www.washingtonpost.com/opinions/mark-zuckerberg-the-internet-needs-new-rules-lets-start-in-these-four-areas/2019/03/29/9e6f0504-521a-11e9-a3f7-78b7525a8d5f_story.html (calling for regulation of harmful content, election interference, privacy, and data portability).

[142] Cecilia Kang, *OpenAI's Sam Altman Urges A.I. Regulation in Senate Hearing*, N.Y. TIMES (May 16, 2023), https://www.nytimes.com/2023/05/16/technology/openai-altman-artificial-intelligence-regulation.html.

[143] James Vincent, *Alphabet CEO Sundar Pichai Says There is 'No Question' That AI Needs to Be Regulated*, VERGE (Jan. 20, 2020, 5:30 AM), https://www.theverge.com/2020/1/20/21073682/ai-regulation-google-alphabet-ceo-sundar-pichai.

[144] Jason Nelson, *AI Needs 'Rules of the Road': Apple CEO Tim Cook*, EMERGE (Nov. 21, 2023), https://decrypt.co/206985/tim-cook-on-ai-regulation-apple-ceo [https://perma.cc/KU5X-M6RA].

[145] David McCabe, *Microsoft Calls for A.I. Rules to Minimize the Technology's Risks*, N.Y. TIMES (May 25, 2023), https://www.nytimes.com/2023/05/25/technology/microsoft-ai-rules-regulation.html.

political winds are blowing, and if they think regulation is inevitable, they may try to get out in front of the wave in hopes that they can shape the form of that regulation.

But there is more to it than that. While companies generally don't like regulation, the one thing they hate even more is competition.[146] And regulation often serves to restrict competition.[147] Sometimes it does so directly. A variety of regulations, passed for some combination of good and bad reasons, restrict or affirmatively prohibit competition in a series of important markets. Some were passed because Congress believed competition wouldn't work in the industry, and a promise to prevent competition was part of the bargain for price regulation. Regulators abandoned those entry restrictions in a host of markets from the 1970s to the 1990s,[148] and in virtually every case (ground transportation, air travel, telephony, electric power, taxis, and hotels), it turned out that both competition and innovation were possible in markets once thought not amenable to competition.[149] The Biden Administration took further steps to eliminate regulatory rules that prevent entry.[150]

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146 *See* Lemley, *Free the Market*, *supra* note 65, at 4.

147 *See* George J. Stigler, *The Theory of Economic Regulation*, 2 BELL J. ECON & MGMT. SCI. 3, 5 (1971).

148 *See* Joseph D. Kearney & Thomas W. Merrill, *The Great Transformation of Regulated Industries Law*, 98 COLUM. L. REV. 1323, 1329-64 (1998).

149 *See* Mark A. Lemley & Mark P. McKenna, *Unfair Disruption*, 100 B.U. L. REV. 71, 78-82 (2020).

150 *FACT SHEET: White House Competition Council Announces New Actions to Lower Costs and Marks Second Anniversary of President Biden's Executive Order on Competition*, WHITE HOUSE (July 19, 2023), https://www.whitehouse.gov/briefing-room/statements-releases/2023/07/19/fact-sheet-white-house-competition-council-announces-new-actions-to-lower-costs-and-marks-second-anniversary-of-president-bidens-executive-order-on-competition [https://perma.cc/3UD8-T33Z].

Regulation can serve valuable social goals, from food safety to environmental protection. And even regulation that prevents market entry sometimes serves (or at least is thought to serve) valuable purposes. AT&T's monopoly stopped the development of incompatible telephone networks that couldn't communicate with each other, solving a major network effects problem.[151] Power company monopolies were thought to be necessary to spur investment in a wide electric grid.[152] But in each case they also limited consumer choice, reduced the incentive to invest in quality, and prevented full price competition.[153] Worse, these entry restrictions discouraged innovations that would have (and eventually did) make those technologies cheaper and better.

Even when barriers to entry were adopted for good reasons, once a regulation exists incumbents in the affected industries can and will game the regulatory system to

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[151] *See* JERRY KANG & ALAN BUTLER, COMMUNICATIONS LAW AND POLICY: CASES AND MATERIALS 293 (7th ed. 2020) (describing how even "customer premises equipment" makers, once they finally won right to connect to AT&T's network with their own handheld phones, initially had to use "Protective Connection Arrangement" device in order to ensure network survived).

[152] *See* Paul L. Joskow & Richard Schmalensee, *Incentive Regulation for Electric Utilities*, 4 YALE J. REGUL. 1, 35 (1986) (recounting traditional rationale for monopoly regulation).

[153] For telephony, see Nicholas Economides, Katja Seim & V. Brian Viard, *Quantifying the Benefits of Entry into Local Phone Service*, 39 RAND J. ECON. 699, 725 (2008) (finding greater welfare gains from firm differentiation and choice than from reduced retail prices).For electricity sectors, see Paul L. Joskow, *Deregulation and Regulatory Reform in the U.S. Electric Power Sector* 121 (MIT Ctr. for Energy & Env't Pol'y Rsch., Working Paper No. 00-003, 2000), https://dspace.mit.edu/bitstream/handle/1721.1/44967/2000-003.pdf [https://perma.cc/4PFR-YMBY] (finding that deregulation led to "retail price reductions . . . in . . . states that ha[d] already implemented reforms," yet noting that these price reductions so far have been achieved less by market forces than by regulators managing the transition towards competition—and enjoying a strong bargaining position as a result).

protect themselves from competition.[154] There is good reason to regulate entry into the pharmaceutical industry, for instance, and good reason to reward innovation in that industry with a temporary monopoly in the form of patent protection.[155] But the industry has become expert at gaming both of those systems to extend control and prevent competition long after patents and regulatory exclusivity should have expired.[156] Companies in other regulated industries, like electric power, are also adept at capturing regulators and using regulation to prevent innovation that threatens their monopoly.[157] Some of the examples, discussed above, of efforts to manipulate CRB administrative adjudications are further evidence of this phenomenon.

Regulation may be particularly problematic for startups. First, regulation can impose standardization, with the government setting rules on what products can and can't do. That is precisely what the AI giants are calling for, for instance.[158] And

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154 *See* Stacey L. Dogan & Mark A. Lemley, *Antitrust Law and Regulatory Gaming*, 87 TEX. L. REV. 685, 688 (2009).

