

February 13, 2018

Assistant Attorney General Makan Delrahim
Department of Justice Antitrust Division
950 Pennsylvania Ave. NW
Washington, DC 20530-0001

Dear Assistant Attorney General Delrahim,

As judges, former judges and government officials, legal academics and economists who are experts in antitrust and intellectual property law, we write to express our support for your recent announcement that the Antitrust Division of the Department of Justice will adopt an evidence-based approach in applying antitrust law equally to both innovators who develop and implementers who use technological standards in the innovation industries.

We disagree with the letter recently submitted to you on January 24, 2018 by other parties who expressed their misgivings with your announcement of your plan to return to this sound antitrust policy. Unfortunately, their January 24 letter perpetuates the long-standing misunderstanding held by some academics, policy activists, and companies, who baldly assert that one-sided “patent holdup” is a real-world problem in the high-tech industries. This claim rests entirely on questionable models that predict that opportunistic behavior in patent licensing transactions will result in higher consumer prices. These predictions are inconsistent with actual market data in any high-tech industry.

It bears emphasizing that no empirical study has demonstrated that a patent-owner’s request for injunctive relief after a finding of a defendant’s infringement of its property rights has ever resulted either in consumer harm or in slowing down the pace of technological innovation. Given the well understood role that innovation plays in facilitating economic growth and well-being, a heavy burden of proof rests on those who insist on the centrality of “patent holdup” to offer some tangible support for that view, which they have ultimately failed to supply in the decade or more since that theory was first propounded. Given the contrary conclusions in economic studies of the past decade, there is no sound empirical basis for claims of a systematic problem of opportunistic “patent holdup” by owners of patents on technological standards.

Several empirical studies demonstrate that the observed pattern in high-tech industries, especially in the smartphone industry, is one of constant lower quality-adjusted prices, increased entry and competition, and higher performance standards. These robust findings all contradict the testable implications of “patent holdup” theory. The best explanation for this disconnect between the flawed “patent holdup” theory and overwhelming weight of the evidence lies in the institutional features that surround industry licensing practices. These practices include bilateral licensing negotiations, and the reputation effects in long-term standards activities. Both support a feed-back mechanism that creates a system of natural checks and balances in the setting of royalty rates. The simplistic models of “patent holdup” ignore all these moderating effects.

Of even greater concern are the likely negative social welfare consequences of prior antitrust policies implemented based upon nothing more than the purely theoretical concern about opportunistic “patent holdup” behavior by owners of patented innovations incorporated

into technological standards. For example, those policies have resulted in demands to set royalty rates for technologies incorporated into standards in the smartphone industry according to particular components in a smartphone. This was a change to the longstanding industry practice of licensing at the end-user device level, which recognized that fundamental technologies incorporated into the cellular standards like 2G, 3G, etc., optimize the entire wireless system and network, and not just the specific chip or component of a chip inside a device.

In support, we attach an Appendix of articles identifying the numerous substantive and methodological flaws in the “patent holdup” models. We also point to rigorous empirical studies that all directly contradict the predictions of the “patent holdup” theory.

For these reasons, we welcome your announcement of a much-needed return to evidence-based policy making by antitrust authorities concerning the licensing and enforcement of patented innovations that have been committed to a technological standard. This sound program ensures balanced protection of all innovators, implementers, and consumers. We are confident that consistent application of this program will lead to a vibrant, dynamic smartphone market that depends on a complex web of standard essential patents which will continue to benefit everyone throughout the world.

Sincerely,

Jonathan Barnett
Professor of Law
USC Gould School of Law

Ronald A. Cass
Dean Emeritus,
Boston University School of Law
Former Vice-Chairman and Commissioner,
United States International Trade Commission

Richard A. Epstein
Laurence A. Tisch Professor of Law,
New York University School of Law
James Parker Hall Distinguished Service Professor of Law Emeritus,
University of Chicago Law School

The Honorable Douglas H. Ginsburg
Senior Circuit Judge,
United States Court of Appeals for the District of Columbia Circuit, and
Professor of Law,
Antonin Scalia Law School
George Mason University

Justin (Gus) Hurwitz
Assistant Professor of Law
University of Nebraska College of Law

Keith N. Hylton
William Fairfield Warren Distinguished Professor
Boston University School of Law

David J. Kappos
Former Under Secretary of Commerce and Director
United States Patent & Trademark Office

The Honorable Paul Michel
Chief Judge (Ret.),
United States Court of Appeals for the Federal Circuit

Damon C. Matteo
Course Professor, Graduate School of Economics and Management
Tsinghua University in Beijing
Chief Executive Officer,
Fulcrum Strategy

Adam Mossoff
Professor of Law
Antonin Scalia Law School
George Mason University

Kristen Osenga
Professor of Law
University of Richmond School of Law

David J. Teece
Thomas W. Tusher Professor in Global Business
Haas School of Business
University of California at Berkeley

Joshua D. Wright
University Professor,
Antonin Scalia Law School
George Mason University
Former Commissioner,
Federal Trade Commission

APPENDIX

Richard A. Epstein & Kayvan Noroozi, *Why Incentives for Patent Hold Out Threaten to Dismantle FRAND and Why It Matters*, BERKELEY TECH. L. REV. (forthcoming), <https://ssrn.com/abstract=2913105>

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