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SEPs, Antitrust, and the FTC
Remarks of Commissioner Rebecca Kelly Slaughter
*As Prepared for Delivery*¹

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Thank you for that kind introduction and thank you to ANSI and everyone who has contributed to the discussion today and throughout World Standards Week. First, I will note that my remarks today represent my views only and not those of any other commissioner or the Federal Trade Commission itself. Second, I want to thank Jennifer for her remarks and to echo her point about the close cooperation between the DOJ and FTC and our shared commitment to protecting and promoting competition, especially at its intersection with intellectual property. I appreciate our alliance and joint work with the Antitrust Division on these issues and look forward to continuing our work together.

Last month marked the 10-year anniversary of the America Invents Act, the first major revision of patent law in decades. The legislation's aim was to strengthen and modernize our patent system. And it is important to note that competition benefits from a strong patent system that issues high quality patents. High quality patents create the incentive for investment and innovation that we want, but, poor quality patents can be abused and used to stifle competition.²

Last month's anniversary brought back memories of my work on that bill and other intellectual property related legislation in the Senate. As I learned quite quickly on the Hill, IP issues can get pretty spicy. But standards-essential patents and competition seem to be their own special form of spicy; ghost pepper spicy.

¹ The views expressed in these remarks are my own and do not necessarily reflect the views of the Federal Trade Commission or any other commissioner.

² U.S. DEP'T OF JUSTICE & FED. TRADE COMM'N, ANTITRUST ENFORCEMENT AND INTELLECTUAL PROPERTY RIGHTS: PROMOTING INNOVATION AND COMPETITION (Apr. 2007)

<https://www.ftc.gov/sites/default/files/documents/reports/antitrust-enforcement-and-intellectual-property-rights-promoting-innovation-and-competition-report.s.department-justice-and-federal-trade-commission/p040101promotinginnovationandcompetitionrpt0704.pdf>; U.S. Dep't of Justice & Fed. Trade Comm'n, In the Matter of Request for Comments on Enhancing Patent Quality (May 6, 2015) https://www.ftc.gov/system/files/documents/advocacy_documents/comment-united-states-federal-trade-commission-united-states-department-justice-united-states/150507ptocomment.pdf (“... steps to enhance patent quality may add costs or delays to patent applicants. The Antitrust Agencies believe, however, that the public benefits of certainty and patent quality to innovation and competition outweigh these potential costs to private parties.”).

If there's one thing working on Capitol Hill taught me is that there is value in confronting complicated and controversial topics directly, and that is what I want to do today. My topline message is that the antitrust laws have an important role to play in the standard-setting context, including conduct related to the use or abuse of SEPs. Antitrust law does not merely *co-exist* with patent law and standards development; instead, these disciplines work hand-in-hand to advance the shared goal of promoting innovation.

First, I'll explain why I think safeguards in the standard-setting process, such as commitments to license on fair, reasonable, and non-discriminatory terms ("FRAND commitments"), are critical to ensuring that the promise of standardization to promote innovation is not compromised. The threat of exclusion against a willing licensee casts a shadow over licensing negotiations and can allow an SEP holder to leverage that threat into royalties that are not in fact FRAND. These issues are even more important now that many of these disputes are resolved on a global scale, sometimes through the use of injunctions in a single jurisdiction.

Next, I'll provide some of my thoughts about how both standards development organizations ("SDOs") and the FTC might respond to the burgeoning disputes over SEP licensing and facilitate more efficient and effective licensing. The FTC in particular, must serve as a backstop to monitor and enforce against conduct in the standard-setting context that harms competition. When patent holders obtain market power by virtue of being included in standards, the way they exercise that market power is not immunized from the antitrust laws merely because patents are involved. The potential availability of private patent and contract remedies does not mean that antitrust leaves the field in the patents and standards setting game, because the *public's* interest in competition is not necessarily protected by these private remedies.