155 *See* Roberto Mazzoleni & Richard R. Nelson, *The Benefits and Costs of Strong Patent Protection: A Contribution to the Current Debate*, 27 RSCH. POL'Y 273, 275-78 (1998) (highlighting studies concluding that the pharmaceutical industry is one of the few sectors in which patents are consistently effective and necessary to recoup firms' financial investments).

156 For an exploration of the problems of evergreening pharmaceutical patents, abuse of the regulatory exclusivity, and collusive settlements see generally HOVENKAMP et al., *supra* note 56, ch. 15-16.

157 *See* Lemley & McKenna, *supra* note 149, at 78. ("Incumbents often use regulation to insulate themselves from competition. A long literature discusses the history of incumbents warping regulations originally intended to check their power into tools for protecting themselves against disruptive entry."). In California, electric utility companies persuaded the Public Utilities Commission to radically increase the price and reduce the benefits of installing solar power because its success was a threat to their business model. *See* Deven R. Desai & Mark A. Lemley, *Scarcity, Regulation, and the Abundance Society*, 7 FRONTIERS RSCH. METRICS AND ANALYTICS, Jan. 25, 2023, at 1, 9-10 (discussing this history).

158 *See, e.g.*, Kang, *supra* note 142

regulation that limits product variety—that mandates a conception of what the industry should look like—tends to favor the players who have already built an industry around that vision and don't want it disrupted. Startups with a different model need not apply, because the regulators have regulated (generally in good faith) with a static vision of what the industry might do.

Second, complying with regulations takes time and money. Incumbents have both; startups generally don't. So persuading the government to impose rules that require companies to hire compliance officers, file reports, and change how they design and build products is likely to disproportionately affect small startups who can least afford to bear the associated costs.[159] Worse, the startups may not know the regulations even exist or have the in-house expertise to ensure compliance. That gives incumbents another opportunity to head off disruption by filing lawsuits and regulatory complaints. And as Lemley and McKenna have documented, incumbents regularly take advantage of this, using lawsuits and regulatory complaints to try to prevent competitors gaining a foothold.[160]

Finally, regulation may explicitly exclude competitors, particularly those who might impose price discipline. Professional licensing boards are often staffed with members of the profession with a vested economic interest in blocking others from entering. Lawyers run the organizations that determine that paralegals and software

[159] *See* Dustin Chambers, Patrick A. McLaughlin & Tyler Richards, *Regulation, Entrepreneurship, and Firm Size*, 61 J. REGUL. ECON. 108, 109 (2022).

[160] Lemley & McKenna, *supra* note 149, at 83-97.

programs can't practice law and that accountants can't partner with lawyers.[161] Dentists often dominate the boards that limit the role of dental hygienists.[162] Ophthalmologists restrict what optometrists are permitted to do.[163] And so on. Imposing restrictions on entry into these professions costs members of the profession time and money – bar dues, licensing exams, continuing education requirements, and the like.[164] But it also ensures that they don't face competition from lower priced alternatives.[165] By accepting or even demanding that they be regulated, they impose costs on themselves, but they impose a much greater cost on others.

Anticompetitive acquiescence via regulation has already had a particularly pronounced effect in the early months of the second Trump administration. One of President Trump's first executive orders is titled "Unleashing American Energy." Among its many regulatory changes to the U.S. energy sector, it demands "the elimination of unfair subsidies and other ill-conceived government-imposed market distortions that favor [elective vehicles] over other technologies."[166] Considering the close relationship between Trump and Tesla CEO Elon Musk, the rollback of electric vehicle subsidies, such as tax credits, might appear to be surprising. But Musk himself

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161 *See, e.g.*, New York Bar Association, Rules of Professional Conduct, Rules 5.3, 5.4.

162 *See* N. Carolina State Bd. of Dental Examiners v. F.T.C., 574 U.S. 494 (2015).

163 *See* Kristin E. Schleiter, *Ophthalmologists, Optometrists, and Scope of Practice Concerns*, AMA J. ETHICS (Dec. 2010), https://journalofethics.ama-assn.org/article/ophthalmologists-optometrists-and-scope-practice-concerns/2010-12

164 See Rebecca Haw Allensworth, *Foxes at the Henhouse: Occupational Licensing Boards Up Close*, 105 CAL. L. REV. 1567 (2017).

165 Id.

166 Executive Order: Unleashing American Energy (Jan. 20, 2025), https://www.whitehouse.gov/presidential-actions/2025/01/unleashing-american-energy/

favors the rollback, explaining that "it will only help Tesla" because Tesla's smaller competitors would experience greater harm from the loss of subsidies, giving Tesla a leg up in the electric vehicle market.[167]

II. The Problems with Acquiescence

Courts (and many commentators) like settlements.[168] Courts view settlement as a way to clear a busy docket. As with plea bargaining (the criminal equivalent of settlement), the system is built on the assumption that the vast majority of cases won't actually make it to trial. If they did, the system would collapse unless we poured many more resources into it. The same is true for the other forms acquiescence that we describe above, like consenting to regulation or to licensing demands premised on ambiguous areas of law. Though these aren't "settlements" in the strict sense, they also involve apparent compromise of the kind designed to avoid costly conflict. (When we

[167] Sara Dorn, *Musk Calls For Ending Electric Vehicle Tax Credit—Which Could Help Tesla*, FORBES (Dec. 5, 2024), https://www.forbes.com/sites/saradorn/2024/12/05/musk-calls-for-ending-electric-vehicle-tax-credit-which-could-help-tesla/; *see also* Andrew J. Hawkins, *What does Trump's election mean for EVs, Tesla, and Elon Musk?*, VERGE (Nov. 6, 2024), https://www.theverge.com/2024/11/6/24289494/trump-election-electric-vehicle-tax-credit-tesla-elon-musk. A similar strategy may have informed Musk's apparent acceptance of tariffs that would seem to harm Tesla's manufacturing capacities. *See* Jack Ewing et al. *Trump's Tariffs Could Help Tesla, by Hurting Its Rivals More*, N.Y. TIMES (Mar. 10, 2025), https://www.nytimes.com/2025/03/08/world/asia/trump-trade-musk-tesla.html?smid=nytcore-ios-share&referringSource=articleShare.

