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Top FTC officials call for hold-up study before policy making

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Pallavi Guniganti

FTC special counsel Koren Wong-Ervin and commissioner Joshua Wright (Credit: Christopher Lazzaro)

Federal Trade Commission special counsel Koren Wong-Ervin joined commissioner Joshua Wright in saying the antitrust agencies need more evidence of patent hold-up and hold-out before pronouncing on the wisdom of solutions – an implicit criticism of the Department of Justice's recent advisory letter to a standard-setting organisation. *Pallavi Guniganti at GCR Live*

Wright has previously ripped the antitrust division's business review letter, sent to the Institute of Electronics and Electrical Engineers (IEEE). He said

the DoJ's statement, that it would not enforce against the IEEE's anti-injunction policy for standard-essential patents, lacked evidence that patent-holders are more likely than licensees to impede the licensing process.

Speaking on a panel with Wright yesterday at GCR Live's 2nd Annual IP & Antitrust conference in Washington, DC, Wong-Ervin agreed that more evidence should be collected before making policy decisions about how to deal with obstruction in the patent licensing process, whether it is hold-up by the patent holders, or "reverse hold-up", also called hold-out, by patent users refusing to pay royalties.

"The antitrust agencies have been really clear that they are only concerned about hold-up on the patent holders' side as an antitrust issue," she said. "But if you're going to make policy, you should know what's happening in the marketplace. If hold-up is happening more on the implementers' side, you're shifting the bargaining by taking injunctions totally off" the table.

Wong-Ervin is counsel for intellectual property and international antitrust in the FTC's office of international affairs, and in a recent presentation to judges in India, said anti-competitive behaviour in standard-setting is rare and public officials should not routinely second guess standard-setting organisations' decisions or SSO-related business activities.

Yesterday she said, "I'm always worried about putting a thumb on the scale with private SSOs. They're private organisations that should make their own rules. For me, I'm always telling China and India, governments should stay out. Same thing for us, we shouldn't put our thumb on the scale by saying this [blocking of injunctions] is a good policy."

Distinguishing between enforcement and policy-making, Wong-Ervin said in individual cases, the agency would have to prove a specific defendant had

engaged in anti-competitive conduct, whereas at a policy level, it operates on generalities.

In the absence of economic studies particular to patent hold-up, she said the overall technology economy does not indicate a problem with hold-up or royalty stacking, the practice of combining various patents necessary to a standard and demanding an aggregate royalty payment that is excessive. She noted that unlike hold-up, the US antitrust agencies have said they do not consider royalty stacking alone to be an antitrust issue.

“It needs to really cripple the product market or restrict output, otherwise it’s just the cost of valuable IP,” Wong-Ervin said. She noted that technology prices are flat or falling relative to overall inflation, and innovation is flourishing. “The market doesn’t look very crippled to me.”

While the antitrust agencies cannot directly take away a patent holder’s ability to seek an injunction to stop the use of its patents, Wong-Ervin said enforcement can deter conduct if the agencies identify it as an antitrust issue, as they have done with hold-up by patent holders.

Despite their enthusiasm for evidence of hold-up, she and Wright both acknowledged such studies would be tough to perform.

Wong-Ervin said one would need actual empirical evidence that the owner of a standard-essential patent was charging a royalty based on the lock-in value of the patent in the standard, and said this would be “difficult to determine” because one would need to work out the fair, reasonable and non-discriminatory rate as a comparison point.

Wright criticised various means of getting data about the frequency of hold-up, saying he was “sceptical of [a] case-counting method” of looking at the

number of litigations or arbitrations alleging hold-up, and that existing measures of innovation are “largely no good”.

He said economic evidence for antitrust policy has mostly come from variations in how laws apply, whether between different states or different industries, which creates natural experiments of which economists can observe the results.

However, unlike resale price maintenance, where there are differing state bans, patent law is federalised and thus uniform throughout US. The commissioner said this means less state-by-state variation to test, but added, “really hard is not impossible”.

Wong-Ervin and Wright spoke alongside Gregory Leonard of Edgeworth Economics and Berkeley Research Group chairman David Teece, in a discussion moderated by Robert Levinson of Charles River Associates.

The conference ended yesterday.