Finally, I think the FTC has been correct in bringing SEP-related enforcement actions against anticompetitive conduct using its stand-alone Section 5 authority, and it should continue to do so with an emphasis on our authority to reach conduct beyond that which violates Section 2 of the Sherman Act. This is consistent with the policy statement the Commission issued in July regarding unfair methods of competition.³

But before we delve into all of that—why is this topic so important? The importance of standardized technology and interoperability is growing. Standards are ubiquitous in our lives, from the ordinary electrical socket to every home appliance or personal device that is connected to Wi-Fi, cellular technology, or both. Add to that medical devices, manufacturing technology, connected cars, and the applications are endless.

Anticompetitive distortions to the bargaining process over FRAND royalties are especially harmful to innovative small businesses and start-ups, the "little engines that could" of our economy. In order to deploy standards in ground-breaking technological development, these small businesses need FRAND licenses to the intellectual property incorporated into standards.

³ FTC Statement on the Withdrawal of the Statement of Enforcement Principles Regarding "Unfair Methods of Competition" Under Section 5 of the FTC Act (July 9, 2021), https://www.ftc.gov/system/files/documents/public_statements/1591706/p210100commnstmtwithdrawalsec5enforcement.pdf.

Small businesses have serious concerns about unchecked SEP licensing abuses that result in cost uncertainty and delays in bringing products and new technology to market. This uncertainty can also scare actual and potential investors away. One start-up called the SEP licensing framework “anarchy.”⁴ Small firms, unlike large firms, often lack the resources for technical legal advice to counter holdup. They are more likely to cave to supra-FRAND rates out of fear of exclusion, rather than put themselves in legal peril by challenging the high rates. Ultimately, all of this uncertainty and risk has a chilling effect that may push firms out of the market or extinguish good ideas in the cradle.⁵ Worse, the threat of exclusion might deter innovation investment in these firms in the first place.⁶

So this is not an issue that is waning. The standard-setting process and the associated licensing of SEPs will only increase in importance to technological advancement. Yet, we continue to see a high volume of SEP litigation in the U.S. and around the world.

Safeguards to Protect Competition

As recognized by the Supreme Court in *Allied Tube*, the standard-setting process and standard-setting organizations by their nature involve discussions among competitors about potential competitive issues and, even more importantly, the displacement of consumer choice in the selection of standards.⁷ Normally, antitrust law frowns on competitors working together to set terms for a market that supplant opportunity for consumer choice. The Supreme Court accepted this displacement of competition because of the benefits of collaborative private standard setting, *but only if there were safeguards to protect against anticompetitive harm.*

As we know, the standard-setting process often involves SDO members engaging in concerted activity and choosing between substitute technologies. This can raise antitrust concerns. When a specific technology is chosen for a standard, this eliminates effective substitutes and, after the standard is adopted and implemented, the costs associated with switching to an alternative technology may be prohibitive. As a result, the owner of patents on the chosen technology may gain market power that can allow it to attempt to stop firms from implementing the standard unless they agree to higher royalties and less favorable licensing terms than it could have obtained before the standard was set and alternative technologies could have been selected.⁸ This is the conduct we refer to as “holdup.”

SDOs may institute safeguards to mitigate this potential for holdup. Among the safeguards are licensing policies that seek commitments from participants to disclose and/or license their SEPs on FRAND terms. This is often done as a quid pro quo for the inclusion of the

⁴ Joachim Henkel, How to License SEPs to Promote Innovation and Entrepreneurship in the IoT (Mar. 23, 2021), <https://ssrn.com/abstract=3808987>.

⁵ Brief of APP Association as Amicus Curiae Supporting Petitioners, *TCL Commc 'n Tech. Holdings Ltd. v. Ericsson, Inc.*, No. 19-1269 (Fed. Cir. 2019).

⁶ *Id.*

⁷ *Allied Tube & Conduit Corp. v. Indian Head, Inc.*, 486 U.S. 492, 500-01 (1988).