[168] For a discussion of the voluminous literature, see, for example, J.J. Prescott & Kathryn E. Spier, *A Comprehensive Theory of Civil Settlement*, 91 N.Y.U. L. Rev. 59, 60 (2016) (examining economic efficiency arguments in favor of settlement); Carrie Menkel-Meadow, *Whose Dispute Is It Anyway?: A Philosophical and Democratic Defense of Settlement (in Some Cases)*, 83 Geo. L.J. 2663, 2669 (1995) (examining non-economic arguments in favor of settlement).

refer to "settlement" in this Part, we are contemplating this kind of acquiescence as well.)

Further, settlements generally seem the sort of thing that should concern only the settling parties. If you injure me, and we agree on the appropriate compensation for that injury, there is little reason for the court to get involved. That is even more true in a business dispute over a deal gone wrong or a fight over boundary lines between neighbors. The combination of these two – settlements are necessary and don't seem to hurt anyone – mean that courts and regulators are happy to approve almost any settlement put before them.[169]

The cases we identify in Part I call these assumptions into serious question. The benefits of settlement have been questioned before, but the classic critiques tend to focus on potential power imbalances between the settling parties and whether the settlements are truly voluntary.[170] That is not the problem we are describing. In fact, we have little doubt that the settlements we described above were entered into voluntarily. Rather, our concern is that many settlements don't just affect the settling parties. They may affect competitors as well. The most extreme cases, like pharmaceutical pay-for-delay settlements, prevent competition altogether, stopping consumers from buying cheaper products from companies that are able and willing to sell them even though

[169] Indeed, the vast majority of civil cases end up settling. Prescott & Spier, *supra* note 168, at 61 n.2 ("While settlement rates vary by type of case and jurisdiction, generally less than 3% of filed cases reach trial verdict.").

[170] *See generally* Owen M. Fiss, *Against Settlement*, 93 YALE L.J. 1073, 1075 (1984); Howard M. Erichson, *Aggregation as Disempowerment: Red Flags in Class Action Settlements*, 92 NOTRE DAME L. REV. 859 (2016).

neither the consumers nor the producers are party to the suit or the settlement agreement. So too does classic regulation that locks in a monopoly franchise. Other settlements among competitors don't bar third parties from the market altogether, but restrict the settling parties from engaging in lawful competition. That hurts consumers or workers in the markets that are no longer competitive. Keyword advertising settlements and no-poach agreements fall in this category.

Other anticompetitive externalities are more subtle because they merely make competition harder rather than impossible, but they still harm consumers and non-settling parties, often by raising rivals' costs and therefore disadvantaging them.[171] Inviting regulation raises the barriers to new market entry, making new competition less likely and disadvantaging existing competitors who haven't reached the scale at which they can easily implement the regulations. Consenting to a negative tax PLR can disadvantage competitors whose business strategies rely on an alternative interpretation of the tax code. And burying the evidence that would invalidate a patent raises rivals' costs, potentially barring the rival from the market (if they never find the invalidating prior art) and at least requiring the rival to pay to litigate or license the invalid patent.

Even more problematic, sometimes settlements can actually change the law for the worse for everyone else. If AI companies (or Google's Book Search project) agree to pay to license something they should be able to use without a fee or permission, the problem isn't just that they will avoid setting a good precedent that benefits everyone

[171] Krattenmaker & Salop, *supra* note 4.

else. It is that the settlement itself sets a bad precedent, making it more likely that future courts will reject a fair use claim, because they will look to the prior settlement as evidence of the existence of a licensing market.[172] Something similar happened in the case of music streaming: after incumbent streaming services failed to object to paying arguably duplicative mechanical royalties for almost a decade, congress found it uncontroversial to finally establish, in the MMA, that these payments are mandatory.[173] Some of these agreements fit in a category Doni Bloomfield has called increasing risk. Even if they don't raise rivals' costs directly, raising rivals' risk can also impose competitive harm.[174]

The problem is more complicated than just rent-seeking or a bad-faith grab for market power, though some of our examples fit easily in that category. Rather, many of the examples we discuss reflect genuine areas of doctrinal or regulatory uncertainty. Resolving that uncertainty can sometimes be desirable for parties even if it means agreeing to an outcome they don't want. While we think the oft-repeated claim that businesses just want certainty in a legal environment[175] is significantly overstated,[176] there is value to knowing what the rules are. That is particularly true if the settlement

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172 *See supra* notes 14-15 and accompanying discussion.

173 *See supra* notes 94-101 and accompanying discussion.

174 Doni Bloomfield, *Competition and Risk*, 86 ANTITRUST L.J. 63 (2024).

175 *See generally* Robert D. Cooter & Daniel L. Rubinfeld, *An Economic Analysis of Legal Disputes and Their Resolution*, 27 J. ECON. LITERATURE 1067 (1989) (reviewing and synthesizing the law and economics literature on settlement and noting the prevalence of this argument).

176 Companies that say this often end up very upset if they don't get the rule they want, and spend a great deal of time and effort trying to influence rules and court decisions, something that wouldn't be true if certainty was all that mattered.

looks like a true compromise, where what the acquiescing party gets is less than what it should have been entitled to under the law but significantly better than what it would have faced if the case went badly. One of us has argued (acting as counsel on behalf of Google) that the proposed Google Books settlement fell into that category.[177] While Google Book Search should have been – and ultimately was – declared a fair use, the result wasn't foreordained, and losing the lawsuit would have meant not only dismantling the program but potentially tens of billions of dollars in statutory damages.[178]

While that is an extreme case, many settling parties can point to at least some uncertainty to justify their decision. Even a killer piece of prior art will invalidate a patent only if the courts acknowledge its power, and some courts are loath to grant summary judgment in patent cases as an ideological matter.[179] So paying a small amount to avoid even a small risk can seem like a logical business decision. Put another way, the relevance of anticompetitive *intent* varies throughout our examples. What unites our examples is that the compromise leads to anticompetitive effects. But whether the parties explicitly envisioned an effect on competition is not always clear. Anticompetitive motives are clearly present in examples like reverse payment

177 *See* Lemley, *supra* note 32.

178 *Id*.

179 *See, e.g.*, *Summary Judgment Grant Rates Are Lower in the Eastern District of Texas*, https://www.rpxcorp.com/data-byte/summary-judgment-grant-rates-are-lower-in-the-eastern-district-of-texas/. For discussions of how courts in the Eastern and Western Districts of Texas seek to attract patent cases by giving more favorable procedural rules to plaintiffs, see Daniel M. Klerman & Greg Reilly, *Forum Selling*, 89 S. Cal. L. Rev. 241 (2016); J. Jonas Anderson & Paul R. Gugliuzza, *Federal Judge Seeks Patent Cases*, 71 Duke L.J. 419-497 (2021).

settlements or manipulated rate-setting proceedings. But YouTube's adoption of content ID or even the Google Book settlement may not have been motivated by a desire to hurt rivals, even if that's ultimately what happened (or would have happened).

