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# Is There Hold Up, And What Role Do Ex Ante Policies Play?

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# What Is Hold Up

## Varying definitions

- FTC's Patent Standards Workshop Notice — “a demand for higher royalties or other more costly licensing terms after the standard is implemented than could have been obtained before the standard was chosen”
- FTC 2011 IP Report — enforcement of patent rights against a firm that has sunk costs in infringing activities
- Economics/competition law — some element of “guile” or intentional and deceptive conduct

# “Naked” Hold Up — Risks

- Encourage infringing activities
- Replace efficient marketplace-driven negotiations
- Under compensation of patent owners
- Diminish incentives for investment in inventive/innovation enhancing activities

# Incremental Value Test — A Flawed Notion

- Would limit value of patents in relation to “next best alternative” with no empirical analysis of potential negative effects from such an approach
  - Represents a radical transformation of patent law and incentives created by such laws
  - Would expropriate *full* value of invention
  - Ignores risks of investing in innovation-enhancing efforts
  - Would foster “reverse” hold up
  - Encourages weaker standardization
  - Would further transfer social wealth from inventors
  - Takes no account of actual licensing practices

# Is There Any Harm That Needs To Be Addressed?

- No empirical evidence of systematic harm to innovation, standards development or competition
- Contrary views expressed at FTC Workshop
- Empirical data suggests robust activities
  - Voluminous standards developed annually
  - Tremendous technical advancements; new generations, versions and enhancements of standardized solutions
  - No royalty stacking problem
  - Significant downstream entry and introduction of new and improved standardized products and services
  - Lower costs to consumers

# Voluntary Ex Ante Licensing Succeeds

- Marketplace driven ex ante licensing is prevalent
- Imposition of arbitrary prescriptive rules unwarranted
  - No evidence of systemic dysfunction
  - No evidence that claimed benefits outweigh societal loss from diminished competition
  - No need to incur potential legal costs with respect to collective ex ante conduct

# Protection Against Real Hold Up

- Marketplace constraints avoid real hold up — incentives to monetize IPR leads to licensing agreements; repeat nature of standardization limits bad acts; etc.
- Procedural safeguards maintain balance of interests among stakeholders
- Bad faith, deceitful or intentional hold up can be addressed under antitrust, patent and common laws based on actual effects and not under prescriptive rules

# Conclusion

- No consensus of hold up
- No evidence of any systemic failure or even diminished success of standardization
- Be careful what you ask for

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