⁸ FED. TRADE COMM'N, THE EVOLVING IP MARKETPLACE: ALIGNING PATENT NOTICE AND REMEDIES WITH COMPETITION A REPORT OF THE FEDERAL TRADE COMMISSION (Mar. 2011), <https://www.ftc.gov/sites/default/files/documents/reports/evolving-ip-marketplace-aligning-patent-notice-and-remedies-competition-report-federal-trade/110307patentreport.pdf>.

patent(s) in the standard. FRAND commitments reinforce the bargain entered into by the patent holder. When a patent holder makes this voluntary commitment, it does so knowing that it has the potential to gain enormous benefits from the high volume of licensees it will gain by virtue of its technology being included in a widely adopted standard.

Normally, patent holders are absolutely entitled to keep the benefit of their invention to themselves and fully exclude any who want to practice the patent; a patent is literally a government-granted and time-limited right to exclude others from practicing their inventions. We not only allow but value this right to incentivize investment in innovative new products and services. But when patent holders' commitment to voluntarily submit their patents in a standard, they make a trade-off. In exchange for widespread adoption of their technology and a broad pool of necessary licensees, the patent holder must generally trade the pricing power they are normally afforded and the right to exclude willing licensees; it must commit to license the technology and to charge FRAND royalties. It is hard to overstate the value that SEP holders can get from being included in a successful standard versus not.

It is fair for patent holders to point out that there need to be adequate incentives for them to engage in the standard-setting process. However, enabling unchecked acquisition of potentially significant market power with no safeguards for implementers is not a balanced approach. An appropriate framework should not allow an SEP holder to refuse licenses to implementers of the standard or threaten exclusionary remedies in order to either extract supra-FRAND royalties or entirely thwart a competitor from practicing a standard.

Therefore, it is my strong belief that SEP holders should not be able to seek exclusionary remedies against a willing licensee. Negotiating a licensing rate in the shadow of the threat of exclusion from the market gives SEP holders the leverage to extract supra-FRAND rates and encompass the value of standardization, downstream innovation, or other aspects of the end product that incorporates the standardized technology.⁹ Indeed, U.S. Courts have recognized the protections that FRAND commitments provide to counter illegal monopoly power and protect the public.¹⁰

As I noted at the start, competition and innovation from small and medium sized entities is most at risk of being inhibited or completely lost when SEP holders anti-competitively leverage their market power. Recently, IEEE solicited public comments about certain aspects of its FRAND policy. The current policy has fairly robust safeguards that, for example, set out the narrow set of circumstances when SEP holders can obtain exclusionary relief against the implementer of an IEEE-SA standard. Dozens of small businesses weighed in to support the policy and explain how important the IEEE's clarity about licensing commitments has been to their ability to more smoothly implement standards, grow, and innovate.¹¹

⁹ *Id.*

¹⁰ See *Broadcom Corp. v. Qualcomm, Inc.*, 501 F.3d 297, 311 (3rd Cir. 2007); *Microsoft Corp. v. Motorola, Inc.*, 795 F.3d 1024, 1031 (9th Cir. 2015).

¹¹ IEEE SA Standards Board Patent Committee, *Call for Comments* (Aug. 24, 2021), https://grouper.ieee.org/groups/pp-dialog/call_for_comments/call_for_comments.pdf.

I want to take a brief detour to address the “holdout” problem that is often purported to be a parallel problem to holdup. Holdout refers to a licensee unilaterally refusing to take a license or unreasonably delaying doing so. While this may well be a problem in the licensing world, it does not pose the same concerns from a *competition* standpoint as holdup, which has the potential to exclude firms from implementing a standard. Holdout, as long as it is unilateral and not done collusively among licensees, fits squarely into the box of problems that have patent law solutions. If a potential licensee has engaged in willful infringement, the patent holder has remedies in patent law, including the potential for enhanced damages.¹² Unilateral holdout does not involve the abuse of market power to stymie consumer choice that holdup does, and therefore does not trigger antitrust concerns in the same way.

So I want to make clear that I am not on anyone’s “side”—not patent holders or patent licensees. I am on team competition and consumers. And competition and consumers are harmed when market power is exploited to engage in holdup.

So what can SDOs do to help?