Even the examples where there is likely some anticompetitive motive vary in their severity. The acquiescing party's calculation may be influenced by the chance to disadvantage its competitors even if it might have settled the case anyway. Hurting competitors might be an added benefit to a settlement that would have happened on the same terms without that harm. But it might also affect the price of the settlement. A company that wouldn't pay to license a worthless patent might do so if doing so meant that its smaller competitors would have to pay as well. A company might agree to an above-market royalty in a copyright office proceeding if it knew that doing so would cost its competitors even more or deter entry by disruptive challengers altogether.

The anticompetitive effects of acquiescence may also change other terms in the settlement. Companies might agree to add terms that benefit plaintiffs but have no value to defendants other than to harm competition. Burying a killer prior art reference in a patent case falls into this category, for instance. So does agreeing to try to suppress a court decision that went in your favor.

Worse (and harder to catch), companies might expressly agree to a settlement but include a secret side deal to benefit the acquiescing party. Pharmaceutical pay-for-delay settlements often take this form, particularly after the more overt ones started attracting antitrust scrutiny. A patentee and a generic nominally agree on an entry

date, but the patentee gives the generic something on the side to replace the money it can no longer pay without antitrust risk. That added benefit might be agreeing not to compete with the generic during the valuable 180-day period using an "authorized generic,"[180] or it might involve the patentee hiring the generic at an outrageous fee in a seemingly unrelated case.[181] Similarly, patent owners who want to point to an artificially high royalty rate may sign a deal with a licensee that sets a high nominal rate but then "calculate" that royalty to involve only a tiny actual payment.[182] And of course the effort to vacate existing court decisions as part of a settlement is itself an effort to conceal the case altogether.[183] These provisions seem particularly problematic, both because standing alone it is hard to see any purpose for them except to hurt competitors, and because the very fact that they are secret means that any later use of the settlement in court will be misleading.

The upshot of all of this is that anticompetitive acquiescence is complicated. Parties may have good reasons to settle, but they may also use those settlements to explicitly or implicitly harm competition. This complexity is one of the main reasons that many examples of anticompetitive acquiescence seem to evade scrutiny from scholars, judges, and policymakers. As noted above, judges and regulators tend to like

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180 *See supra* notes 52-59 and accompanying discussion.

181 *See* In re Cipro Cases I and II, 61 Cal. 4th 116 (2015) (rejecting purported justification in which a generic agreed to provide "marketing services" for the branded drug, even though generic companies don't generally engage in drug marketing and even though the branded drug had been marketed successfully for years); see also Michael A. Carrier, *Payment After* Actavis, 100 IOWA L. REV. 7, 22-24 (2014) (discussing additional cases).

182 Lee & Lemley, *supra* note 114, at 281-303 (surveying cases).

183 Bock, *supra* note 49.

settlements.[184] The existence of a seemingly good faith agreement can obfuscate broader harms by suggesting that the settlement will only affect the parties, as well as spare valuable judicial resources.[185] It is only in rare cases—such as the Google Books settlement—that a decisionmaker will explicitly grapple with the potential anticompetitive effects of a settlement agreement.[186]

This problem is partially attributable to ways in which law conceptualizes the normative value of settlement, and agreement generally. Many of the areas of law implicated in the examples described in Part I—in particular, IP and antitrust—have difficulty grappling with the problems of anticompetitive settlement within their four corners.

IP, which rests on the use of property entitlements to incentivize the production of socially valuable new inventions or creations, explicitly incentivizes parties to bargain and reach agreement.[187] A free market bargain between two parties—for example, over the licensing of copyright material for the training of generative AI—would, from the perspective of copyright's economic justifications, seem to be positive; the copyright owner receives compensation and the licensor is able to use the

[184] *See supra* notes 168-169 and accompanying text.

[185] As we discuss this below, this obfuscation is even worse when the settlement is hidden from public eye, such as through the use of arbitration agreements. See *infra* note 205.

[186] *See supra* note 27 and accompanying text (discussing rejection of Google Books settlement).

[187] WILLIAM M. LANDES & RICHARD POSNER, THE ECONOMIC STRUCTURE OF INTELLECTUAL PROPERTY LAW 13-14, 20-21 (2003)

copyrighted material.[188] Moreover, IP tends to affect competition in its own right. Though an IP entitlement does not necessarily confer market power in the conventional sense, it does provide a right to exclude competitors and assert control over pricing.[189] The law tolerates, and in fact encourages this, in the service of IP's innovation-incentive goal.[190] It is important but challenging to distinguish the permissible competitive effect of enforcing an IP right from the anticompetitive effect of settling an IP dispute.[191]

Even antitrust, which is largely devoted to scrutinizing problematic bargains between parties, cannot fully account for all the problems of anticompetitive acquiescence. As we discuss in the next Part, some of the practices we described in Part I should be considered illegal under antitrust law.[192] But others may serve legitimate purposes as well as illegitimate ones. An agreement that confers some competitive advantage on the agreeing parties—for example, YouTube content ID-driven licensing arrangements—does not categorically offend the antitrust law. After all, most agreements between arms-length buyers and sellers are designed to benefit the parties. Without some evidence of problematic conduct, such as collusion or tying

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188 *See, e.g.*, United States Department of Justice and Federal Trade Commission, Antitrust Guidelines for the Licensing of Intellectual Property (2017) (noting that IP licensing is generally procompetitive).

189 HOVENKAMP et al., *supra* note 56, ch. 4.

190 *Id*.

191 *Cf.* Noti-Victor and Tang, *supra* note 99 (examining difficulties of assessing market power in IP-intensive industries).

192 *See infra* Part III.C.

arrangements, and a reduction in competition, antitrust law will generally not penalize business decisions just because they provide a competitive advantage. .[193]

This suggests that the problem of anticompetitive acquiescence requires creative solutions that are attentive to the benefits of settlement but also to its potential harms to competition, innovation, and social welfare writ large. In Part III, we offer some proposals.

