

Jay P. Kesan, Ph.D., J.D.

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Mr. Patrick J. Roach, *standardsproject@ftc.gov*
Federal Trade Commission
600 Pennsylvania Avenue, NW, Rm. NJ-6264
Washington, DC 20580

Subject Category: Request for Comments and Announcement of Workshop on Standard-Setting Issues, Project No. P111204

Dear Mr. Roach,

I am pleased to provide a comment in response to your Request for Comments and Announcement of Workshop on Standard-Setting Issues, Project No. P111204.

I am writing as a scholar and commentator with a significant interest in standard-setting issues and standard-setting organizations.

I appreciate your interest in the topic of patent “hold-up” and the commitment to license users of a standard on reasonable and non-discriminatory (“RAND”) terms.

Patent “hold-up” refers to a situation where a patentee/firm refuses to license their technology and attempts to use this refusal as a threat to seek higher (“supra-normal”) royalty payments. One of the key rationales for RAND is to mitigate patent “hold-up” so that the refusal to license or threat of refusal is not available anymore and is taken away as a bargaining option from the patentee. This refusal to license is instead replaced by a commitment to license the technology at issue on reasonable and non-discriminatory (RAND) terms.

The term patent “hold-up” has, however, taken hold and is employed even in situations where there is no hold-up. It is important to not conflate two distinctly different scenarios. One, where there is a genuine threat of a refusal to license, i.e., patent hold-up, and a second scenario where there is no refusal to license, but there is a disagreement about what the reasonable royalty rate should be for a particular technology.

In the first scenario, we do have strategic behavior that is a concern, but in the second scenario, we are faced with a typical intellectual property dispute concerning technology valuation and what the appropriate royalty rate should be in a particular, factually-laden, technology context. In the first scenario, there is a regulatory concern that needs to be addressed with a private SSO policy or public

solution. In the second scenario, these royalty disputes among technology companies are best resolved with additional information, evidence, and perhaps by resorting to the court system.

Our federal courts are well-equipped to deal with royalty rate disputes in virtually every significant patent dispute, and there is a rich body of common law jurisprudence to help federal judges resolve such disputes with the assistance of expert testimony.

In fact, there is little or no empirical evidence indicating that there is a significant problem with patent “hold-up” especially nowadays when there is wide-spread resort to RAND licensing policies as a default rule among SSOs.

In short, concerns about patent “hold-up” and the resultant inability to realize a standard should not be used as a label justifying regulation of run-of-the mill commercial disputes about reasonable royalty rates.

Best regards,

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Jay P. Kesan, Ph.D., J.D.