Above all, what I want is widespread and efficient licensing that minimizes wasteful and expensive litigation, and to achieve actual FRAND rates. I think we can all agree that those dollars would be better spent on research, development, and innovative new technology. Broad and accessible licensing at fair, reasonable, and non-discriminatory rates benefit the entire standards ecosystem, and especially small businesses. To be clear, everyone who wants to practice a standard should be taking a license, but it should not be because of the threat of exclusion that enables the patent holder to obtain supra-FRAND rates.

One way to accomplish this goal is with clearer FRAND policies that facilitate licensing. A recent study shows that some widely-implemented standards are subject to significantly more litigation than others.¹³ Commenters have suggested that SDO FRAND policies play a role in this trend.¹⁴ I encourage SDOs to be creative and explore crafting policies that reduce the ambiguities that fuel litigation, including clarifying the appropriate role of injunctive relief and how a reasonable rate should be determined.

Backstop of Antitrust Laws, Including Stand-Alone Section 5

¹² See *Apple v. Motorola*, 757 F.3d 1286, 1342 (Prost, J., concurring in part). See also Final Judgment, *Core Wireless Licensing S.A.R.L. v. LG Electronics, Inc.*, No. 2:14-cv-912, Dkt. No. 47 (E.D. Tex. Nov. 1, 2016) (awarding enhanced damages for the willful infringement of a SEP); *Core Wireless Licensing S.A.R.L. v. LG Electronics, Inc.*, 2016 WL 4596118, *2-*3 (E.D. Tex. 2016) (rejecting the argument that summary judgment was appropriate because enhanced damages cannot be awarded for infringing an SEP); *Optis Wireless Tech., LLC v. Huawei Device USA, Inc.*, 421 F. Supp. 3d 410, 412 (E.D. Tex. 2019) (“in light of the verdict of willfulness, the Court awarded enhanced the damages by 25 percent” for infringement of SEPs), vacated, No. 2:17-CV-00123-JRG, 2020 WL 5034154 (E.D. Tex. Apr. 3, 2020) (vacated by settlement).

¹³ IPLytics, *SEP Litigation Trends: What Does the Data Say?* (2021), <https://www.iplytics.com/wp-content/uploads/2021/05/SEP-litigation-trends-What-does-the-data-say-Iplytics-April-2021.pdf>.

¹⁴ Michael Carrier and Brian Scarpelli, *How Standard-Setting Orgs Can Curb Patent Litigation*, LAW360 (June 15, 2021, 6:17PM), <https://www.law360.com/articles/1392222/how-standard-setting-orgs-can-curb-patent-litigation>.

In a perfect world, SDOs could work with their members to implement FRAND policies that provide clear guidance to reduce licensing frictions and eliminate the threat of exclusion against willing licensees. But until we reach that aspirational world, the antitrust agencies serve an important backstop to protect and promote competition. The FTC has long been at the forefront of tackling anticompetitive conduct by participants in the standard-setting process. It has brought cases challenging deceptive conduct and failure to abide by FRAND licensing obligations.¹⁵ It has also included remedies to prevent anticompetitive abuse of SEPs.¹⁶

SDO policies themselves may have anticompetitive effects. For example, in its first standard setting action, the FTC brought a case against the American Society of Sanitary Engineering (“ASSE”), a group of plumbing equipment manufacturers. In that case, ASSE refused to modify an existing standard to encompass competitive products, citing its own policy as its justification. The FTC resolved the case through a consent order that required ASSE to stop issuing blanket refusals to develop standards based on its policy language.

The narrowing of Section 2 case law over the years should not stop the FTC from bringing tough cases and attempting to make better law. But we also have Section 5 in our toolbox. In addition to encompassing conduct that would be illegal under the Sherman Act, Section 5’s prohibition on unfair methods of competition extends beyond the Sherman Act. Indeed, in July, the FTC withdrew outdated guidance that took a far too limited approach to Section 5’s prohibitions on unfair methods of competition.¹⁷ We are now better aligned with Congress’s intent for the FTC to use its expertise to reach beyond the Sherman Act and to provide an alternative institutional framework for vigorously enforcing the antitrust laws.