III. Reducing the Harm from Anticompetitive Acquiescence

If the goal is to reduce the risk of anticompetitive acquiescence while still allowing breathing room for litigants and companies to resolve cases and legislative battles, we can't simply prevent settlements[194] altogether. Many, perhaps most, settlements are good, or at least competitively neutral. Rather, we think the best approach is three-pronged: (1) create procedural mechanisms to identify problematic acquiescence and head it off, (2) reduce the impact of acquiescence on the law applied to third parties, and (3) ban certain narrow classes of behavior that serve no social purpose and threaten great harm.

A. Procedural Mechanisms

[193] 1 HOVENKAMP et al., *supra* note 56, ch. 1.

[194] Recall that we define "settlement" broadly, to include both the resolution of legal claims, as well as the other kinds of acquiescence we described in Part I, such as consenting to regulation or agreeing to licensing demands premised on unclear legal entitlements.

The first step in dealing with anticompetitive acquiescence is to identify the problem. We have set out several categories of cases in which acquiescence can be anticompetitive, but we are by no means confident that we've identified all or even most of the potential instances in which companies can abuse the process. And even in the categories we have identified, distinguishing legitimate settlements from those partially or entirely motivated by anticompetitive animus can be challenging.

But courts won't be able to distinguish good from bad behavior unless they try and unless they have the proper information. Courts must begin by scrutinizing settlements for anticompetitive effect. This needn't be much of a burden in most cases. It is settlements between actual and potential competitors and settlements in IP cases that present the most significant competitive risks. Right now, courts often have no role at all in reviewing a settlement. And even when they do,[195] it is common for busy judges to simply approve whatever the parties put in front of them. That's a problem in the sorts of cases we identify in this paper. Courts and regulatory adjudicators shouldn't accept a deal in those cases simply because the parties sign on to it if the deal is likely to affect non-parties and the public interest. They should scrutinize the deal for anticompetitive risks.

Fortunately, there are several useful models to work from. Courts already scrutinize class action settlements for fairness to absent class members, for instance.[196] That isn't simply a rubber stamp; courts can and do reject settlements they think are

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[195] FEDERAL RULES OF CIVIL PROCEDURE, R. 41(a)(2) (noting some limited scenarios when a judge might review the terms of a requested dismissal by the plaintiff).

[196] *Id*. R. 23(e).

insufficiently protective of the class.[197] As the Google Books case illustrated, this scrutiny can consider the broader competition problem that the settlement might create.[198] Similarly, courts evaluate antitrust and other regulatory consent decrees to ensure they are consonant with the public interest.[199] And some courts have rejected settlements of antitrust cases that seem to entrench rather than undermine the monopoly.[200]

This model can be applied beyond class action settlements and consent decrees. The key is for courts to consider not just the interests of the settling parties but the interests of absent parties and the public as a whole. If after initial review a judge sees potential risks, they could open the settlement for comment by interested parties. Regulatory agencies have an even easier path to this sort of scrutiny, because they are used to engaging in notice-and-comment rulemaking that permits third parties to share their views.[201] The key is that both courts and agencies must affirmative consider the interests of others besides the parties.

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197 *See, e.g.*, In re: HIGH TECH EMPLOYEE ANTITRUST LITIGATION, Order Denying Plaintiffs' Motion for Preliminary Approval of Settlements (N.D. Cal., August 8, 2014) (denying settlement of no-poach class action litigation, finding the settlement insufficiently protected the class members and penalized the defendants).

198 *See supra* notes 29-31and accompanying text.

199 See, e.g., United States v. Microsoft Corp., 159 F.R.D. 318 (D.D.C.), rev'd, 56 F.3d 1448 (D.C. Cir. 1995) (rejecting antitrust consent decree against Microsoft because it didn't deal with important competition issues).

200 *See, e.g.*, Snow v. Align Tech., Inc., 2025 WL 635341 (N.D. Cal. Feb. 27, 2025) (rejecting "coupon" settlement for antitrust class action because encouraging consumers to buy from a monopolist by giving them coupons entrenches rather than corrects the effects of monopolization).

201 5 U.S. Code § 553(c).

Courts and agencies should also be more willing to require disclosure of information in settlement agreements.[202] Many of our examples of anticompetitive acquiescence depend on the secrecy of the deal or of information in it. Patent settlements work because the invalidating prior art is suppressed. Patent and copyright royalty deals and pay-for-delay pharmaceutical settlements often work because the parties can hide a secret side deal for more favorable treatment. And collusive vacatur works by hiding the very fact (and precedential value) of the court ruling itself. Bringing those provisions into the daylight may make some anticompetitive agreements unattractive. (That's a good thing.) For others it may reduce the harm from the agreement by making third parties aware of the very thing one of the settling parties wanted to hide.

While there is a long-standing assumption that settlements are confidential, that need not be the case.[203] The Federal Trade Commission requires pharmaceutical companies to disclose their pay-for-delay settlements so it can scrutinize them for anticompetitive effect.[204] Doing so has reduced the incidence of anticompetitive payments in those agreements. Class action settlements must be public.[205] And even

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202 See generally David Luban, Settlements and the Erosion of the Public Realm, 83 Geo. L.J. 2619, 2657 (1995) (critiquing settlement secrecy).

203 See Laurie Kratky Dore, *Secrecy by Consent: The Use and Limits of Confidentiality in the Pursuit of Settlement*, 74 NOTRE DAME L. REV. 283, 390-402 (1999) (examining courts' discretion to reveal the contents of confidential settlements).

204 Federal Trade Commission, *Pay for Delay*, https://www.ftc.gov/news-events/topics/competition-enforcement/pay-delay

205 FEDERAL RULES OF CIVIL PROCEDURE, R. 23(e). One related problem is that arbitration agreements can contain class action waivers, which can funnel class action claims into confidential arbitration (with confidential settlements). Many others have critiqued this state of

confidential settlement terms are often required to be disclosed in later litigation because they affect royalty rates in that litigation.[206] And others have proposed making settlement information public more generally.[207] Even if some information in a settlement is truly a trade secret, most of it isn't, and courts can and regularly do deal with confidential information in litigation by filing redacted versions of briefs and opinions. They can do the same here. And they should certainly prevent agreements that require the burying of evidence like prior art that invalidates a patent. It is hard to see any legitimate interest in keeping that information from the world.

Federal courts are bound by article III to end a case if there is no longer a controversy between the parties, though they still have substantial power to scrutinize and publicize the terms of that settlement. But regulatory agencies and state courts are not bound by article III. They can and should go further in appropriate cases, deciding matters that are fully briefed and presented to them even after the parties settle if proceeding to decision would give third parties valuable information. A number of state courts already do this when an opinion is decided.[208] The Patent Trial and Appeal

affairs and called for legislative change. Mark A. Lemley, Christopher R. Leslie, *Antitrust Arbitration and Merger Approval*, 110 NW. U. L. REV. 1, 4 (2015).

