

Why Patent Hold-Up Does Not Violate Antitrust Law

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The views expressed herein are not purported
to reflect those of the U.S. Department of Justice.

An article with the same title (with Luke Froeb as a coauthor) is now posted on SSRN and will be published in *Texas Intellectual Property Law Journal*.

The Problem

RAND/FRAND Commitments

Owners of SEPs normally have entered into RAND/FRAND commitments with SSOs in exchange for consideration of their technologies in standards.

SEP owners have agreed to license on terms that would have been reached in *ex interim* bargaining, occurring just before the standard was adopted.

A FRAND royalty is concept, not a number; SEP owners and implementers will never propose the same royalty.

Ex Interim Bargaining

Bargaining divides the gain from reaching agreement, measured against the parties' best alternatives to the agreement.

For a technology with a good alternative, *ex interim* bargaining would have yielded a low royalty because the gain from adopting the technology was small.

For a key technology with no good alternative, *ex interim* bargaining would have yielded a high royalty because the gain from adopting the technology was large.

Patent Hold-Up

Real world bargaining over SEP royalties occurs *ex post*, after the standard is set, and even after implementers make sunk investments in the standard.

The *ex post* gain from agreement is greater than the *ex interim* gain, and when an SEP owner takes advantage of this, it engages in “patent hold-up.”

Some commentators apply the term “patent hold-up” if the SEP owner merely proposes a royalty that is later determined to exceed FRAND.

Patent Hold-Out

Although an SEP owner is obliged to license at a royalty not exceeding FRAND, an SEP implementer has no reciprocal obligation.

Bargaining over SEP royalties occurs after the inventor has fully sunk the investment in developing the technology and is completely vulnerable.

When an SEP implementer refuses to give the SEP owner a fair share (e.g., half) of the *ex interim* gain, it engages in “patent hold-out.”

Patent Ambush

A scenario sometimes alleged, but never proved, is “patent ambush,” in which an SEP owner makes a fraudulent FRAND commitment to distort technology choice.

A complete remedy for the fraud is to enforce the FRAND commitment.

Possible Solutions

Distinct Policy Domains

Policy toward invention is addressed by patent law, which manages incentives to invent and implement, and grants patent owners rights of action.

Policy toward trade and commerce is addressed by contract law, which interprets bargains, and grants private rights to enforce them.

Policy toward competition is addressed by antitrust law, which bars certain anticompetitive conduct, and grants public and private rights of action.

Patent Law

Implementers are barred from using patented technology without taking a license, and an SEP owner can seek an injunction to stop infringement.

Courts hesitate to grant injunctions when a dispute is just about money, and they cite FRAND commitments as a rationale for denying SEP injunctions.

A damages action for infringement is the only action patent law provides to an SEP owner seeking to resolve a FRAND dispute.

Contract Law

FRAND commitments are deemed contracts, and implementers are considered third-party beneficiaries with rights to enforce them.

Commentators assert that contract remedies for patent hold-up are inadequate, yet courts have set FRAND royalties in actions for breach brought by SEP implementers.

Contract remedies plainly are insufficient to protect SEP owners from patent hold-out because implementers have made no enforceable commitments.

Antitrust Law

Some commentators assert that patent hold-up violates Section 2 of the Sherman Act, and Section 2 suits alleging patent hold-up have been filed.

Commentators argue that breaching a FRAND commitment constitutes an exercise of unlawful monopoly power that harms downstream device users.

Antitrust law authorizes treble damages, and Judge Koh recently certified a class action against Qualcomm seeking to recover almost \$15 billion.

Antitrust Law Insights

Antitrust and Patent Rights

Antitrust law and patent rights were once viewed as sharply at odds, but even then, antitrust took away nothing patent law was understood to give.

Since the 1980s, antitrust law and patent rights have been understood to work in concert to protect and promote dynamic competition.

Dynamic competition is vitally important because technical progress accounts for much of our economic growth.

Antitrust and Monopoly Prices

“The mere possession of monopoly power, and the concomitant charging of monopoly prices, is not only not unlawful; it is an important element of the free-market system. The opportunity to charge monopoly prices—at least for a short period— . . . induces risk taking that produces innovation and economic growth.”

Trinko (2004)

Antitrust and Competition

“The Sherman Act . . . rests on the premise that the unrestrained interaction of competitive forces will yield the best allocation of our economic resources, the lowest prices, the highest quality and the greatest material progress, while at the same time providing an environment conducive to the preservation of our democratic political and social institutions. But even were that premise open to question, the policy unequivocally laid down by the Act is competition.”

Northern Pacific (1958)

Hold-Up Does Not Harm Competition

Mere patent hold-up does not harm a competitive process, and no court decision has found merit in an antitrust claim based on mere hold-up.

Commentators assert that hold-up causes excessive rewards to invention, but that is speculation, and patent rewards are not a concern of antitrust law.