When SEP holders undermine the competitive safeguards put into place by SDOs, and obtain or enhance monopoly power by voluntarily contributing their technology to standards, the FTC should investigate, and when appropriate, bring cases. While any application of the law takes into account the specific facts and circumstances, conduct that may violate Section 5 could include an SEP holder’s refusal to license a SEP to any willing licensee in violation of a FRAND commitment or conditioning a SEP license on taking or giving a cross license to patents that are not essential to the standard or are SEPs from unrelated standards. As I said earlier, and as I cannot emphasize enough, I think SEP holders attempting to seek exclusionary relief against willing licensees is highly problematic.

¹⁵ See *In the Matter of Motorola Mobility LLC*, Decision and Order, FTC File No. 121-0120 (July 23, 2013), <https://www.ftc.gov/sites/default/files/documents/cases/2013/07/130724googlemotorolado.pdf>; *In the Matter of Robert Bosch GmbH*, Decision and Order, FTC File No. 121-0081 (Apr. 23, 2013), <https://www.ftc.gov/sites/default/files/documents/cases/2013/04/130424robertboschdo.pdf>; *In the Matter of Union Oil Company of California*, Complaint, FTC File No. 011-0214 (Mar. 4, 2003), <https://www.ftc.gov/sites/default/files/documents/cases/2003/03/030304unocaladmincmplt.pdf>; *In the Matter of Rambus Inc.*, Complaint, FTC File No. 011-0017 (June 18, 2002), <https://www.ftc.gov/sites/default/files/documents/cases/2002/06/020618admincmp.pdf>; *In the Matter of Dell Computer Corp.*, Decision and Order, FTC File No. 931-0097 (May 20, 1996), <https://www.ftc.gov/enforcement/cases-proceedings/931-0097/dell-computer-corporation>.

¹⁶ *In the Matter of Motorola Mobility LLC*, Decision and Order, FTC File No. 121-0120 (July 23, 2013), <https://www.ftc.gov/sites/default/files/documents/cases/2013/07/130724googlemotorolado.pdf>; *In the Matter of Robert Bosch GmbH*, Decision and Order, FTC File No. 121-0081 (Apr. 23, 2013), <https://www.ftc.gov/sites/default/files/documents/cases/2013/04/130424robertboschdo.pdf>.

¹⁷ FTC Section 5 Statement, *supra* note 3.

Finally, conduct that I find particularly mind boggling is when SEP holders demand licenses for SEPs that they have not even identified, much less provided the information needed to allow an implementer to evaluate whether the patents at issue are valid, enforceable, essential to the implementation of a standard, and being offered on non-discriminatory terms. Again, this is a challenge that is unduly burdensome on small businesses that don't have patent attorneys on staff or legal departments.

I would also be remiss if I did not acknowledge the fact that not all FRAND policies are alike and therefore not all FRAND commitments are alike. To that I will simply say, where a FRAND commitment is ambiguous or insufficient to deter anticompetitive conduct, antitrust law is available to bolster SDO safeguards in the event that market power is abused to an anticompetitive end.

Let me also respond to some of the criticism I've heard from those who take issue with the concept of holdup and the application of antitrust law to that conduct. First, critics question how the FTC could possibly justify antitrust enforcement without robust empirical data that holdup is a problem and they claim that such data does not exist. To the first point, the quantification and the use of empirics may be useful components of investigations and cases, but they are not the only components and they are not required for proving an antitrust violation. The FTC need not wait until we have X amount of studies or Y number of data points. Instead, as antitrust enforcers, we must examine facts and evidence and then decide whether there is conduct resulting in competitive harm that merits bringing an enforcement action.

Regarding the existence of data, a recent working paper developed a framework for assessing opportunistic conduct by SEP holders by looking at court dockets and found that such conduct is prevalent.¹⁸ In addition, I offer the evidence that in multiple instances, judges have either reduced licensing rates subject to FRAND commitments or found that rates demanded by SEP holders were not FRAND.¹⁹ And, finally, I should note that the operation of the problem may obscure the availability of data; if small and medium entities are agreeing to supra-FRAND terms because they are afraid of the threat of exclusion after litigation, there necessarily will not be a high volume of cases challenging licensing demands.