206 *See, e.g.*, Mark A. Lemley & Carl Shapiro, *A Simple Approach to Setting Reasonable Royalties for Standard-Essential Patents*, 28 BERKELEY TECH. L.J. 1135, 1141 (2013) (discussing disclosure a best practice in the context of standard-essential patent licensing).

207 *See, e.g.*, Mark A. Lemley & Nathan Myhrvold, *How to Make a Patent Market*, 36 HOFSTRA L. REV. 257 (2007) (arguing for disclosure of patent license information in order to facilitate a working market for patents).

208 *See, e.g.*, Cadence Design Sys., Inc. v. Avant! Corp., 29 Cal. 4th 215, 218 n.3 (2002) ("When parties settle a case after oral argument, we may nonetheless exercise our discretion to issue an opinion 'to resolve the legal issues raised, which are of continuing public interest and are likely to recur.'").

Board has done the same.[209] A board or state court that has already written an opinion setting a rate or invalidating a patent can and should publish that opinion in appropriate circumstances. The opinion itself is a public good, and the parties shouldn't be able to deprive the public of the benefit of it.

To be sure, there are many settlements that are unlikely to pose any competitive risk. Lawsuits between individuals, and most ordinary contract or tort lawsuits between an individual and a company, don't tend to pose the sorts of risks we identify here. We could reduce the burden on courts by requiring disclosure and approval only of settlements in certain types of cases, such as IP and antitrust disputes, or to settlements of other disputes between companies that are actual or potential competitors. Even if we weren't willing to require advance court approval of settlements in that subset of cases, a requirement to disclose the settlement to antitrust agencies or to publish it so antitrust lawyers could evaluate it would help identify (and hopefully deter) anticompetitive deals.

B. Reducing the Effects of Agreements on Subsequent Decisions

A second important step to reduce the anticompetitive effects of acquiescence involves not trying to reduce or publicize the agreements themselves, but to reduce the effects those agreements have. As we noted in Part I, a number of the most problematic

[209] See, e.g., Koninklijke KPN N.V. v. Vidal, 2024 WL 4929541, at *2 (Fed. Cir. Dec. 2, 2024) (allowing the Patent and Trademark Office to intervene on appeal to defend the decision of the Patent Trial and Appeal Board after the prevailing party settled and dropped its opposition to the appeal).

examples of anticompetitive acquiescence occur not because of the agreements themselves, but because courts and agencies use the terms of those agreements to set the rules for subsequent cases and even to change the law altogether. When patent litigants agree to settle a case with a nominal royalty rate (and perhaps a secret side deal), that royalty rate becomes the benchmark that applies to every subsequent case involving the same patent. When AI companies agree to pay to license content they can legally use for free (or when Google tried to do so in the Book Search settlement), doing so creates a licensing market for those uses that potentially makes everyone else need to pay expensive licenses for what would otherwise be lawful fair uses.[210] When incumbents agreed to double-pay for streaming royalties, it set a benchmark for subsequent Copyright Royalty Board decisions and ultimately double-payment got entrenched in the Music Modernization Act.

We think courts should eliminate or at the very least reduce the external effects of settlements on subsequent cases. Unlike court judgments, settlements are private agreements between two parties. They haven't been vetted by a court, and at best they reflect what is in the interests of those parties. At worst, as in several examples we give in Part I, they may affirmatively be designed to disadvantage outside parties by moving the law or the royalty rate in a way that hurts those outsiders. Courts should confine market effect analyses to those that result from actual adjudication where possible. Even if it isn't possible, courts and regulators should be extremely careful to weed out

[210] Am. Geophysical Union v. Texaco Inc., 60 F.3d 913, 930-31 (2d Cir. 1995) (finding that previously common photocopying of scientific journal articles was unlawful because there was now a group – the Copyright Clearance Center – demanding payments for photocopies).

settlements that result from anticompetitive acquiescence. They should not, for instance, accept unsupported recitals or representations in agreements about standard royalty rates, as the Federal Circuit did in *EcoFactor v. Google*.[211] The CRB offers a more positive example. The Board has apparently learned the lessons of the early Webcaster rate-setting proceedings and now heavily scrutinizes the licensing deals presented as benchmark evidence.[212] Though many of these benchmarks are still imperfect, parties seem to now understand that the CRB will not tolerate explicit attempts to game the rate-setting process through engineered agreements.

How might a court or regulator better exercise their discretion and choose not to weigh existing settlements when developing the law? The generative AI fair use cases, described above, are illustrative, and, indeed, are likely the next major battleground for this question. Despite the frequent invocation that fair use's fourth factor must account for existing licensing markets,[213] this is not a foregone conclusion. In fact, numerous commentators (including one of us) has criticized this reasoning as circular: if a use becomes less fair based on the existence of actual licensing arrangements, then fair use can no longer be used to favor normatively desirable uses; rather, it becomes entirely tethered to whether or not transaction costs preclude licensing.[214] The Second Circuit in

[211] EcoFactor, Inc. v. Google LLC, 104 F.4th 243 (Fed. Cir.), reh'g en banc granted, opinion vacated, 115 F.4th 1380 (Fed. Cir. 2024). The case is on en banc review, and hopefully the full court will discount those representations.

[212] *See* Victor, *supra* note 97 (discussing benchmarks used in recent CRB rate setting proceedings such as Web IV and Phonorecords III). .

[213] *See* supra note 15 and accompanying discussion.

[214] Lemley, *supra* note 15190; Loren, *supra* note 15, at, 38;Gibson, *supra* note 15 at 948.

particular has, at times, seemed to accept this critique, noting, for example, that a "copyright holder cannot prevent others from entering fair use markets merely 'by developing or licensing a market for parody, news reporting, educational or other transformative uses of its own creative work.'"[215]

The ultimate *Google Books* fair use decision, which came after the rejection of the settlement agreement, is illustrative. Though the rejected settlement would seem to have suggested that a licensing market for e-book search was feasible (even if not yet existent),[216] the Second Circuit ultimately found that Google's activities were fair use, noting that the existence of actual or hypothetical licensing markets did not disturb this finding.[217] Essentially, the court found that the Google Books search tool was both socially valuable and fundamentally different from copyright owners' traditional distribution and licensing uses.[218] Such a transformative use was simply not a one that should require compensation, even if licensors were willing to pay.

