

**Holding the Line on Patent Holdup: Why Antitrust Enforcement Matters**  
**Commissioner Terrell McSweeney<sup>1</sup>**  
March 21, 2018

Recently, some academics and practitioners have suggested that patent holdup is a “flawed” theory without real-world evidence to back it up.<sup>2</sup> It has also been suggested that recent empirical studies “contradict” patent holdup.<sup>3</sup> I do not find these arguments compelling. The competitive risks associated with patent holdup have long been an area of bipartisan agreement – for good reason. It would be unfortunate if the antitrust agencies were to unlearn the lessons of over 15 years of scholarship and bipartisan study and question their longstanding support for combatting holdup based on vague concerns about over-deterrence.

In 2001, Tim Muris announced an initiative by the Federal Trade Commission and Department of Justice to “develop a better understanding of how to manage the issues at the intersection of competition and intellectual property law and policy.”<sup>4</sup> Then-Chairman Muris identified the standard-setting process as an important topic for further study. The antitrust agencies held a series of hearings that featured over 300 panelists and more than 100 written comments. Bt Bt4 (m)-4 (t)- 6 (h)-4 ((g)6a0 (e)46 (h)- 1 (i)-e-4 (3.9)3 ((i)-[ ( B, (t)- 0 (e)415.-4 e2 ((e)4 6 (d)]6

<sup>2</sup> See, e.g., Feb. 13, 2018 Letter to Assistant Attorney General Makan Delrahim, <https://cpip.gmu.edu/wp-content/uploads/sites/31/2018/02/Letter-to-DOJ-Supporting-Evidence-Based-Approach-to-Antitrust-Enforcement-of->

the agencies issued a joint report, “Antitrust Enforcement and Intellectual Property Rights: Promoting Innovation and Competition.”<sup>5</sup>

The agencies’ 2007 Report devoted over 20 pages to discussing the patent “holdup problem.” Numerous panelists raised the issue of patent holdup, including industry participants speaking from real-world experience.<sup>6</sup> The Report noted that this problem threatens harm to consumers both through higher prices as well as “less investment in developing and implementing standards.”<sup>7</sup> The agencies



***The Evidence on Patent Holdup***

There is ample evidence that patent holdup exists. The FTC has brought a number of enforcement actions challenging opportunistic behavior by patent holders designed to hold up implementers of a standard. Panelists at the FTC/DOJ hearings reported having experienced patent holdup.<sup>15</sup> There is also strong anecdotal support for the theory that patent holders are willing to seek considerably more than the FRAND value of their patents, consistent with the added market power conferred by inclusion within a standard. When courts have been asked to rule on the reasonableness of purported “FRAND” offers by patent holders, they have found patent holders demanding far more than that to which they were entitled – a finding consistent with holdup. Below are two recent examples:

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## *Conclusion*

The FTC's record of challenging holdup on antitrust grounds stretches back over two decades.<sup>20</sup> The Agency has brought seven significant enforcement actions across both Republican and Democratic administrations.<sup>21</sup> The good news is that the standard-setting process works well overall. These seven challenges were brought against a backdrop of hundreds of thousands of FRAND licensing negotiations. Parties successfully negotiate the vast majority of SEP licenses without involvement from the courts or antitrust agencies.

Although antitrust enforcement actions are rare, they are nonetheless important.<sup>22</sup> For example, between 1996 and 2003, the FTC brought three cases challenging deception by patent holders for failure to disclose patents reading on standards. Following these enforcement actions, this type of opportunistic behavior appears to have abated. By protecting the integrity of the standard-setting process itself, sound antitrust enforcement actually strengthens market opportunities for new technologies, thus improving the incentive for valuable innovation. The motivation for firms to engage in holdup will endure where there is opportunity. Given the importance of standard-setting to the modern economy, it is imperative that the FTC continue to take holdup seriously and not abdicate its antitrust enforcement mission in this area.

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<sup>20</sup> The Department of Justice has not brought an enforcement action related to patent holdup.

<sup>21</sup> *In re Dell*, 121 F.T.C. 616 (1996) (No. C-3658); *In re Rambus, Inc.*, No. 9302 (2002); *In re Union Oil Co. of Cal.*, No. 9305 (2003); *In re Negotiated Data Solutions LLC*, No. 051-0094 (2008); *In re Robert Bosch GmbH*, No. 121-0081 (2012); *In re Motorola Mobility*, No. 121-0120 (2013); *FTC v-0 0 6.7 (201)120bP004 Tw 8.8 0 Ta0-Tw (-)Tj 0.006 Tc -0.015 Tw*