

I filed [comments](#) today on the FTC's proposed [Settlement Order](#) in the Google standards-essential patents (SEPs) antitrust case. The Order imposes limits on the allowable process for enforcing FRAND licensing of SEPs, an area of great complexity and vigorous debate among industry, patent experts and global standards bodies. The most notable aspect of the order is its treatment of the process by which Google and, if extended, patent holders generally may attempt to enforce their FRAND-obligated SEPs through injunctions.

Unfortunately, the FTC's enforcement action in this matter had no proper grounding in antitrust law. Under Supreme Court doctrine there is no basis for liability under Section 2 of the Sherman Act because the exercise of lawfully acquired monopoly power is not actionable under the antitrust laws. Apparently recognizing this, the Commission instead brought this action under Section 5 of the FTC Act. But Section 5 provides no basis for liability either, where, as here, there is no evidence of consumer harm. The Commission's Order continues its recent trend of expanding its Section 5 authority without judicial oversight, [charting a dangerously unprincipled course](#)

The standard-setting organizations (SSOs) that govern the SEPs in this case have no policies prohibiting the use of injunctions. Even if an SSO agreement (or a specific license) did disallow them, seeking an injunction would be a simple breach of contract. Reading a limitation on injunctions into the SSO agreement is in severe tension with the normal rules of contract interpretation. To turn Motorola's effort to receive a reasonable royalty for its patents by means of an injunction into an antitrust problem seems directly to undermine the standard-setting process. It also seems to have no basis in law.

My comments rely heavily on Bruce Kobayashi and Josh Wright's article, [Federalism, Substantive Preemption, and Limits on Antitrust: An Application to Patent Holdup](#), published in [Competition Policy and Patent Law Under Uncertainty: Regulating Innovation](#) (Manne & Wright, eds.).

For previous posts on the topic see, e.g.:

- [The Price of Closing the Google Search Antitrust Case: Questionable Precedent on Patents](#) (January 2013)
- [Europe Shouldn't Intervene in Microsoft-Motorola Patent Dispute](#) (April 2012)

- [FTC's Misguided Rationale for the Use of Section 5 in Sherman Act Cases](#) (February 2010)
- [The Case Against the Section 5 Case Against Intel, Redux](#) (January 2010)