The courts can and should do something similar in the generative AI fair use cases. These cases ultimately come down to an issue similar to the one presented in *Google Books:* whether utilizing copyrighted works in order to generate information

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[215] Bill Graham Archives v. Dorling Kindersley Ltd., 448 F.3d 605, 614–15 (2d Cir. 2006); see also Authors Guild, Inc. v. HathiTrust, 755 F.3d 87, 99 (2d Cir. 2014) ("[U]nder Factor Four, any economic 'harm' caused by transformative uses does not count because such uses, by definition, do not serve as substitutes for the original work.").

[216] *See supra* notes 25-26 (discussing proposed licensing structure in the settlement agreement).

[217] Authors Guild v. Google, Inc., 804 F.3d 202, 226 (2d Cir. 2015)

[218] *Id*. at 214 ("The more the appropriator is using the copied material for new, transformative purposes, the more it serves copyright's goal of enriching public knowledge and the less likely it is that the appropriation will serve as a substitute for the original"); *see also* Victor, *supra* note 23, at 1929.

(rather than reproduce protectable expression) is transformative and thus weighs in favor of fair use.[219] Relying on *Google Books* and related cases, the courts could find that even if certain AI companies are willing to license training data from copyright owners, that does not mean they had to. If the use is deemed to be highly transformative, then any existing licensing deals should have little bearing on the ultimate fair use finding. And such a fair use finding would create a global precedent allowing generative AI companies to use training data for free, reducing (but not eliminating) the incentive for AI companies to enter into licensing deals in order to raise costs for their smaller rivals.[220]

C. Ensuring that Regulation Protects Competition

Done properly, regulation can work hand-in-hand with antitrust law to promote competition and market efficiency while avoiding negative externalities. But as we saw in the last part, regulation is too often used to pull up the ladder, imposing costs on new entrants in order to privilege incumbents.

The simplest solution to the problem of regulatory capture – enact good regulations, not bad ones – is also the hardest to implement in practice. One of us has

[219] *See* Mark A. Lemley & Bryan Casey, *Fair Learning*, 99 TEX. L. REV. 743, 765 (2021); Matthew Sag, *Fairness and Fair Use in Generative AI*, 92 FORDHAM L. REV. 1887, 1908 (2024); Matthew Sag, *Copyright Safety for Generative AI*, 61 HOUS. L. REV. 295, 305 (2023)

[220] *See supra* Part I.A.1.

written elsewhere about the risks of regulation.[221] Nonetheless, we think there are things governments can do to reduce the risk.[222]

First, lawmakers and regulators need to be aware of the problem. We should be quite concerned when incumbents ask to be regulated. That doesn't mean we shouldn't regulate them; there may be good reasons to do so. But we should know that they are trying to benefit themselves at the expense of competitors, and we should vet the regulations accordingly. In particular, regulation can be designed narrowly to ensure that non-similarly-situated parties are not treated the same. For example, IRS PLR system could be improved by better ensuring that only recipient of the PLR is bound by the decision (something that is supposed to happen anyway), and by making it harder for taxpayers to know in advance what a PLR decision will be, curbing the risk of strategic behavior.223 And regulation can be adopted through consultation with multiple industry and civil society stakeholders, to better ensure that policy goals are clearly defined and responsibly implemented.224 Second, legislators and agencies should proceed with caution when they regulate new technology. Some technologies—like vaping devices marketed to teenagers—may require urgent action to prevent irreversible harms. And some technologies may become harder to regulate once the interest groups backing them

221 Lemley & Wansley, *supra* note __; Lemley & McKenna, *Unfair Disruption*, *supra* note __.

222 Portions of this section are adapted from Lemley & Wansley, *supra* note __.

223 See Marks, *supra* note __, at 720 (proposing these and other modifications to the PLR system).

224 Cf. Orly Lobel, *The Renew Deal: The Fall of Regulation and the Rise of Governance in Contemporary Legal Thought*, 89 MINN. L. REV. 342, 344, 380 (2004); Jody Freeman, *Collaborative Governance in the Administrative State*, 45 UCLA L. REV. 1, 2 (1997); Margot E. Kaminski, *Binary Governance: Lessons from the GDPR's Approach to Algorithmic Accountability*, 92 S. CAL. L. REV. 1529 (2019).

become entrenched.[225] But regulating too early in the history of a new technology is often counterproductive. We should be particularly aware of the risk that early regulation shaping how products can and can't be made will be driven by profile and recency bias.226 Regulators should take care not to overreact to AI chatbots that sometimes hallucinate or self-driving cars that are involved in a small number of serious crashes. It can take time to observe the net impact that a new technology will have on health, safety, the environment, economic growth, democracy, or other social values. Regulation that treats new technologies more harshly than existing ones, conscious or not, is a key means of coopting disruption.[227] Similarly, we should be conscious of the burden regulatory compliance imposes on startups and the fact that costly regulation disproportionately

225 *See* Matthew T. Wansley, *Regulation of Emerging Risks*, 69 VAND. L. REV. 401, 414-15 (2016).

226 See, e.g., Noti-Victor, *supra* note 79, at 1839 (discussing the Audio Home Recording Act, which imposed a levy on early digital recording technology, as an example of recency-bias-driven regulation that ultimately failed to actually achieve its goals).

227 It is also likely to be ineffective. Several examples from recent history involve early legislation that subsequent technological changes rendered irrelevant. *See* Semiconductor Chip Protection Act of 1984, Pub. L. 98-620, § 302, 98 Stat. 3347 (codified as amended at 17 U.S.C. §§ 901-914) (entirely new IP right to protect semiconductor "mask works" that was only ever used twice, because the way we make semiconductors changed); R. Jason Richards, *The Utah Digital Signature Act as "Model" Legislation: A Critical Analysis*, 17 J. MARSHALL J. COMPUT. & INFO. L. 873, 876 (1999) (discussing weakness of Utah Digital Signature Act of 1995 as "model" legislation for electronic signature technology); Jane K. Winn, *The Emperor's New Clothes: The Shocking Truth About Digital Signatures and Internet Commerce*, 37 IDAHO L. REV. 353, 356-57 (2001) (explaining how laws written in 1990s to regulate electronic commerce rapidly became obsolete because they didn't anticipate how people would behave); Ryan Calo, *Artificial Intelligence Policy: A Primer and Roadmap*, 51 U.C. DAVIS L. REV. 399, 428 (2017) ("[T]he Electronic Communications Privacy Act ('ECPA'), passed in 1986, interacts poorly with a post Internet environment in part because of ECPA's assumptions about how electronic communications would work.").

