



Reverse hold-ups: The often ignored risks faced by innovators in standardized areas

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Pros and Cons of Standard Setting
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Personal views- not reflective of CC views



Summary of the paper

Innovation is risky, and even more so in standardised fields:

- Risk of not getting rewards are larger
- Rewards should therefore be larger

There is a risk that rules on standardisation agreements are tilting too much in favour of IP users:

- Risks of IP holder being under-rewarded was under-estimated
- Risks of patent hold-up exaggerated

This could have adverse consequences on welfare:

- The bargaining power of innovators is undermined in standardised fields
- Leading to lower rewards for innovation
- Ultimately, leading to fewer innovations



Policy conclusions/ implications

Competition policy should not impose too many (or any?) constraints on IP holders in standardised areas:

- No constraints on the level of royalties

Beware of other mechanisms by which the bargaining power of IP holders may be eroded, eg:

- Courts depriving the ability of essential patent holders to seek for an injunction
- “Buyer cartels”/ collective negotiations of royalties
- Imposition of “price caps” on royalties for essential IP rights
- Threat (or use) of competition law by IP users

Competition law is not the right instrument to address patent hold-up cases.



Discussion

1. The right balance between protection of IP holders and prevention of patent hold-up is also an empirical question.
 - Is it the case that, in practice, innovators in standardised areas tend to be under-rewarded for their investment?
 - Is there any data/ empirical work which compares the returns to investment, or rate of innovation, in standardised areas compared to other areas?
2. Are the competition risks of patent hold-up really so low?
 - Ex-ante negotiations can be very complex/ infeasible if many essential patents are involved
 - Ex-ante negotiations do not necessarily preclude patent hold-up: risk that the possibility of patent hold-up enables strategic behaviour, leading to inefficient choice of technology (exclusion of “superior standards”)
3. To avoid competition authorities acting as price regulators, does this not call for active rules to pre-empt competition problems from standardisation agreements?



Example of “inefficient ex-ante negotiations”

Standard A

Produce end good at unit cost £1.5
Investment: £5

Standard B

Produce end good at unit cost £1
Investment: £5

User 1

B: royalty
of £1

A: cost £0.4

User 2

B: royalty
of £1

A: cost £0.4

User 3

B: royalty
of £1

A: cost £0.4

User 4

User 5

- Users 1, 2 and 3 will vote for Standard A
- Standard A owner can then recoup the investment by charging high royalties on users 4 and 5
- Leads to inefficient technology choice. Consumers will be harmed if users are not perfect competitors