I'm reminded of an anecdote I read recently about Abraham Wald.²⁰ During World War II, Wald was trying to help solve the problem of why bombers were being shot down. Engineers looked at bombers that returned to see where they had taken on bullets and found lots of bullet holes in the wings. This suggested reinforcing the wings. But Wald said, no, we should reinforce the bellies. The ones with bullet holes in the bellies are likely the ones that are sitting at the

¹⁸ Brian J. Love, Yassine Lefouili and Christian Helmers, Do Standard-Essential Patent Owners Behave Opportunistically? Evidence from U.S. District Court Dockets (November 8, 2020), <https://ssrn.com/abstract=3727085>.

¹⁹ See *Microsoft Corp. v. Motorola, Inc.*, 963 F.Supp.2d 1176 (W.D. Wash. 2013); *In re Innovatio IP Ventures LLC Patent Litigation*, No. 2303, 2013 WL 5593609 (N.D. Ill. Oct. 3, 2013); *Realtek Semiconductor Corp. v. LSI Corp.*, 946 F.Supp.2d 988 (N.D. Cal. 2013). See also Jorge L. Contreras, *Much Ado About Holdup*, 3 U. Ill. L. Rev. 875 (2019).

²⁰ JAN ECKHOUT, *THE PROFIT PARADOX* n.11 (2021) (citing JORDAN ELLENBERG, *HOW NOT TO BE WRONG: THE POWER OF MATHEMATICAL THINKING* (2014)).

bottom of the ocean. The ones with bullet holes in the wings are the ones that made it back. Looking at the data that was available did not provide the whole picture, or even the most important parts of the picture. This story is a helpful reminder of why selection bias can be real when looking at data and that we cannot take absence of data points as evidence of absence of data itself when we are not able to see the entire picture.

Another argument I've heard is that because holdup is based on the breach of a contractual FRAND commitment between a patent holder and the SDO, contract law is sufficient for parties to vindicate those contractual rights.

Contract law *may* be sufficient to address the breach of FRAND commitments and it *may* be best to let parties work it out. But contract law may *not* be enough and we should not foreclose an entire body of law—antitrust law—when we find conduct that results in competitive harm. I can see no justification for saying that because one area of the law applies to a certain set of facts, the FTC should disregard its statutory obligation to enforce the antitrust laws. Antitrust law is a critical supplement to contract law, just like it's a critical supplement to IP law. To say that there should be an artificial barrier to applying antitrust law is misguided at best and harmful to innovation and competitive markets at worst.

Finally, I routinely hear complaints that implementers are often large, well-financed companies that can handle their market disputes just fine on their own. This is absolutely the case. I want to be very clear: I think the FTC should investigate antitrust violations related to SEPs, but I think we should focus our energy on cases where the market power abuse harms small and medium enterprise implementers. I'm not interested in getting us involved in extensive cross-licensing disputes between large-well financed patent holders and implementers. My focus is entirely different from an enforcement perspective.

I mentioned my work on IP on Capitol Hill; trust me, I am very familiar with just how much lobbying energy large companies on all sides of the IP debates can muster to get the government to create more favorable market conditions for them. In my current role as an enforcer, I am interested in applying our limited enforcement dollars to helping those companies that do not have that lobbying muscle on their side.

Any articulation of a general policy with respect to standards is going to make some powerful companies upset and others happy; the important question from an enforcement perspective is not just what the policy is, but how do we apply that policy. It is important to me that we get the policy right, but it is equally important that we apply it in a way that protects honest small businesses and end users.

On that note, let me close by saying that I think the FTC ought to be vigilant in this space and use the full range of its authority to investigate and halt anticompetitive conduct. I look forward to the FTC continuing to work closely with DOJ as we jointly pursue our shared mission to protect and promote innovation.