favors incumbents. There is a good case for exempting small companies from certain regulations for a limited period to enable them to get their footing.[228]

Finally, we should disfavor regulations that limit market entry. Those regulations most directly prevent new startups from competing and disrupting the market, and they have almost always turned out to be a bad idea. And companies quite frequently seek to impose such rules. Hotels sought to ban Airbnb;[229] taxi companies sought to require Lyft and Uber to charge more money than they do.[230] Fantasy sports companies are trying to ban their competitors.[231] AI companies are discussing proposals to ban or restrict open-source software in AI companies.[232] The list goes on. Even if there is reason to regulate a new technology, there is rarely a good reason to ban it—and almost never at the behest of a competitor who stands to benefit from eliminating competition.

D. Banning the Worst Abuses

228 *See* JEFF KOSSEFF, THE TWENTY-SIX WORDS THAT CREATED THE INTERNET 157 (2019); Anupam Chander, *How Law Made Silicon Valley*, 63 EMORY L.J. 639, 643 (2014).

229 Katie Benner, *Inside the Hotel Industry's Plan to Combat Airbnb*, N.Y. TIMES (Apr. 16, 2017), https://www.nytimes.com/2017/04/16/technology/inside-the-hotel-industrys-plan-to-combat-airbnb.html.

230 Roger Lowenstein, *Uber, Lyft and the Hard Economics of Taxi Cab Medallions*, WASH. POST (May 24, 2019), https://www.washingtonpost.com/business/economy/uber-lyft-and-the-hard-economics-of-taxi-cab-medallions/2019/05/24/cf1b56f4-7cda-11e9-a5b3-34f3edf1351e_story.html.

231 Sam McQuillan, *Daily Fantasy Sports Battle Over Pick'Em Games is LSR's Top Story of 2023*, LSR, https://www.legalsportsreport.com/157511/2023-daily-fantasy-sports-battle-over-pickem-games-lsr-story-of-the-year (last updated Jan. 5, 2024); Sam McQuillan, *Sports Betting Lobbyist Asked for Wyoming Inquiry into Pick'Em Fantasy Sports*, LSR, https://www.legalsportsreport.com/145759/sports-betting-lobbyist-asked-for-wyoming-inquiry-into-fantasy-sports (last updated Oct. 26, 2023).

232 *See* Nelson, *supra* note 144.

Finally, we think there are certain classes of agreements that pose a great risk of anticompetitive acquiescence and serve little or no social purpose. We should ban them altogether. Pharmaceutical reverse payments, agreements among competitors not to compete, collusive vacatur settlements, and buying your competitor to make their antitrust suit against you go away all fall in this category. None serve a useful social purpose. Pharmaceutical companies have tried for decades to justify paying their competitors to drop patent challenges and stay off the market, and have yet to come up with a convincing justification.[233] The justifications are similarly weak for agreements among competitors not to compete over things like bidding for ad space.[234] And they are even weaker for collusive vacatur, which serves only the interest of one party in erasing legal rulings it doesn't like.

Antitrust law offers an existing way to target reverse payments and agreements not to compete. Unfortunately, courts are not always sympathetic to those challenges even when the law is clear. The Second Circuit, for instance, wrongly rejected the FTC's challenge to a blatantly anticompetitive agreement in the *800 Contacts* case.[235] And while the Supreme Court overturned appellate courts and imposed a plaintiff-friendly modified rule of reason on reverse payments,[236] some courts still resist actually applying the law.[237] While it shouldn't require new legislation to get courts to enforce

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233 1 HOVENKAMP et al., *supra* note 56, ch. 16

234 2 HOVENKAMP et al., *supra* note 56, ch. 33.

235 1-800 Contacts, Inc. v. Fed. Trade Comm'n, 1 F.4th 102, 109 (2d Cir. 2021)

236 F.T.C. v. Actavis, Inc., 570 U.S. 136 (2013).

237 *See* Hovenkamp et al., *supra* note __, ch. 16 (collecting cases).

existing law, either legislation or a definitive Supreme Court ruling might help prompt judges too enamored of settlements to recognize that not all settlements are legal. Courts and antitrust agencies also have the power to reject mergers that eliminate a competitor seeking to enforce the antitrust laws.

Courts have even more direct power over collusive vacatur. When a court has issued an opinion, it should flatly refuse to vacate that opinion at the request of settling parties. There is no question judges have the power to refuse to vacate their opinions, and they would be serving the public interest by doing so. When a court issues an opinion, that decision benefits the public, not just the parties, because it adds to the framework of the law. And it may benefit third parties more specifically by giving them res judicata or collateral estoppel rights against the party who lost the decision. Further, the best argument for judges liking settlements – that it clears their docket – has much less force once the judge has already issued an opinion.

An aggrieved party who thinks a decision is wrong can and should appeal. If they don't (or if they think they would lose the appeal), they shouldn't have the right to make the adverse decision disappear. Courts should refuse to eliminate their opinions simply because one of the parties wishes the law was different than it is. While some courts, particularly appellate courts, refuse to engage in collusive vacatur, too many judges are willing to delete court rulings just because the parties ask for it. The issue of collusive vacatur has never been presented to the Supreme Court, but the Court could just flatly ban it. Even if it doesn't, appellate courts can and should forbid the practice in their jurisdictions.

CONCLUSION

When companies win by losing, we all lose. Anticompetitive acquiescence occurs in many different industries, from generative AI to pharmaceuticals to social media to music streaming to electric cars. The early days of the Trump administration suggest the practice could become even more common.[238] And when competition is harmed in these industries, we are all worse off. By pricing out smaller competitors, hiding valuable information, or changing the law to make entry more difficult, anticompetitive acquiescence brings with it all of the harms that come with loss of competition: less innovation, higher prices, lower product quality, less consumer choice, and entrenched corporate power. We show the existence and surprising extent of the problem. We hope our solutions will improve litigation, preserve competition, and start a conversation about how the law can further the benefits of settlement without also harming competition.

[238] *See supra* notes 166-167 and accompanying discussion (noting Elon Musk's acquiescence to repeal of electric vehicle subsidies).